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## Constitutional Law Casebooks: A View From the Podium

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# CONSTITUTIONAL LAW CASEBOOKS: A VIEW FROM THE PODIUM

*Robert A. Sedler\**

CONSTITUTIONAL LAW: CASES AND MATERIALS. By *Edward L. Barrett*. Mineola, N.Y.: The Foundation Press. 5th Edition. 1977. Pp. lxii, 1526. \$24. 1980 Supplement. Pp. xvi, 530. \$5.50.

CONSTITUTIONAL LAW: PRINCIPLES AND POLICY. By *Jerome A. Barron* and *C. Thomas Dienes*. Indianapolis: Bobbs-Merrill. 1975. Pp. xxxv, 1116. \$24. 1979 Supplement. Pp. xvi, 357. \$6.50.

THE PROCESS OF CONSTITUTIONAL DECISIONMAKING. By *Paul Brest*. Boston: Little, Brown. 1975. Pp. 1375. \$27.50. 1980 Supplement. By *Sanford Levinson*. Pp. 563. \$8.95.

CONSTITUTIONAL LAW — CASES AND OTHER PROBLEMS. By *Paul A. Freund*, *Arthur F. Sutherland*, *Mark De Wolf Howe* and *Ernest J. Brown*. Boston: Little, Brown. 4th Edition. 1977. Pp. lxiii, 1422. \$27.50. 1980 Supplement. By *Henry Monaghan*. Pp. 324. \$7.95.

CONSTITUTIONAL LAW: CASES AND MATERIALS. By *Gerald Gunther*. Mineola, N.Y.: The Foundation Press. 10th Edition. 1980. Pp. xciii, 1839. \$27.

CONSTITUTIONAL LAW: CASES AND MATERIALS. By *Paul Kauper* and *Francis Beytagh*. Boston: Little, Brown. 5th Edition. 1980. Pp. xxxvi, 1641. \$30.

CONSTITUTIONAL LAW: CASES — COMMENTS — QUESTIONS. By *William B. Lockhart*, *Yale Kamisar*, and *Jesse H. Choper*. St. Paul: West Publishing Co. 5th Edition. 1980. Pp. xcvi. 1733. \$22.95.

Constitutional law teachers may choose from a large number of casebooks. Careful scrutiny shows, however, that the variety is actually quite narrow. This Review attempts to provide a basis for choice by analyzing constitutional law casebooks from the perspec-

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tive of the instructor who relies on the casebook to help teach the course.<sup>1</sup> The Review will focus primarily on how the casebook itself can influence the teaching of the course.

A survey of the presently available constitutional law casebooks reveals that marketability is the primary consideration underlying their structure and content. Constitutional law casebooks, like other casebooks, are published by commercial publishers. Casebooks that will not sell will not be published, regardless of their academic quality. Authors must, therefore, package their casebooks so as to enhance marketability.

Constitutional law courses are heavily subscribed at all law schools and are required at many. An admittedly unscientific sampling of law school curricula indicates that there are two basic patterns of constitutional law offerings: (1) a four semester hour course covering the entire subject, frequently offered in the first year; and (2) a two-part course, typically carrying six semester hours and often divided into "powers" and "rights." To assure that his<sup>2</sup> casebook has the widest possible appeal, an author must follow the general lines of these offerings and the model of casebooks in other basic courses. Because most instruction in basic law school courses centers on the analysis of appellate court decisions, the main ingredient of constitutional law casebooks will be cases.

The proliferation of cases in constitutional law casebooks is a function of the fact that decisions of the United States Supreme Court are the "stuff" of constitutional law.<sup>3</sup> Constitutional law teachers, whether or not they are willing to admit it and whether or not they agree with the "direction" of the Supreme Court at a partic-

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1. I thoroughly considered all of the casebooks before deciding to use the Lockhart, Kamisar and Choper book when I first taught the basic course in constitutional law in the spring of 1977. In the fall of 1977, I used Gunther, but returned to Lockhart, Kamisar and Choper thereafter.

In preparation for this Review, I obviously did not read all of the casebooks, page by page and cover to cover. The process I used may best be described as "scanning for impressions." I focused on the organization of each book, the substantive areas covered, the balance between cases and text, and the content of the text. I also examined carefully the treatment of due process and equal protection in each book. It is fair to say, however, that I turned most of the pages in every book. My general impressions of each book certainly will not hold true for every particular, and those who are more familiar with the other books will be able to point to particular instances that belie my impressions. But I believe that my impression is reasonably accurate for each book as a whole.

2. I use the masculine form of the possessive pronoun advisedly. The authors of these constitutional law casebooks are all male. They are also all white. While "affirmative action" is covered at length in the body of the casebooks, it has not yet found its way into their authorship.

3. The study of constitutional law is, at least in part, a study of the Supreme Court as an institution and of its role and function in the American constitutional scheme.

ular time, tend to view the Court as an institution with some degree of veneration. They thus almost invariably classify Supreme Court decisions in constitutional cases as either "important," "very important," or "landmark." Authors of constitutional law casebooks are no exception, and most constitutional decisions rendered by the Supreme Court during an author's professional lifetime<sup>4</sup> are likely to find their way into his casebook. Once included in a book, these cases have remarkable staying power. Although some may be downgraded to note cases or even to textual discussion in subsequent editions, few disappear entirely. Nor are cases retired due to age. To the author, the older cases may seem to be landmarks, they may provide historical perspective, they may be useful to trace the evolution of doctrine, or it simply may be unthinkable not to include them. In any event, they remain.

The substance and organization of constitutional law casebooks are well defined. As Professor Monaghan has observed:

Authors of constitutional law casebooks traditionally have presented their subject through Supreme Court opinions arranged under the three general groupings of judicial review, distribution of powers (federalism and separation of powers), and individual liberties. This organizational consensus rests upon two widely held and deep beliefs: a basic course in constitutional law should (1) consist of a rigorous and sustained study of substantive doctrine and (2) be undertaken principally through a detailed examination of Supreme Court decisions, albeit supplemented in varying degrees by authors' questions and law review excerpts.<sup>5</sup>

While some casebooks cover some areas that others omit, the differences in coverage are essentially peripheral.<sup>6</sup> So too, while some authors now put most of the material on justiciability at the end of their books rather than at the beginning, this is no real difference. The material constitutes a self-contained unit and can be covered at the beginning of the course if the instructor wishes to do so.<sup>7</sup>

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4. I suspect that there is some correlation between the length of an author's "professional lifetime" and the number of Supreme Court cases that the author includes in his casebook, although I have made no effort to verify this empirically.

5. Monaghan, Book Review, 90 HARV. L. REV. 1362 (1977) (reviewing P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING (1975)).

6. In his latest edition, for example, Gunther no longer covers the power of the states to tax interstate commerce, while the other authors do. This seems to be the only "major" area that is excluded from any of the books.

7. Professor Gunther's justification for putting this material at the end of the book, is that: "Developments of those 'jurisdictional' principles — issues such as standing and ripeness and abstention — have increasingly been influenced by the underlying substantive rights involved, and I have accordingly found it easier to deal with those problems after an examination of substantive materials." Gunther, p. xxiii. My own view, perhaps influenced by my experience in litigating constitutional cases, is exactly to the contrary. It is only after the justiciability questions have been resolved that the court considers the underlying substantive rights, and

All of the casebooks contain far too much material for even a six or seven semester hour course. Presumably the justification for this massive overabundance is that it enables the individual instructor to select which areas he or she wishes to cover.<sup>8</sup> For example, while very few instructors may cover Congress's taxing and spending powers, that material is available to them and can be ignored by all others.

Although choosing among particular substantive areas is not difficult, the overabundance of material may create problems for the instructor within each substantive area. In most substantive areas, there is such breadth and depth of coverage that the instructor must either cover a few areas completely or assign only some of the material in each area. If the instructor opts for the latter approach, the material may appear too disjointed and may not lend itself to integrated analysis. Much of the problem created by excessively detailed coverage is due to the fact that all of the casebooks employ a "partly historical" analysis. In a number of areas, they trace the evolution of current doctrine even though many of the older cases either have long ceased to have any vitality as a precedent,<sup>9</sup> or have long been superseded by later and more pertinent cases.<sup>10</sup> Some of this material, particularly when developed by main or note cases, seems unnecessary.

One solution to this problem would be to publish a smaller version of the casebook for instructors who want less detailed coverage.<sup>11</sup> On the other hand, the authors could eliminate much material

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the development of substantive doctrine may well depend on whether substantive questions can be presented in justiciable form. I also think that the analysis of justiciability problems requires a degree of precision that is not always present in the analysis of substantive problems, and it is desirable that the student start out with this kind of analysis.

8. I suspect that there is some correlation between a casebook's size and its profitability, but I am not sure that this is so.

9. *United States v. Darby*, 312 U.S. 100, 117 (1941) (overruling *Hammer v. Dagenhart*, 247 U.S. 251 (1918)). Notwithstanding its interment in *Darby*, all of the casebooks reproduce *Dagenhart* as a main case or a substantial note case.

10. For example, some casebooks include first amendment cases holding that abstract discussion of unlawful action cannot be proscribed, e.g., *Fiske v. Kansas*, 274 U.S. 380 (1927), even though the current doctrine is that actual advocacy of unlawful action cannot be proscribed unless it reaches the level of "imminent incitement." *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

11. For example, the Lockhart, Kamisar and Choper book has been reduced by 500 pages to reappear with the same organization as *THE AMERICAN CONSTITUTION* (5th ed. 1981). The "rights" portion of the main book has been issued separately as *CONSTITUTIONAL RIGHTS AND LIBERTIES* (4th ed. 1975). The "rights" portion of the Gunther book likewise has been issued separately as *INDIVIDUAL RIGHTS AND LIBERTIES* (4th ed. 1975).

After this Review was in the editing stage, I received a copy of *MODERN CONSTITUTIONAL LAW: CASES AND NOTES*, by *Ronald D. Rotunda*. St. Paul: West Publishing Co. 1981. Pp. 1058. The book purports to be a "compact pedagogical tool introducing and exposing students to the underlying principles of constitutional law." *Id.* at xvii. It does so by "limit[ing] textual

without in any way detracting from the quality of coverage. It may not be necessary to discuss every possible refinement and variation of the basic principles developed in the main cases, or to speculate on hypothetical questions that are not likely to arise. Perhaps some of the concepts of *nouvelle cuisine* should be applied to constitutional law casebooks in the hope that less caloric versions will be more effective teaching tools.<sup>12</sup>

This reviewer's major concern, however, is not with the overabundance of material contained in all the casebooks, but rather with the uniformity of their substance and organization.<sup>13</sup> Because of this uniformity, the different casebooks do not represent different teaching approaches. Rather, they are simply a collection of cases and materials that give each instructor a starting point for developing his or her own approach to the teaching of constitutional law. For this reason, an instructor cannot select a casebook on the basis that it embodies a teaching approach that the instructor favors.

There are many possible ways to teach constitutional law. One approach might be to analyze the process of constitutional litigation — to focus on how lawyers challenge the constitutionality of governmental actions and on how the Supreme Court develops constitutional doctrine in the litigation process. A casebook embodying this approach would stress justiciability and its relationship to substantive law since those issues are almost always raised in constitutional

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notes to a minimum in order to favor intensive coverage of a limited nature of cases." *Id.* While I have not tried to determine how effectively it succeeds in its objective of being a "compact pedagogical tool," the end result is that the book is designedly a reduced collection of cases. Its use has the same pedagogical implications as the use of the books falling into the "cases, cases, and more cases" and the "cases and substantive commentary" categories.

12. The issuance of annual supplements and the long wait between new editions compounds the problem. Because the supplements are put together hastily, cases included in them are insufficiently edited, and some important cases are merely noted. More important is the impact of new Supreme Court decisions on the cases and materials contained in the main book. The new decisions can significantly affect the meaning and relevance of those cases and materials, and considerable effort is wasted relating the new cases to the cases and materials in the main book. This year for example, when the new edition of Lockhart, Kamisar and Choper was available, I found that it took substantially less time to cover a particular area than in the previous year when the supplement cases had to be integrated into the main book. My colleagues who were using the new edition of the Gunther book had the same experience. Perhaps it is time to consider abolishing supplements and instead putting out annual "semi-revised" editions. With computerized printing techniques, it should be technically possible to incorporate new Supreme Court decisions at the appropriate place in the casebook and to revise existing material in light of those decisions. This would require a heavy time commitment by the authors, since the Supreme Court generally announces its major decisions at the end of the Term, but it could be done. The end product would be far superior to the present practice of issuing annual supplements, and it is hoped that the authors and the publishers will give serious consideration to this proposal.

13. In my other field, conflict of laws, exactly the opposite is true. The instructor can select a casebook based on the teaching approach it takes. See Sedler, *Casebooks on the Conflict of Laws: Reflections Upon the Publication of a New Book*, 77 MICH. L. REV. 959 (1979).

litigation. Structurally, such a casebook would be organized along functional lines (school desegregation litigation, welfare rights litigation, and the like) rather than by traditional substantive categories. It would also contain some case studies in which a particular dispute would be followed from its inception to its final resolution in the Supreme Court.<sup>14</sup>

Other casebooks might take an historical-doctrinal approach that traces the evolution of constitutional doctrine in particular areas. A casebook adopting this approach would be organized along both historical and substantive lines and would focus on the Supreme Court's role in promulgating and developing constitutional doctrine. It would also explore the historical tensions between the Court and the other branches of government and consider how those tensions have affected the development of constitutional doctrine.

Still another approach might be almost entirely substantive. A casebook of this type would include for the most part only cases that retain their vitality. Textual material would set forth settled doctrine, with the breadth and depth of coverage corresponding to the importance of the particular substantive areas. The book would also present refinements and variations of basic principles, and examples of how lower courts apply Supreme Court decisions.

Although there are a number of other possible approaches to teaching the subject, the point is that none of the casebooks is designed to embrace any one approach. As a result, an instructor cannot choose a casebook to match his or her favored teaching approach. Admittedly, the need for marketability may demand this uniformity. Many instructors may be uncomfortable with a casebook that departs from the well-established norm. But whatever the reason, teaching approach provides no real basis for choosing among the casebooks.

The one exception to the uniformity of substance and organization is Brest's book, *The Process of Constitutional Decisionmaking*, which is organized so as to offer "an understanding of the structure, operation and doctrines of the American constitutional system that the conventional organization cannot provide" (p. 1). It looks to the sources of the constitutional decisions, such as constitutional history, the development of values, findings of constitutional fact, and criteria for justification. At the same time, however, it covers most of the substantive areas examined in the other casebooks, although some-

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14. It might also trace the origin of the case to the legislative process that produced the law being challenged as unconstitutional.

times in less detail.<sup>15</sup> While the packaging differs from the other casebooks and a number of the sections do cut across traditional substantive lines, Brest often puts the cases and materials together in the conventional manner. In a sense, Brest has combined two casebooks in a single volume: one embodies the constitutional decision making approach, and the other contains much of the substantive doctrine found in the other casebooks.<sup>16</sup> Again, one suspects that marketability has dictated this combination. A new edition of this casebook is being planned, and it will be interesting to see how it strikes the balance. At present, Brest's book is at most a partial exception to the uniformity of constitutional law casebooks.

Although similar in substance and organization, the casebooks differ considerably in their methodology of presentation. This difference has significant pedagogical implications and provides a clear basis of choice for teachers. Leaving aside Brest's book, the six casebooks fall into three categories that may be denominated as follows: (1) "cases, cases, and more cases"; (2) "cases and substantive commentary"; and (3) "cases and commentary with direction and probing."

The Barrett book and the Freund, Sutherland, Howe and Brown book fall into the first category. They are truly "casebooks." Each area is developed in detail by main cases and note cases, with very little textual commentary. Of the very large number of cases, too many appear to be minor variations of a basic principle. A substantial percentage are not worth reading for the particular points that they make. The authors also do not indicate the relative importance of the cases, and the note cases are often reproduced in almost as much detail as the main cases.<sup>17</sup>

The pedagogical implications of using this kind of casebook are twofold. First, since students essentially will be reading cases, knowledge derived from class preparation will be limited to what the cases contain. Class preparation will not stimulate extra-case analysis. Second, if the instructor wishes to go beyond the four corners of the cases and engage in extra-case analysis, the casebook will offer no direction or assistance.

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15. Professor Monaghan estimates that it has about fifty percent fewer cases than the other books. Monaghan, *supra* note 5, at 365 n.12.

16. The 1980 supplement adds a new chapter on freedom of expression, evidencing a concern for increased substantive coverage.

17. Foundation Press has announced that a sixth edition of the Barrett casebook, this time co-edited by Professor William Cohen, will be published in May 1981. The announcement indicates that the new edition will probably convert the casebook from the "cases, cases, and more cases" category to the "cases and substantive commentary" category.

The Kauper and Beytagh book and the Barron and Dienes book constitute the second category. Their method of presentation generally consists of a main case, followed by extensive expository material. While they cite law review articles and other writings, there is relatively little discussion of the commentators' views. And although these casebooks ask some questions, they usually do not go very far beyond the principles of the main case. The emphasis is on setting forth and explaining the substantive doctrine developed in the cases.

The pedagogical implications of the "case and substantive commentary" approach are substantially the same as those involved in using casebooks in the first category. While the authors provide commentaries in addition to the cases, they seek primarily to improve the student's understanding of substantive doctrine. The instructor is given more information, but little else. If the instructor wants to develop extra-case analysis, the casebook again offers little guidance.

The Gunther and the Lockhart, Kamisar and Choper books fall into the third category and have a methodology of presentation completely different from the other books. These authors use their books to direct the student and the instructor toward an understanding of the subject. The organization of the various substantive areas tends to be highly structured and designed to encourage detailed analysis of the area within that structure. The books provide a basis for extra-case analysis with commentaries and discussions that go beyond substantive doctrine. They also raise many questions designed to probe deeply and to stimulate thought.

Use of this kind of casebook has obvious pedagogical implications. The student is encouraged, through questions and ideas, to engage in extra-case analysis. Likewise, the instructor can use the casebook during class as the basis for extra-case analysis, building on the initial exposure that the student has received while preparing for class. Moreover, the casebook enhances the instructor's own understanding of the subject. Stated simply, an instructor can do much more with a "directive and probing" casebook than with one that is primarily expository.

To many constitutional law instructors this discussion may seem merely to state truisms, which, to an extent, it does. The widespread adoption of the "directive and probing" casebooks evinces a preference among constitutional law teachers for a casebook that they can use effectively as a teaching and learning vehicle.<sup>18</sup> Nevertheless, it

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18. It is my strong impression that these two books have the lion's share of the market, with Gunther's book enjoying by far the widest use.

is important to note that only two of the conventional casebooks fall into the "directive and probing" category.<sup>19</sup>

As between these two, the Lockhart, Kamisar and Choper book is, in my opinion, distinctly preferable as a teaching tool because it uses the views of a much larger number of commentators to make points and raise questions. Despite the existence of two excellent treatises,<sup>20</sup> the primary source of constitutional law scholarship remains the extensive commentaries by scholars in books and law reviews. Many commentators who are not "front-rank" authorities have produced truly outstanding pieces on particular subjects. A constitutional law casebook can be used to make the views of these commentators more accessible to both the students and their instructors. The Gunther book ignores much of this literature, presenting only the ideas of Professor Gunther himself and of a relatively few other commentators. Valuable as these ideas may be, they do not capture the wide variety of views that is contained in the Lockhart, Kamisar and Choper book.<sup>21</sup> This feature of the Lockhart, Kamisar and Choper book makes it, in my opinion, the casebook of choice in the field.

This Review has argued that the nature of the casebook selected can strongly influence the teaching of constitutional law. It would be desirable if there were different casebooks, embodying different approaches to the subject, but, with one partial exception, there are not. The point of difference between the casebooks is the methodology of presentation, and this difference provides a clear basis for choice. While some may like to believe that everything depends on the instructor, the effect of casebook selection on teaching success should not be discounted.

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19. I would also place Brest's book in the "directive and probing" category.

20. J. NOWAK, R. ROTUNDA & J. YOUNG, *HANDBOOK ON CONSTITUTIONAL LAW* (1978); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978).

21. I may have a personal bias in this regard, since the Lockhart, Kamisar and Choper book cites my works, and I am not one of the relatively few commentators whose ideas are set out in the Gunther book. While I do not believe that this bias affects the validity of my point, it nonetheless should be noted.