An Advance in Tradition

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According to Professor Robert Sedler, traditional constitutional law textbooks fall into three categories: "(1) 'cases, cases and more cases;' (2) 'cases and substantive commentary;' and (3) 'cases and commentary with direction and probing.'" Sedler concludes, and I concur, that the third category is clearly the most beneficial for teaching purposes since it stimulates extra-case analysis and allows the instructor to do much more than is possible with a purely expository text. Not only is Constitutional Law by Professors Stone, Seidman, Sunstein, and Tushnet of this third classification, it may also prove to be the best this category has to offer. Constitutional Law is, by and large, a traditional constitutional text. It is organized, with modest exceptions that will be discussed, along subject lines rather than by history or legal process. Unlike Brest and Levinson's Processes of Constitutional Decisionmaking, this casebook does not provide any fundamentally new direction for the constitutional law course, nor does it make any drastic changes in the subject matter approach. Accordingly, it is

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Id. at 1027.

The weaknesses of the traditional constitutional law casebook are discussed in Christopher D. Stone, Towards a Theory of Constitutional Law Casebooks, 41 So. Cal. L. Rev. 1 (1967). Whatever the merits of these criticisms, it is unlikely that the traditional approach as a method of introducing constitutional law will disappear soon. See Frederick Schauer, Book Review, 31 J. Legal Educ. 680, 681-82 (1981), reviewing Gerald Gunther, Cases and Materials on Constitutional Law (10th ed. 1980).

For a discussion of the exceptions to this arrangement, see text accompanying notes 15 to 17 below (discussing the historical orientation of the introduction to the Equal Protection Clause) and notes 18 to 21 and accompanying text (discussing the organization of the chapter "Implied Fundamental Rights," a legal process orientation).

organized along the "conventional division" between structural constitutional law and individual liberties; and, as with most constitutional texts, the chapters on structural issues appear first. The menu of issues covered is also staple. The standard topics of judicial review, separation of powers, and federal-state relations (including the commerce clause) are found in the sections on structural constitutional law while, following Professor Gunther's lead, a separate inquiry into issues of state and local taxation is omitted. Subjects dealing with individual liberty include the familiar offerings of freedom of speech, equal protection, due process, and the religion clauses. Omitted are discussions of certain individual safeguards that normally are not taught under the rubric of constitutional law, such as the protections against cruel and unusual punishment and unreasonable searches and seizures.

Constitutional Law deviates in part from the norm in the organization of its subject coverage. For example, the book devotes a separate chapter (pp. 1427-65) to the "Economic Liberties" of the contracts and takings clauses instead of including these subjects within sections dealing with Lochner v. New York and economic substantive due process. This organization may confer upon both provisions, but most particularly the contracts clause, an importance and legitimacy not necessarily enjoyed when linked to the discredited economic substantive due process cases. Given the recent revitalization of the contracts clause, the attention devoted to

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6 Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, and Mark V. Tushnet, Constitutional Law (1986), to which all page references in text are made. Compare the analysis in Scott H. Bice, Book Review, 23 U.C.L.A. L. Rev. 610, 612 (1976), where Dean Bice suggests that there are actually three "conventional divisions: judicial function, distribution of governmental powers among the branches of the federal government and between the federal government and the states, and individual rights." Bice's first two categories are condensed here as parts of structural constitutional law.


8 Gunther, Constitutional Law at 331-33 (cited in note 7).

9 A brief note discussing state and local taxation issues is included (pp. 287-90).

10 U.S. Const., amend. VIII. The topic of cruel and unusual punishment most often occurs in the substantive criminal law course. Lockhart, Kamisar, Choper and Shiffrin, however, include it in their constitutional law text. Lockhart et al., Constitutional Law at 556-91 (cited in note 7).

11 U.S. Const., amend. IV. The issue of unreasonable search and seizure is taught most often in criminal procedure and, increasingly, in legal history.

12 198 U.S. 45 (1905).

13 The authors' decision to treat the contracts clause separately, however, may be due more to their separation of textual from non-textual liberties than to a recognition of a new vitality in economic freedom. See notes 18-21 and accompanying text below.
the subject appears to be well-deserved.  

Another organizational feature that merits attention is the arrangement of the chapter on equal protection (pp. 435-689). The chapter is notable in that, unlike those in most other casebooks, it does not begin with "rational basis" review. Rather, it begins with a detailed historical section on race discrimination (pp. 435-95) that traces the legal status and treatment of blacks from the pre-Civil War period (and before *Dred Scott*) through desegregation and busing. This organization is particularly well-chosen. The equal protection clause is, after all, more about racial equality than it is about, for example, equal treatment of advertising signs on trucks.  

Beginning equal protection analysis with race, therefore, makes good sense. Furthermore, an extended historical introduction places the equal protection clause in perspective in a way not accomplished by a purely doctrinal approach. For example, the chapter includes (at p. 437) the pre-Civil War case of *State v. Post*, which dramatically exhibits the relegation of blacks to the status of non-persons even in the North. The case thereby provides a particularly thought-provoking background for modern-day analysis of the constitutional meaning of equality.

The only difficulty with the chapter on equal protection is that the authors fail to follow completely through on their original inclination. After the historical materials, the chapter proceeds to rational basis analysis (pp. 495-528) before returning to the doctrinal treatment of race and other suspect classifications (pp. 528-610). This disjointed approach would be greatly improved by the discussion of the race and suspect classification materials in one cohesive section.

Another innovative feature of the book is the combined discussion of various "nontextual" constitutional rights, including

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14 See Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) (striking down application of state pension protection law imposing fine on corporation as an impairment of company's obligations under its pension plan); United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) (invalidating two states' repeals of their covenant limiting their ability to subsidize rail transportation out of Port Authority bonds). See also Richard A. Epstein, Toward a Revitalization of the Contract Clause, 51 U. Chi. L. Rev. 703 (1984) (arguing for increased use of the clause). My colleague Richard Myers suggests, however, that rather than giving the contracts clause a new legitimacy, its separation from substantive due process may simply provide an excuse for most teachers to ignore the issue.


17 20 N.J.L. 368 (1845).

18 In fact, as the authors concede, the rights discussed are not wholly nontextual. "The words 'liberty,' 'property,' and 'equal' all appear in the Constitution, and they are explicit . . . . [The] goal [in the use of the word 'implied'] is to draw attention to discretionary
the "fundamental interests" branch of equal protection jurisprudence and both substantive and procedural due process,\^19 in a single chapter entitled "Implied Fundamental Rights" (pp. 691-924). While the scope of subject coverage does not diverge significantly from other texts,\^20 the use of "implied" rights as an organizational principle constitutes a novel and significant departure. This use of "implied" rights focuses the chapter on the legitimacy of the nontextually based rights, rather than on the substantive definition of the rights themselves. The emphasis on institutional issues is, of course, not new. Other texts in their notes extensively analyze institutional matters, especially in the context of implied rights. However, the presentation of a wide range of substantive issues with the institutional issue as the unifying theme highlights this topic for the student in a way that notes alone do not. In this respect, this section allows a more concentrated legal process approach than is normally possible with the traditional constitutional law text. The section also provides an additional benefit in that it effectively bridges the traditional division\^21 between structural constitutional issues and individual liberties through its pervasive application of the structural problems raised in Marbury v. Madison\^22 to questions of individual liberty.

A possible objection to this organizational strategy is that it "says" too much. The structure could be interpreted both as positing a clearer line of demarcation between textual and nontextual rights than is tenable and as presenting a false dichotomy as to what is and is not "implied." For example, one could plausibly argue that the protection of nude dancing under the first amendment is no less nontextual than is the articulation of a penumbral right of privacy.\^23 This argument, however, would miss the essential purpose of the chapter. The organizational scheme is designed to raise these issues, not to answer them. To the extent that it provokes such responses, it succeeds in its purpose.

\^19 Whether procedural due process is properly characterized as a "nontextual" right similar to substantive due process or fundamental interests is a matter that could be debated.

\^20 Those who prefer to teach the subjects in this chapter along a different organizational scheme, therefore, will not suffer any loss in substantive coverage.

\^21 See notes 6-7 and accompanying text above.

\^22 5 U.S. 137 (1803).

A more valid criticism can be made of the placement of the discussion of “fundamental interests” in equal protection (pp. 751-840) before the discussion of “fundamental rights” in due process (pp. 840-900). It would seem more appropriate to establish what is fundamental as a noncomparative interest (due process) before discussing what is fundamental only relative to the rights of others (equal protection). The ordering of these discussions may, however, simply be a matter of personal preference. In any event, the text permits such a reordering by a professor without impairing substantive coverage.

Indeed, because the order in which major subjects are presented may be readily adjusted, the authors’ broad organizational choices are not the key determinants in an evaluation of a textbook. The more significant determinant is the quality of the major subject discussions themselves.

It is in these discussions that Constitutional Law makes its strongest contribution. The book is an impressive scholarly work that will both add significantly to substantive understanding and work as an effective classroom tool. A striking example of the book’s excellence is its chapter on “Freedom of Expression” (pp. 925-1360). At 435 pages long, the chapter is a comprehensive effort that easily could comprise a full semester course in its own right. Yet its true achievement is the division of materials along content-based and content-neutral lines. While the content-based/content-neutral distinction is not a new one, its use as a comprehensive organizing principle to bridge a wide range of first amendment doctrines marks an innovative and substantive contribution to the literature. Its benefit as a pedagogical device is even greater. In most texts, the progression from one first amendment doctrine to another often occurs without any apparent organizational purpose. The absence of an overriding organizational principle is particularly problematic in the area of free expression since the materials themselves are almost overwhelming in their diversity and complexity. By providing a structure that allows students to see relationships between the diverse doctrines, Constitutional Law

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24 It is possible that my views on this chapter are not entirely objective since I had the opportunity to comment on earlier versions of the material. While I do not believe that this minimal involvement has affected my objectivity, it should be acknowledged. As to the excellence of the chapter itself, I take great solace that those with whom I have discussed the work agree that it is an extraordinarily adept performance.

provides coherence and a key to understanding that is unavailable in competing texts.

A second chapter worthy of special mention is “The Constitution and the Problem of Private Power” (pp. 1467-1536), which discusses the state action doctrine. The introductory section explains the relationship of the state action doctrine to concerns of federalism and individual autonomy. The chapter then divides the state action cases into three categories: (1) those in which government does not act, or acts only through the judiciary;\textsuperscript{26} (2) those in which government action takes the form of subsidization, encouragement, or the grant of authority;\textsuperscript{27} and (3) those in which private action substitutes, in effect, for the traditional state action, as in the public function cases.\textsuperscript{28} This breakdown of the cases works well. Certainly the “encouragement” and “public function” cases properly belong in separate categories, for they raise questions that are analytically distinct. In addition, the discussion of the first category, state inaction, in combination with the introductory policy overview effectively raises the crux of the state action issue: when (and why) does pure inaction deserved to be treated as action? The casebooks that focus only on what is “encouragement” and what is “public function” tend to ignore this central point.

In a sense, singling out specific chapters disserves the book as a whole. The features that truly set the book apart and pervade the entire text are the excellent style and substance of the notes. Obviously, a major purpose of note material is to stimulate analysis and criticism of the principal case. This often is accomplished in note material by raising questions concerning the premises and reasoning of the principal case and by referring to cases or scholarly commentary in which divergent views are expressed. In most textbooks, this “direction and probing”\textsuperscript{29} is accomplished by posing a short question and offering a citation or brief excerpt from divergent cases or commentary. \textit{Constitutional Law} improves on this method. On frequent occasions it presents, in declarative form

\begin{itemize}
\item \textsuperscript{26} Principal cases in this section are Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) (state acquiescence in private action); and Shelley v. Kraemer, 334 U.S. 1 (1948) (judicial enforcement of private discrimination).
\item \textsuperscript{27} Principal cases representative of the “encouragement” category are Burton v. Wilmington Pkg. Auth., 365 U.S. 715 (1961); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Blum v. Yaretsky, 457 U.S. 991 (1982).
\item \textsuperscript{28} The public function case chosen by the authors is Marsh v. Alabama, 326 U.S. 501 (1946). Also noted is Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).
\item \textsuperscript{29} See Sedler, 79 Mich. L. Rev. at 1027-28 (cited in note 1).
\end{itemize}
(also an improvement\textsuperscript{30}), a number of alternative theories criticizing or explaining the principal case. The reader is then asked to evaluate these theories in relation to the principal case and to each other. This approach is an extremely effective pedagogical tool because it encourages the student to analyze divergent solutions to complex issues and, at the same time, exposes the student to a wide range of thought. The inclusion of a range of perspectives provides a more subtle benefit as well: it offers a more balanced presentation of the various issues than is available in texts whose references do not represent widely divergent views or whose notes are dominated by the specific views of the author.

The notes in \textit{Constitutional Law} are also remarkable because they refer to such a wide variety of sources. These sources range from generous excerpts from \textit{The Federalist} in the opening chapter on judicial power, to materials on the economic analysis of law in the section on the commerce clause, to commentary on political theory in the chapter on separation of powers. While the use of such materials, again, is not new to the constitutional law textbook, the prominence given them and the skill with which they are integrated into the doctrinal areas make them particularly enriching. For example, the extensive use of historical materials on federalism, anti-federalism, and republicanism, and the discussion of contemporary theories of judicial review make the opening sections on the theory of the Constitution and \textit{Marbury v. Madison} highlights of the book.

The notes also merit praise because they do not attempt too much. Unlike Gunther's book, they do not present a seamless web of citation and counter-citation to other sections of the book in an effort to tie together divergent constitutional strands. While Gunther's approach is valuable from a scholar's perspective because it demonstrates the relationship between seemingly unrelated doctrines, it may be too convoluted for a student's introduction to constitutional law. The field is difficult enough to master without the further confusion of a maze-like presentation.\textsuperscript{31}

The authors' commitment to the successful use of their text in

\textsuperscript{30} Dean Bice has argued that notes presented in declarative form are often superior to those couched as leading questions: "While questions can help stimulate critical thinking, they are an inefficient way to convey a complex analysis." Bice, 23 U.C.L.A. L. Rev. at 614 (cited in note 6).

\textsuperscript{31} See Gunther, \textit{Constitutional Law} (cited in note 7). I do not dispute that the Gunther book is a superb scholarly effort. My concern is that as it has evolved, it has become far too complex for a student's first exposure to constitutional law. A book need not be superbly intricate in order to be challenging.
the classroom is evident in a number of other features. For example, they provide a teacher’s manual, a device uncommon to constitutional law texts, which is designed to explain the “most important strategic decisions made in the casebook” and to suggest “additional questions and approaches” beyond the notes. Also helpful for both teacher and student are the short biographical sketches of selected Supreme Court justices contained in the textbook itself (pp. lv-lxxi). Finally, the authors already have prepared a supplement including the major high and low points of the 1985-86 term.

Of course, Constitutional Law is not without its weaknesses. The choice of some leading cases, for example, could have been better. Generally, the book’s selection of leading cases is the standard fare: the celebrated cases of constitutional law are duly celebrated, and the areas with no preeminent decision are marked by a suitably representative case. In some instances, however, the choice of cases may be criticized on grounds other than that one’s personal favorite has been omitted. Selections that are not well-advised are, for example, Allen v. Wright as the leading case on standing and Lynch v. Donnelly as the leading case on the establishment clause. Neither case is in any sense landmark; each purports to rely solely on standards developed in previous cases. The significance, if any, of these decisions is the extent to which they distort, rather than simply apply, these standards in reaching their ultimate results. Indeed, I do not think it would be disputed, even by those who support the results, that the Court’s analyses in

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33 At the risk of seeming too pessimistic, I feel compelled to warn the authors that their inclusion or exclusion of certain Justices is likely to provoke heated debate. The authors fail, for example, to provide biographical material on Gabriel Duvall, despite their acknowledgment of the substantial “scholarly attention” that has been devoted to him in recent years. See, as the sole examples, David P. Currie, The Most Insignificant Justice: A Preliminary Inquiry, 50 U. Chi. L. Rev. 466 (1983); Frank H. Easterbrook, The Most Insignificant Justice: Further Evidence, 50 U. Chi. L. Rev. 481 (1983). Both studies are noted in Constitutional Law at lv. Another notable omission is the fourth horseman of reaction, Pierce Butler. His three equestrian colleagues, McReynolds, Sutherland, and Van Devanter are included.


these cases, if not entirely bankrupt, are certainly on the brink of foreclosure. In fact, I assume the authors chose these cases precisely because such blatant disingenuousness provides a good catalyst for discussion.

I would argue, however, that it is not pedagogically helpful to begin with cases from which the only principle to be learned is that the Court can distort its own standards and language to reach desired results. Leading cases should set forth principles intelligibly, and cases that are simply dishonest do not do that. Such cases may demonstrate the deficiencies in the principles as applied, but this is a secondary step dependent upon an initial understanding of the principles themselves. In sum, Allen, Lynch, and similar cases are the stuff of which notes, and not leading cases, are made.

The sections on religion and standing fail to measure up to the rest of the materials in other respects as well. Religion clause jurisprudence has received a new prominence in the Court's recent terms; in addition, the increased religious activism of both governmental and private entities ensures that religious issues will long remain in the forefront. It is therefore disappointing to see only seventy or so pages, the standard allotment, devoted to religion issues. The chapter's focus on more recent cases and its lack of emphasis on the landmark decisions also seem misguided. The use of Lynch as the principal establishment case already has been criticized, but the extent that it dominates the establishment section also should be noted. The reproduction of the Lynch text occupies more than thirteen full pages, while the accounts of the seminal school prayer decisions, Engel v. Vitale and Abington School Dist. v. Schempp, are limited essentially to one paragraph each. This represents a sacrifice of materials that are both historically and doctrinally important in favor of materials whose value, at best, is that they represent the most recent pronouncements of the Court. A "most recent case," of course, quickly becomes outdated.

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39 For example, see Gunther, Constitutional Law at 1463-1531 (cited in note 7); Ronald D. Rotunda, Modern Constitutional Law: Cases and Notes 888-946 (2d ed. 1985); Edward L. Barrett, Jr. and William Cohen, Constitutional Law: Cases and Materials 1412-82 (7th ed. 1985). The Lockhart casebook, however, devotes over 100 pages to the subject. See Lockhart et al., Constitutional Law at 1027-1129 (cited in note 7).
42 Another instance in which the book appears improperly to emphasize recency over substance is in its selection of South-Central Timber Development, Inc. v. Wunnicke, 467
The treatment of standing and other justiciability doctrines also could be improved. The first problem with these materials, undoubtedly, is that they are discussed in the first chapter. As the authors concede, the issues are a "bit abstract when students know little about substantive constitutional law."

Aware of this objection, the authors defend their choice on the ground that "the jurisdictional matters bear critically on the role of the Supreme Court in the constitutional scheme, and if one looks at 'Marbury' et al., without looking at these limitations, the students' view is only partial." This purpose has its merits, but it is one that could be fulfilled by a short declarative note summarily setting forth the jurisdictional limitations. Students need not be led, at such an early point, into critical analysis and interpretation of those limitations.

The difficulties with the section, however, are more fundamental. The treatment of standing is limited to one case plus notes, while ripeness and mootness are limited to one and a half pages in total. Such brief attention would be inadequate wherever the materials were placed. Justiciability issues are more than a "bit abstract" and complex even when students do understand substantive constitutional law. These are not topics that can be treated summarily: the section is simply not meaty enough to provide any chance of substantive understanding for persons unfamiliar with this area. This inadequacy is unfortunate, particularly since the first chapter is otherwise one of the best in the book.

Finally, I object to the authors' treatment of McCulloch v. Maryland. McCulloch is included in the chapter on judicial review, where the authors present it as the leading case of the "representation-reinforcement" theory of judicial decisionmaking. Undoubtedly it is that, and McCulloch certainly is important to the development of judicial review theory. To some degree, however, every constitutional decision from Ferguson v. Skrupa to Roe v. Wade to Bowers v. Hardwick is informative as to the scope of

U.S. 82 (1984) (plurality opinion) as its principal case representing the "market participant" doctrine. The case adds little to the substantive understanding of the issue and, since it is a plurality opinion in a volatile area, would also appear to be of little precedential significance.


Id.

17 U.S. 316 (1819).

372 U.S. 726 (1963) (holding that the Court's role in reviewing state economic regulation is to be extremely minimal).

410 U.S. 113 (1973) (indicating that the Court's role in protecting personal privacy rights is to be active).

106 S. Ct. 2841 (1986) (holding that the Court should not actively overturn state legislative determinations as to morality).
judicial review. Moreover, to treat McCulloch solely as a subdivision of Marbury v. Madison is a mistake. The substantive side of McCulloch is also important, both historically and doctrinally. McCulloch remains perhaps the seminal case on the scope of national power and the coincidental issue of the limits of state power. It would be appropriate, therefore, if it received more pronounced attention in these areas.

Having dispensed with the obligatory minor criticisms, I return to the positive. Constitutional Law brings together four of the leading scholars in contemporary constitutional law. The success of the book, at least in hindsight, was apparently assured by how well Professors Stone, Seidman, Sunstein, and Tushnet complement each other in both their substantive expertise and their ideological perspectives. The result is a fair and ideologically balanced book whose quality and depth is sustained throughout. There is little else that can be asked from the “traditional” constitutional law text.