Cases Versus Theory

CONSTITUTIONAL LAW: CASES AND MATERIALS, 10th Edition. By William Cohen† and Jonathan D. Varat.‡ Westbury, New York: Foundation Press, 1997. Pp. xliii, 1732.

*Reviewed by Richard B. Collins**

Past reviewers have noted that the large modern market for American constitutional law casebooks was not served by much diversity in approaches to the subject.[1] More recently there has been some divergence, and teachers have more choices. Cohen & Varat[2] (CV) has changed least in the intervening years and continues to serve its part of the market very well. Case editing is excellent,[3] and selection is good. So if you liked the former standard, it remains a sound choice, and if you did not, you will have moved on.

Notable differences among constitutional law casebooks fall into several categories. Books differ in overall organization, amount and character of secondary readings, organization and inclusion of particular subjects, and length. This review compares CV with some of its prominent competitors in these respects.

I. COMPARATIVE SHOPPING

A. *Basic Approach to Teaching Constitutional Law*

On this subject, books designed to teach constitutional law to American law students differ little. All are essentially casebooks dominated by opinions of the Supreme Court. A predictable set of familiar cases appears in all.

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† Professor of Law, Stanford Law School.

‡ Professor of Law, UCLA Law School.

* Associate Dean, University of Colorado Law School.

1. *See, e.g.*, Christopher D. Stone, *Towards a Theory of Constitutional Law Casebooks*, 41 S. CAL. L. REV. 1 (1967).

2. WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW CASES AND MATERIALS (10th ed. 1977).

3. Except for the annual supplement, which often shows signs of short deadlines. But so do those of other authors.

The nearest thing to a difference is Brest & Levinson,[4] whose title announces a process-oriented approach. But the main process approached is that of constitutional adjudication in the Supreme Court, so the work is not so different after all.[5]

There are prominent teaching textbooks about American constitutional law, but they are intended for undergraduate courses in political science.[6] I am not aware of any being used in a law school course. In other countries, textbooks are standard; the casebook remains an Americanism.

B. Overall Organization

Traditional books were mostly cases organized under the major headings of judicial review, federalism, separation of powers, due process and equal protection, and First Amendment. *Marbury v. Madison* and judicial review came first, followed by federalism, the major topic of pre-Civil War constitutional law. The materials on federalism, substantive due process, racial equal protection, and the start of materials about free speech were traditionally organized historically. Other subjects were arranged categorically. This continues to describe CV.

Other prominent books have departed from tradition in overall organization. The most distinctive is again Brest & Levinson. The first third ("Part One") of the book is a chronological study with chapters on the Marshall Court, the Taney Court, the period from the Civil War to the Great Depression, and a modern chapter on federalism and economic regulation.[7] The rest of the book ("Part Two") is topical studies of modern law, mostly about individual rights.

Another variant is to put individual rights law ahead of structural constitutional law, essentially the approach of Farber, Eskridge & Frickey.[8] Over several years, Professor Cohen annually sent his

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4. PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISION-MAKING: CASES AND MATERIALS (3d ed. 1992).

5. There are a few noncase studies. *E.g.* The Alien and Sedition Act and Nullification, *id.* at 57-68, and the Helms-Hyde Bill, *id.* at 1523-38.

6. *E.g.*, BERNARD SCHWARTZ, CONSTITUTIONAL LAW: A TEXTBOOK (2d ed. 1979).

7. BREST & LEVINSON, *supra* note 4, at 1-543. This part ends oddly, with a subchapter on modern separation of powers cases. There was formerly at least one casebook that was organized chronologically throughout. *See* JOHN BURRILL SHOLLEY, CASES ON CONSTITUTIONAL LAW (1951).

8. DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY (West 1993). This work, like BREST & LEVINSON, also begins with a constitutional law chronology, though much shorter, a 31-page "Prologue on Constitutional History." *Id.* at 1-31.

current syllabus to those interested in CV and its predecessor, Barrett & Cohen. These showed that he taught the subject by assigning rights law first. But new editions of his casebook presented structure first, and the tenth continues to do so.

C. *Secondary Readings*

Here we reach a subject of considerable and growing variations among casebooks. Professors Cohen and Varat announce their "primary goal" to publish a book that is "flexible enough to be used by law teachers with widely varying approaches to the material."[9] Thus the book provides mostly primary readings: the Constitution, cases, and statutes. Notes are historical or descriptive and concise. Questions are incisive and relatively few. Quotes from other secondary sources are rare and short, many no more than a sentence. CV's relative paucity of space devoted to secondary readings sets the book apart from most others. Because more space is allocated to cases, the cases are less severely edited. While some other books overly truncate cases, particularly the facts, it is rare to need to supplement a CV case.

Other books include many more references to constitutional theory. The Lockhart casebook has been prominent over many editions.[10] In the words of its authors, its distinctive feature is inclusion of "competing perspectives drawn from the best of legal scholarship."[11] Faithful to this purpose, the book includes numerous quotes from scholarly works. Every prominent article, book, and scholar is probably quoted and many others are cited.

Prior editions of the Gunther casebook were noted for their battery of questions.[12] The latest, with Kathleen Sullivan as coauthor, has significantly more notes and cites and fewer questions; it more closely resembles Lockhart.[13]

Today's best seller is Stone, Seidman, Sunstein & Tushnet.[14] Its secondary materials and references depart in important ways from

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9. COHEN & VARAT, *supra* note 2, at v.

10. WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS (8th ed. 1996). *See* Ira C. Lupu, *Intergenerationalism and Constitutional Law*, 85 MICH. L. REV. 1390 (1987) (reviewing STONE and LOCKHART).

11. LOCKHART ET AL., *supra* note 10, at v.

12. *See* Robert Sedler, *Constitutional Law Casebooks: A View from the Podium*, 79 MICH. L. REV. 1020, 1026 (1981) (reviewing seven casebooks).

13. GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW (13th ed. 1997). Another work that includes many cites and quotes to scholarship is JEROME A. BARRON ET AL., CONSTITUTIONAL LAW: PRINCIPLES AND POLICY: CASES AND MATERIALS (4th ed. 1992).

14. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW (3d ed. 1996).

traditional casebooks. Like Lockhart and Gunther, it has extensive notes and questions. It adds several excerpts from The Federalist Papers, biographies of many justices, and extensive theoretical notes on other subjects. The book's sales show that this has been a winning formula.

Brest & Levinson again differs most from CV. It includes large amounts of authorial text and many quotes from other secondary sources. Comparing these books demonstrates the flexibility goal announced by Professors Cohen and Varat. Of the books discussed here, Brest & Levinson most constrains a teacher, CV least. Its "primary goal" is in fact largely achieved.

D. Particular Case Law Subjects

All casebooks cover the case law subjects outlined under part B above. A few have distinctive additions. Professor Rotunda's book, though shorter than most, includes a larger section on foreign affairs, immigration, and citizenship.[15] Lockhart includes a section on the death penalty.[16] Brest & Levinson includes a number of distinctive sections, such as those on Indian affairs and the extensive section on religious liberty.[17] The latest edition of Stone touts comparative law references.[18] The most distinctive coverage in CV is on the Eleventh Amendment and intergovernmental immunity generally.[19]

More important to teachers is how well a casebook organizes the few subjects that provide organizational challenges. The most significant is free speech. There are huge differences in amount of coverage (from 137 pages in Farber to 456 in Stone)[20] as well as in organization. Many books begin historically, and this part in CV is very good. Then there tends to be a division between those that organize around purposes of regulation and circumstances of expression (content discrimination, private or public, words or conduct, etc.), including CV, and those that divide by category of expression, such as sexual or commercial. One consequence of the former choice is that a category of speech becomes scattered. In CV, speech related to sex

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15. RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW 223-70 (5th ed. 1997), BREST & LEVINSON, *supra* note 4, at 1355-1405, also covers citizenship.

16. LOCKHART ET AL., *supra* note 10, at 555-81.

17. BREST & LEVINSON, *supra* note 4, at 133-40, 1405-57.

18. STONE ET AL., *supra* note 14, at xxxiii.

19. COHEN & VARAT, *supra* note 2, at 59-84, 372-406.

20. FARBER ET AL., *supra* note 8, at 581-718; STONE ET AL., *supra* note 14, at 1073-1529.

appears in four places.[21] My experience is happier with categorical arrangements.

Another organizing challenge of less importance to most teachers is materials on the dormant Commerce Clause. Again, no two books are alike, though most, including CV, chop this subject into too many categories. Import and export cases, which are subject to the same antidiscrimination rule, wind up under three or more headings.[22] Of the books mentioned here, Stone is best, first addressing import-export cases, then transportation and others.[23]

E. Length/Heft

Constitutional law casebooks are the sumo wrestlers of the law school curriculum, dreaded by students for their bulk. The main cause is no doubt marketers' desire to supply teachers of different tastes with full meals. And supplements must be bought and toted as well.

Page numbers don't fully reveal the size of these tomes because some creatively number appendices separately. A better way to compare is weight. By our postal scale:

Stone, Seidman, Sunstein & Tushnet	6 lb. 2 oz.
Lockhart, Kamisar, Choper, Shiffrin & Fallon	5 lb. 14 oz.
Gunther & Sullivan	5 lb. 13 oz.
Brest & Levinson	5 lb. 4 oz.
Rotunda	4 lb. 10 oz.
CV	4 lb. 9 oz.
Farber, Eskridge & Frickey	4 lb. 6 oz.
Barron, Dienes, McCormack & Redish	4 lb. 3 oz.

21. COHEN & VARAT, *supra* note 2, at 1274-1313, 1398-1402, 1412-15, 1449-55.
22. *See, e.g.*, COHEN & VARAT, *supra* note 2, at 247-51, 272-327 (six categories).
23. STONE ET AL., *supra* note 14, at 298-343, 343-73.

By contrast, most casebooks on other subjects are less than four pounds. The task of hauling these behemoths about can now be avoided by buying the electronic version of many, including CV. But the efficacy of this option is hugely reduced because the annual supplements are not done electronically.[24] Thus, the potential convenience of an electronic supplement slotting into its ordained places has yet to be realized. Until that happens, it is difficult to recommend that students pay the extra charge for the electronic version.

II. MY SYLLABUS

Our basic course at Colorado omits the First Amendment, the subject of a separate course. I assign *Marbury* followed by these units: national powers and intergovernmental immunities; separation of powers including materials usually found under judicial review; limits on economic regulation (dormant commerce power, preemption, Lochner, modern economic due process and equal protection, takings and contract clause); modern substantive and procedural due process; the rest of equal protection; state action and civil rights statutes. At times I have integrated the last two subjects into one unit, so that the *Civil Rights Cases* and *Shelley* are seen as part of the background for *Brown*. Many teachers find ways to get to the great issues of current contention more quickly. I prefer to reach them later in the term, when they serve well to maintain interest and enthusiasm.

My syllabus does not match any casebook, so assignments must jump about. As they intend, Professors Cohen and Varat make this easier than most. My syllabus adds significantly to the books, so lack of secondary material in CV is not important. In sum, it is a fine book unless you crave a lot of theory.

24. Information by telephone from Foundation Press, December 1997.