Notes on Notes

CONSTITUTIONAL LAW, 3d Edition. By Geoffrey R. Stone,[†] Louis M. Seidman,[††] Cass R. Sunstein,[‡] and Mark V. Tushnet.[‡‡] Boston, Massachusetts: Little, Brown and Company, 1996. Pp. lxi, 1766.

Reviewed by Margaret G. Stewart[*]

A number of years ago, our college collapsed two constitutional law courses into one. Constitutional Law, a required four-hour course taught in the third semester,[1] replaced a required three-hour course, Constitutional Law: Powers of Government, and an elective two-hour course, Constitutional Law: Due Process and Equal Protection.[2] While no one argued that there was insufficient material to justify five hours of coverage, the faculty was concerned that students could and did graduate without any exposure to the constitutional issues which are at the heart of popular political discourse and which frequently dominate the U.S. Supreme Court's[3] calendar.

Furthermore, many of us who teach in the area of constitutional law believed that the division made it more difficult for students to appreciate the underlying and continual concerns that the roles of judicial review and federalism present whenever the Court is asked to justify or reject majoritarian decisions. My search for a text which emphasized those themes led me to adopt the Stone, Seidman, Sunstein

---

† Harvey Kalven, Jr., Distinguished Service Professor of Law and Provost, University of Chicago Law School.

†† Professor of Law, Georgetown University Law Center.

‡ Karl N. Llewellyn Distinguished Service Professor of Jurisprudence, University of Chicago Law School and Department of Political Science.

‡‡ Carmack Waterhouse Professor of Constitutional Law, Georgetown University Law Center.

* Professor of Law, IIT Chicago-Kent College of Law; B.A. 1968, Kalamazoo College; J.D. 1971, Northwestern University School of Law.

1. In the evening division, it is taught in the fourth semester.

2. A third elective course on the First Amendment remained unchanged. Since it is not a course I teach, I have made no comments on the text's treatment of those issues. My focus here is on Chapters I-VI, which form the core of the four-hour course.

3. Hereinafter referred to as "the Court."

and Tushnet casebook.[4] Having used it for at least five years, I remain convinced that it does an excellent job in a difficult field. But, of course, I have a few quibbles.

It is simply impossible to understand constitutional law without at least a basic knowledge of the history of the United States. The longer I teach, the more I realize that assuming student familiarity with that history is unwise. For every student who can argue the antifederalist position fluently, there is invariably one who has never heard of the Articles of Confederation. At the same time, as a practical matter, the amount of current doctrine calling out to be mastered severely limits the number of classroom hours that can be devoted to the past political and judicial landscape.

The Stone, Seidman, Sunstein and Tushnet casebook seems to have found a workable mix. For the most part, it utilizes a chronological approach in its separate treatment of key subject matter areas. Upon occasion, I have toyed with the idea of trying to teach a History of Constitutional Law course, focusing, for example, on the Court's pre-1937 approaches to the scope of congressional power to regulate under the Commerce Clause and to the simultaneous limits imposed under the Due Process Clause on the states' authority to regulate economic activity. However, I always ultimately decide, as did the authors, that tracing each doctrinal strand results in a more coherent class. The text itself draws the necessary connections, pointing out the parallels created by the early 20th century Court's commitment to a laissez-faire economy in *Lochner*[5] and by its restrictive interpretation of the Commerce Clause.

The authors' general fidelity to this chronological doctrinal analysis makes their decision to begin a discussion of congressional power with *United States v. Lopez*[6] puzzling. Yes, the case presents a decent (if biased) review of the Court's Commerce Clause jurisprudence. Yes, the opinions frame the issue of federalism dramatically. But students' ability to analyze and criticize the arguments made there, I think, depends on their understanding of what came before. In just over forty pages,[7] the authors neatly trace the Court's checkered approach to the Commerce Clause and the Court's apparent abandonment of any attempt to second-guess Congress' determination of what activity in the aggregate substantially affects interstate commerce. Into

4. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW (3d ed. 1996).
5. Lochner v. New York, 198 U.S. 45 (1905).
6. 514 U.S. 549 (1995).
7. STONE ET AL., *supra* note 4, at 189-233.

that world *Lopez* comes as a thunderclap. If for no reason other than dramatic impact, it belongs at the end of the sequence, not at the beginning.[8]

The placement of *Lopez* is an exception to the authors' usual chronological approach. The placement of their treatment of fundamental interests in the context of equal protection is an exception to their doctrinal approach, albeit an exception I think more easily justified. Chapter V deals with "Equality and the Constitution," leading students (again more or less chronologically, though slavery, school segregation and desegregation are treated separately from other racial classifications) through the traditional analysis of when and why legislation that treats persons differently violates the Fourteenth Amendment. Chapter VI then addresses "Implied Fundamental Rights," covering, *inter alia*, economic substantive due process, then equal protection fundamental interests doctrine, and finally a return to "modern" (i.e. noneconomic) substantive due process.

While it is true that the Court's attempts to define and justify "fundamental" interests ordinarily protected from legislative control is similar in both situations, I find it more logical to complete equal protection before moving to due process, and more interesting to compare the Court's economic and noneconomic due process decisions without a side-trip into equal protection. In the first place, much of the equal protection fundamental interest material focuses on the right to vote and increasingly on the appropriate (or inappropriate) use of race as a gerrymandering tool. The Court's concern here mirrors its concerns in the more obvious "classification" contexts, particularly in the realm of affirmative action, and the cases fit well together. In the second place, the interpretation of economic and modern substantive due process cases, like the out-of-step treatment of *Lopez*, lessens the impact of the rejection of *Lochner* in cases like *Roe v. Wade*.[9] Obviously it is possible to remind students of the demise (and of the rejoicing at the demise) of *Lochner*, and in notes the text does so. But the reminder can be made unnecessary.

Quibbles about order are easily overcome; my syllabus just puts *Lopez* at the end of the Commerce Clause materials and the equal protection fundamental rights materials at the end of Chapter V. Much more important is the continuing reiteration of the themes of

---

8. Of course, whether the thunderclap heralds a storm or constitutes a squall is debatable. Certainly most lower courts have not used the case to invalidate other challenged enactments, and it is impossible to predict what other, if any, confluence of factors would rouse the majority's ire.

9. 410 U.S. 113 (1973).

judicial review and federalism I first referred to. Of equal importance is how the authors attempt to focus student attention on those themes. The text is characterized by highly-edited opinions and a plethora of notes that appear to excerpt, to one degree or another, every law review article and book from every possible point of view on every conceivable issue. These two characteristics are the book's strength—and its weakness.

Case Editing. As any constitutional law teacher confronted with a new Supreme Court opinion in the middle of the term knows, it is unrealistic to expect students to plow through interminable unedited pages of argument and counter-argument penned by an increasingly fractured Court. Most of us find it difficult, if not impossible, to cover the doctrine as we would wish to; a single one-hundred-page opinion simply cannot be allowed to consume two hours of class. On the other hand, teaching constitutional law is not only about teaching constitutional doctrine (or constitutional history). Like all law school teaching, it is also about teaching legal reasoning and analysis, about helping students discern what is and what should be used to justify legal decisions. In its treatment of *McCulloch v. Maryland*,[10] the text superbly directs attention to precisely those issues. Indeed, it was this use of *McCulloch* (rather than the more usual focus on the case as the seminal interpretation of the Necessary and Proper Clause) that was one of the first things that intrigued me. However, highly edited opinions in effect do this work for the students. The edited version necessarily separates out the critical from the peripheral, the true issue from the red herring, the structure from the off-shoots. My classes love it; and on many days, so do I. It is a practical necessity, and the authors perform their task well. But I am always grateful for the occasional opinion that has not been so heavily red-lined, either because it is itself unusually short or unusually complex, or because it is in the supplement (where it sometimes seems the number of pages is less problematic).

Notes. A completely unscientific survey of students over the years elicited two unanimous comments about the casebook: "It's too heavy," and "Does *anyone* read/understand/think about all those notes?" I suspect the two comments are related. I also suspect, with some evidence gleaned from class discussion, that the answer to the second comment is: "only the professor." But it is the notes that distinguish this casebook, and they are the primary reason I continue to use it.

---

10. 17 U.S. (4 Wheat.) 316 (1819).

Teaching constitutional law is, in my opinion, one of the great joys of life—and all too often one of life's most frustrating experiences. The subject matter fascinates me, both because of its theoretical complexity and interdependence and because of its relevance to every aspect of what it means to be a member of the United States polity at the end of the twentieth century. I have always been and remain a deeply political animal; I care very much about the issues the Court addresses and hold strong opinions about the decisions it reaches. One challenge is always to make sure that, even though my views inevitably become known through the course of the semester, positions with which I disagree get an equal and fair hearing.[11] The eclectic nature of the notes assures me that none will be inadvertently overlooked. More important, however, is the role they play in engaging the class.

The first six weeks of the course cover the powers of Congress and the implications of those powers for notions of federalism (and vice versa) and the doctrine of separation of powers. With the cutback in available classroom hours, something had to be dropped from the original three-hour course I taught, and I happily eliminated most cases concerning the dormant Commerce Clause. Even I found cases about curved mud guards[12] dull. But I thought that the rest of the cases would resonate with students. At a time when Newt Gingrich is calling for a return of control to the states (except, of course, for "tort reform") and issues concerning the role of special prosecutors dominate headlines, how can cases defining and limiting federal power or determining when prosecutorial decision making may be taken away from the President fail to excite a class? It beats me, but frequently they do.

The notes help. Some do so by relating the cases to today's headlines; connections students might not see are drawn for them. Some do so by virtue of their extreme positions; when what a student unthinkingly assumes that "everybody knows" is challenged, a defense becomes necessary and a rethinking may occur. Nonetheless, I fear most students who come into the class unengaged in structural politics

---

11. A number of years ago, I had just finished teaching *United States v. Nixon*, 418 U.S. 683 (1974), when an apologetic student came up and asked if the class had misread me: they all assumed, he said, that I was a liberal Democrat. True. But then why did I consistently refer to "President" Nixon and present an argument for the blanket executive privilege the Court denied? It was one of the best compliments I had ever been paid.

12. Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959).

and law remain unengaged, and this suspicion is one of the reasons teaching constitutional law can be frustrating.[13]

The last eight weeks of the course focus on equal protection and due process. Here the problem is *not* boredom. Rather, it is an odd combination of firmly held (though not legally reasoned) convictions and embarrassment, or at least wariness, of expressing those convictions publicly. One reason I try as hard as I do in the first part of the semester to foster debate is that the issues are usually less emotional, and I hope a habit of comfortable participation will develop. The authors' choice to begin the equal protection material with cases about slavery and desegregation is also useful here; no one would argue in favor of slavery or white-mandated segregation of blacks, and so the discussion can at least begin on common ground.

But once the focus turns to affirmative action, voting districts, abortion, etc., the silence can be deafening. The notes help, probably more so here than before. In the first place, more students read more of them. In the second place, many students find it easier to express agreement with an "authority" on one side of a debate or another than to make the same argument unprotected. And in constitutional law, and in this casebook, it is not difficult to find an "authority" on any position. Finally, the notes usually effectively challenge the raft of assumptions students hold based on the extent to which past Supreme Court decisions have become part of our society's background knowledge. My favorite example is *Reynolds v. Sims*,[14] the "one person-one vote" case. By emphasizing the dissenting opinions in their edit and by beginning the following notes with a critical quote from Robert Bork, the authors draw into question why only numbers matter in apportionment. Most students are stunned to realize that the logic of the United States Senate stands in opposition. The "I thought I knew what the answer must be, but now I'm *so* confused" reaction is one of the reasons teaching constitutional law is such a joy.

The desire to assure representation of all views is clear in the choice and number of notes. It is a desire I obviously approve of and share. However, just as sometimes I wish for less-heavily-edited opinions, I sometimes also wish for longer excerpts. Trying to do justice to John Hart Ely, Derrick Bell or Catherine McKinnon in a paragraph is difficult. But students interested in a particular viewpoint

---

13. One of the reasons for combining our original two constitutional law courses was that a significant number of students did not take the Equal Protection and Due Process course. Anecdotal evidence suggested that many of them had been so bored with the Powers of Government course that they could not face another two hours of constitutional law.

14. 377 U.S. 533 (1964).

are certainly told where to look. As one student said, ". . . the notes are good because I intend to keep the book. . . . I think it will make an excellent reference book for constitutional law issues in the future." What more could any teacher—or author—wish for?

While no casebook is without flaws, this one provides a mix of history, doctrine and commentary that is superb. It *is* too heavy, but, unfortunately, whatever changes I would recommend would only exacerbate the problem. Until the Supreme Court stops deciding cases, or lawyers stop writing about them, the only solution is a good backpack. Anything that opens minds as this text does is worth the weight.