Problem Solving and Storytelling in Constitutional Law Courses


Reviewed by William A. Kaplin*

I have labored over 25 years in the law school vineyards. The vines that I tend sometimes grow strong and hardy, and sometimes they do not. The fruit my vines produce is sometimes plentiful and robust, and sometimes not; the wine is sometimes of premium vintage, and sometimes not. Over the years, I have tested and developed various methods for stimulating the growth of my vineyard and maximizing the quality of its produce. This essay is about those methods and the materials used to implement them.

My vineyard is the field of constitutional law, and in particular, those parts of the field concerning constitutional analysis and decision making. The vines are my students. The fruits are their accomplishments and the qualities of mind and heart they develop as students and later as lawyers and public servants. The wine is the broader identity of competency and caring, professional and personal integrity, and clarity of purpose that my students develop over a lifetime in the law. My primary methods, while I have the students in my classes, are

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¶¶ In April 1998, when this essay was in press, the second edition of the casebook was published. All bibliographical information remains the same except for the publication date (1998) and the page count: pp. xliv, 1090. Most of this essay's discussion of the first edition directly applies to the second edition as well. In addition, this essay includes occasional references to the second edition, especially to point out differences from the first.
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problem solving and storytelling.¹ My materials, at present, are those in Farber, Eskridge, and Frickey, Constitutional Law: Themes for the Constitution's Third Century² (FEF), along with a problem-solving text of my own³ and informal materials I am collecting as a means of piecing together constitutional law stories.⁴

I. WHY PROBLEMS AND STORIES, AND WHY FARBER, ESKRIDGE, AND FRICKEY?

I emphasize problem-solving and storytelling methodologies because they help overcome three of the greatest contemporary challenges of teaching constitutional law. The first challenge is to counteract students' tendencies to react negatively to constitutional law as being overly abstract, amorphous, and esoteric. Problems and stories help meet this challenge by presenting a real-life and practical perspective on the subject, thus giving concrete life and utility to what students learn. The second challenge is to facilitate students' development of an integrated understanding of the subject—what I call the "big picture" or "forest vs. trees" perspective on constitutional law. Problems and stories help here by moving students beyond rules, doctrines, and clause-by-clause views of the Constitution, and helping them to interrelate theory with practice and substance with process. The third challenge (common to most law school courses) is to insure that students are active rather than passive learners, investing themselves and taking responsibility for their own learning. Problems help here by allowing students to practice their skills, improve with practice, and reflect on the "art" of lawyering; stories help by

1. The problem-solving method entails the use of written problems, assigned in advance, that become the focus for class discussion and provide the opportunity for practicing lawyering skills; this method is described and evaluated in the section on "The Problem-Solving Method," infra Part II. The storytelling method entails the use of true or fictitious stories, told in class or read in advance, that are a stimulus for student reflection and empathy and may also provide a backdrop or focus for class discussion; this method is described and evaluated in the section on "The Storytelling Method," infra Part III.

2. DANIEL A. FARBER ET AL. CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY (West 1993) (sometimes hereinafter referred to as "FEF"). The second edition of FEF was to be published in April 1998. The second edition follows the format and purposes of the first edition and has about the same number of pages. The modest and well-considered changes in the second edition indicate the positive evolutionary growth of this work. Unless otherwise explicitly noted, all page and section citations in this essay are to the first edition.


4. See notes 114-21, infra, and accompanying text.
stimulating student interest and by engaging students’ emotions as well as their intellects in the learning process.

I continue to work on interrelating the problem-solving and storytelling methodologies. Their compatibility seems clear. A well-drafted problem, after all, usually tells a story; and a client usually has a story to tell which the lawyer elicits and develops as part of the problem-solving process. It should follow, then, that the two methods can be used to accomplish similar goals and that, with careful planning, they will be mutually reinforcing. That is my experience thus far.

Prior to using FEF, I used the first two editions of Stone, Seidman, Sunstein, and Tushnet, Constitutional Law, and before that I used two or three editions of Gunther, Constitutional Law. In earlier years I also used the first edition of Brest, Processes of Constitutional Decisionmaking and two editions of Lockhart, Kamisar, and Choper, Constitutional Law. I selected the FEF casebook and continue to use it in part because it includes both stories and problems. In particular, I was impressed by its case study on Brown v. Board of Education that occupies all of Chapter 2 and is presented in the form of a story. The case study is an excellent vehicle for introducing the constitutional decision making process and its complexities in a legal and social context that engages students’ interest. I also selected the FEF casebook in part because it places the individual rights materials before the materials on federal powers. I wanted to experiment with this reversed order and thus far have been satisfied—largely because the rights materials (like the Brown case study) engage student interest better than the powers materials. They also set a more contemporary and practical tone for the course that focuses students on issues they are more likely to confront in practice. In addition, I thought FEF to be more compact

5. See Myron Moskovitz, Beyond the Case Method: It’s Time to Teach with Problems, 42 J. LEGAL EDUC. 241, 256 (1992). “A problem is . . . . an integrated story with elements that must be identified, extracted, and organized into a coherent structure . . . . The lawyer gets a story [from the client], and must sort out interrelated issues based on the questions to be resolved and the rules of law that apply.” Id.
12. FARBER ET AL., supra note 2, at 33-132.
13. See notes 51 and 67-69, infra, and accompanying text.
than most other constitutional law casebooks and to contain more useful background information and other guidance for students. And, as my bottom line, I thought the FEF materials and the authors’ approach to the subject would support the type of academically rigorous and challenging course presentation to which I am committed. In general, my experience with the FEF casebook has confirmed all of my initial reasons for selecting it.

II. THE PROBLEM-SOLVING METHOD

The problem-solving method is not the same as the traditional method of using hypotheticals in conjunction with case analysis. The problem-solving method has several distinct characteristics:

The first feature is, of course, the problem. The problem involves several issues cutting across several cases and statutes. It is meant to resemble a complex situation that a lawyer might face in practice. The problem may be framed in the context of litigation, negotiations, drafting, or planning. The student must approach the problem in a specified role, such as advocate, judge, advisor, planner, legislator, or law clerk to any of these.

The second feature is the advance distribution of the problem. Students are expected to work on the problem at home and come to class prepared to discuss it. Whereas the hypothetical sprung during class calls for “thinking on your feet,” the take-home problem gives the student time for in-depth, well-organized legal analysis.

The third feature is that the problem is the focus of the class discussion . . . . The assigned cases, statutes, and other materials become tools for helping to solve the problem. A Socratic discussion of the cases . . . still occurs, because the students must understand the cases in order to analyze the problem. But the students must do much more. They must analyze a new complex set of facts, organize the issues into a logical framework, read the relevant authorities with an eye towards resolving the client’s concerns, and apply the authorities to the facts of the problem. In class, the professor guides the discussion around these tasks.14

The problem method as thus described can be used effectively in both introductory and advanced courses and in both large and small classes.15 This method can be a particularly potent pedagogical technique in constitutional law courses, lending a concreteness and

14. Moskovitz, supra note 5, at 250.
practicality to what may otherwise appear to be an ephemeral and esoteric subject. The problem method can also help demystify constitutional law and make it more accessible for students.

Problem solving is receiving increased attention in legal education generally. The value of the method and the importance of the skill are increasingly recognized. In an influential 1992 report, a task force of the American Bar Association included "Problem Solving" as the first on its list of "the fundamental lawyering skills essential to competent representation" and called problem solving one of the two "conceptual foundations for virtually all aspects of legal practice . . . ." 16

As Kurtz, Wylie, and Gold emphasize, "[k]nowledge is not itself the most powerful of all resources open to a practicing academic or lawyer. Rather, as knowledge grows and develops and itself becomes unmanageable, . . . [it is necessary] to appreciate the importance of acquiring the intellectual skills and abilities necessary to acquire knowledge, process information, solve problems and evaluate results." 17 Problem-solving methods are adapted to the acquisition of such skills, and these methods have "potential for application across learning objectives and styles . . . and individual student preferences." 18 A problem method of instruction "challenges both instructor and participant to learn and to learn to learn . . . . [I]f we can empower our graduates to learn to learn throughout their personal and professional lives, we will have accomplished the highest learning goal possible." 19

In my own view, for an introductory constitutional law course, the most basic and pervasive objective to be achieved through problem solving is the enhancement of the student's capacities for more complex levels of legal analysis. Legal analysis is itself a fundamental lawyering skill that goes hand-in-hand with problem solving. 20 Using problems to teach legal analysis allows the instructor to move beyond the narrow confines of the case-by-case approach emphasizing individual case analysis and the traditional "hypothetical" based primarily on a single

18. Id. at 797.
19. Id.
case or issue.\textsuperscript{21} In particular, as \textit{Narrowing the Gap} emphasizes, "a lawyer should be familiar with the skills and concepts involved in analyzing and synthesizing the pertinent legal rules and principles in light of the facts" and, in doing so, should be capable of "[b]reaking legal rules down into their component parts (elements, 'factors,' 'considerations,' competing interests, and so forth), and relating the facts at hand to each of these components . . . ."\textsuperscript{22}

Problem-solving methods can also influence instructional objectives and outcomes in at least two other positive ways in an introductory constitutional law course (and in other law school courses). First, problem solving counters the narrow and sometimes misleading perspective students may attain from a concentrated diet of appellate court opinions, opening up new vistas of dispute-resolution forums other than courts, dispute-resolution techniques other than litigation, and lawyering competencies other than courtroom advocacy. Second, problem solving moves students beyond \textit{knowing} the law to \textit{applying} the law, beyond the comfortable confines of settled rules and holdings to new challenges in sometimes unsettled territory, thus stretching students' minds and providing them a better sense of themselves as lawyers as well as learners.

To be more specific, there are many concrete objectives that may be achieved or enhanced by use of problem-solving methods in constitutional law courses. In basic courses, these objectives include the following:

1. Engaging students in deeper levels of legal analysis:
   a. moving beyond individual cases and their applications: the \textit{synthesis} of substantive law;\textsuperscript{23}
   b. gathering facts and working with incomplete facts;
   c. deepening understanding of constitutional law concepts and methods (developing new insights and perspectives by working with new applications of the law).

2. Moving from theory to practice: injecting concreteness and realism into what may otherwise appear to students as an overly abstract subject matter.

\textsuperscript{21} See the comparison between problems and hypotheticals in note 98, infra.
\textsuperscript{22} \textit{Narrowing the Gap}, supra note 16, at 152.
\textsuperscript{23} In Bloom's taxonomy of educational objectives, synthesis is the fifth of six types of learning, as ranked in ascending order of difficulty: knowledge, comprehension, application, analysis, \textit{synthesis}, evaluation. \textsc{Benjamin Bloom}, \textsc{Taxonomy of Educational Objectives: Handbook I: Cognitive Domain} (1956). As Moskovitz notes, supra note 5, at 247, "Problem-solving helps students to move up this ladder."
3. Introducing students to lawyering forums other than appellate courts and lawyering competencies other than advocacy.

4. Introducing students to notions of lawyering roles, lawyering tasks, and professional responsibilities to clients.

5. Engaging students in active (vs. passive) learning and stimulating them to "learn to learn."

6. Helping students develop coherent views of the various substantive areas of constitutional law and a holistic view of the overall subject matter.

In addition, the problem-solving methodology can provide a foundation for collaborative learning in constitutional law. The instructor could, for example, divide the class into small working groups and use problems as the focus of work assignments for the student groups.24 If the instructor were to assign particular roles to different groups, or to different students within a group, then a small measure of experiential learning could be added to the collaborative process. In upper-level courses the collaborative and experiential aspects of the problem-solving method can be greatly expanded, of course, by the use of simulations and role-plays.25

III. THE STORYTELLING METHOD

Stories, like problems, can add reality and humanity to students' perceptions of constitutional law. Through the lens of stories, students can explore life experiences of real people in real struggles experiencing real hurt; and can understand that the courts and the other governmental institutions operating under the Constitution, depending on time and circumstance, may either contribute to the struggles and hurt or help alleviate them. Moreover, through stories students can experience the challenges lawyers face, their successes and failures, and the ways that they may cause as well as alleviate hurt. In so doing, stories—like problems—can challenge students with new understandings of law's applications and lawyers' roles, thus moving students out of their comfort zones and expanding their horizons.

Stories can also do some things that problems do not do, or do not do as well. Stories, for instance, "can stir imagination in ways that more conventional discourse cannot."26 Stories can elicit emotional responses from students and thus engage the affective domain more


effectively than problems. And while problems and stories can both depict reality, stories do a better job of setting the scene for confrontations with reality in which students come face-to-face with circumstances that are unfamiliar and unsettling:

Perhaps the story prompts a response that feels inconsistent with other strongly held views or intuitions. Perhaps the experience of a response to the story is itself troubling because it occurs on levels not easily summarized by principles, logical analysis, or other specific modes of reasoning that seem more generally accessible or rationally defensible.  

Moreover, stories can give voice to the life experiences of marginalized and downtrodden persons in society, thus presenting alternative perspectives that may not be fully represented in conventional law. In this and other ways, stories "can shake up some assumptions," and can occasion student reflection on whether the received legal wisdom is indeed wise and the prevailing legal principles indeed "right" and "just." As Martha Minow states, storytelling "disrupt[s] . . . rationalizing, generalizing modes of analysis with a reminder of human beings and their feelings, quirky developments, and textured vitality."  

Let me be clear that I am addressing the use of stories in the law school classroom, not in legal scholarship as such. It has been my observation that storytelling in legal scholarship has been more discussed in the literature than storytelling for teaching purposes. Moreover, storytelling in legal scholarship is the subject of a lively contemporary debate between supporters and critics. One major point of contention, for example, concerns the relationship (or lack thereof) between legal storytelling and rational legal discourse—in particular, whether storytelling scholarship emphasizes attitude and emotion at the expense of rational analysis and, if so, whether this is good or bad.  

29. Minow, supra note 27, at 29.
30. Minow, supra note 27, at 36.
Some of the criticism of stories in legal scholarship, however, may aptly be applied to stories in the classroom. For example, "Stories alone do not articulate principles likely to provide consistency in generalizations to guide future action; stories do not generate guides for what to heed or what additional stories to elicit. Stories on their own offer little guidance for evaluating competing stories." Moreover, a story is not "morally neutral, for it always seeks to induce a point of view. Storytelling . . . is never innocent. If you listen with attention to a story well told, you are implicated by and in it." The use of stories thus presents some danger (as may the use of some other teaching techniques) that the instructor could play with students' emotions in order to indoctrinate them with viewpoints to which he or she is partial.

How might an instructor heed these cautions about the use of the storytelling method? I have several suggestions. First, use storytelling only to supplement legal analysis and rational discourse, not to replace them. Second, be sensitive to the partiality of stories generally and, in particular, the stories that you tell; and be willing to acknowledge this partiality to the class. Third, emphasize and respect the particulars of the story, and be wary of generalizing beyond the story's own context. Fourth, use stories more to "increase the range of understandings among listeners" than to narrow that range. If you use a story to channel student thinking, make sure the channel is reasonably wide and includes access to various tributaries for further exploration. Fifth, when you discuss the meaning of a story with the class, avoid being overly directive. As you suggest themes the story addresses, draw out perspectives the story presents, or elicit student responses to the story, reserve ample room for students to do their own reflecting and reach their own conclusions. Avoid "the-moral-of-the-story-is . . . " statements.

It also follows, from the cautions about the storytelling method and these suggestions for heeding them, that stories are highly selective and should be chosen with close attention to pedagogical goals. At least two major choices are involved at the initial stages of selection. The first is whether to select stories that are already in the law—that

32. Minow, supra note 27, at 35.
34. See Minow, supra note 27, at 36.
is, stories that can, in part, be found and documented in court opinions and other legal records—as opposed to stories that derive solely from other sources such as literature, history, and oral tradition. I use both types but usually prefer the former. With a law-based story, the instructor can focus on what happened before the litigation but was not in the court records because it was considered legally irrelevant or unimportant, or was unknown at the time. The story I use about Mildred and Richard Loving is an example.36 Similarly, the instructor can focus on what happened after the litigation that sheds further light on how law impacts people’s lives. The story I use about the Cruzan family is an example.37 There are also two stories in FEF—the Brown story38 and the Carrie Buck story39—that are law-based and cover both the before and after of litigation.

The second choice is whether to select true stories or fictitious stories. Again, I use both, but my clear preference is the "true" story (a story we consider to be true as best we can tell given the difficulties of objectively ascertaining truth). Law-based stories are generally true in this sense, although that is not always the case.40 Stories drawn from history are also true in this sense; my story of the "Okies" is an example.41 In contrast, stories drawn from literature or oral traditions may be fictitious—for example, the story of the Joad family in the Grapes of Wrath42—but may nevertheless provide important insights into constitutional law and may have a basis in fact even though the genre is fiction. In short, there is a broad range of sources from which effective story selections may be made.

IV. THE CONTENT OF THE FARBER, ESKRIDGE, AND FRICKEY CASEBOOK

Professors Farber, Eskridge, and Frickey identify two major purposes of an introductory constitutional law course: (1) to "give students a sound grasp of judicial doctrine,"43 and (2) to provide

36. See text accompanying notes 113-14, infra.
37. See text accompanying notes 115-16, infra.
38. See notes 100-10, infra, and accompanying text.
39. See notes 111-12, infra, and accompanying text.
40. See L.H. LaRue, CONSTITUTIONAL LAW AS FICTION: NARRATIVE IN THE RHETORIC OF AUTHORITY 2-3 (Penn State U. Press, 1995), which asserts that constitutional law opinions set forth many stories that are legal fictions used for rhetorical purposes. LaRue defines stories broadly, e.g., the "story of growth" told by Chief Justice Marshall in McCulloch v. Maryland. Id. at 70-92 (ch. 3).
41. See text accompanying notes 117-18, infra.
42. See note 117, infra.
43. FARBER ET AL., supra note 2, at v.
students an understanding of how “basic questions about the nature of . . . [American] society” pervade constitutional law.\textsuperscript{44} To advance these goals, the authors “emphasi[ze] the cutting edge of the law” throughout the text.\textsuperscript{45} Their thesis, evident in both the structure and substance of the text, is that “constitutional law generally, and dramatically after Brown [v. Board of Education], is incomprehensible without understanding social and political movements which shape its agenda.”\textsuperscript{46} Thus, after presenting an excellent introductory overview of constitutional law and United States Supreme Court history,\textsuperscript{47} the text departs from traditional patterns for studying constitutional law by using Brown as the first primary case. The authors consider Brown to be “the most important reference point for public-law thinking since the 1950’s and . . . an important testing case for the ‘grand theories’ of constitutional law . . . .”\textsuperscript{48} Their discussion of Brown lays the foundation for consideration of judicial decisionmaking and its impact on racial desegregation as well as other contemporary issues addressed in the remainder of the text.

The text also departs from traditional norms of presenting constitutional law by the manner in which it presents Brown. Rather than the standard case excerpts followed by notes and questions, the coverage of Brown begins with the story of the events leading up to the U.S. Supreme Court’s decision and includes much of the aftermath as well.\textsuperscript{49} The authors’ intent is to “introduce the constitutional process as a part of the legal process” while generating student enthusiasm for the course material right from the start.\textsuperscript{50}

Following the Brown case study are the materials on individual rights. The authors address rights issues before power issues (again departing from traditional norms of presentation) because these materials flow naturally from the discussion of Brown and because “[t]he modern constitutional tradition is an individual rights tradition . . . .”\textsuperscript{51} The recurring theme in the rights materials is “[h]ow does and how should the Constitution mediate the tendency toward

\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{46} Id. at vii.
\textsuperscript{47} Id. (Chapter 1).
\textsuperscript{48} Id. at vi.
\textsuperscript{49} Id. at 33-131; see also id. at 1097-1127.
\textsuperscript{50} DANIEL A. FARBER ET AL., TEACHER’S MANUAL TO ACCOMPANY CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION’S THIRD CENTURY 5 (1993) [hereinafter TEACHER’S MANUAL]; see also FARBER ET AL., supra note 2, at vi.
\textsuperscript{51} FARBER ET AL., supra note 2, at vi.
exclusion and suppression in a multicultural polity?" The individual rights portion of the text begins with a chapter (Chapter 3) on equal protection that emphasizes race discrimination materials and establishes a smooth transition from the Brown case study. These materials cover facial racial classifications that disadvantage minorities or evidence racial hostility (e.g., Loving v. Virginia), facially neutral regulations with racially disproportionate effects (e.g., Yick Wo v. Hopkins), the state action concept in the context of race discrimination (e.g., Moose Lodge v. Irvis), Congressional authority to enforce civil rights (e.g., Katzenbach v. Morgan), and affirmative action (e.g., City of Richmond v. Croson).

Chapter 4 continues to address equal protection, but in the context of classifying factors other than race. The first section of this chapter reviews the history and current status of rational basis review; the second section focuses on gender classifications and the levels of equal protection scrutiny as they have been applied to varying types of gender-based discrimination, and includes a consideration of current issues on maternity leave statutes and single-sex schools and the third section addresses other types of classifications, in particular, classifications by sexual orientation.

Chapter 5 shifts attention from equal protection to substantive and procedural due process. The general theme of the Constitution's role in our multicultural polity and the emphasis on the "cutting edge of the law" continue to characterize the Chapter 5 materials. The chapter also provides a link back to equal protection and chapters 3 and 4 through its discussion of fundamental interest analysis under the equal protection clause. The "right-to-privacy" cases—from procreation, to abortion, to consensual sexual activity, to the right to die—are of course the primary focus of Chapter 5. These materials are inherently exciting and contentious, and the authors do a good job of drawing out their potential.

52. Id. at vii.
53. Id. at 133-286.
55. 118 U.S. 356 (1886), reprinted in FARBER ET AL., supra note 2, at 146-47.
59. FARBER ET AL., supra note 2, at 287-300.
60. Id. at 344-53.
61. Id. at 353-59.
62. FARBER ET AL., supra note 2, at 441-79.
The Chapter 6 materials focus on the First Amendment and, according to the authors, are “more densely doctrinal.”63 Nevertheless, the authors maintain continuity with earlier chapters by emphasizing the role that free speech and press rights can play in fighting racial and gender oppression.64 The chapter begins with contemporary materials on hate speech and other modes of offensive speech, followed by the classic cases on incitement, libel, obscenity, offensive speech, commercial speech, and speech via campaign expenditure.65 Then come cases and materials on speech in the public forum, prior restraints, overbreadth and vagueness, freedom of association, and freedom of religion.66

At the conclusion of the individual rights materials, the text reverts to the traditional starting place for constitutional law courses, namely, structural constitutional issues. These issues begin in Chapter 7 with materials on federalism. The standard casebook materials on powers delegated to Congress (the commerce power, taxing and spending powers, treaty powers) are included, as well as intergovernmental immunities (e.g., New York v. United States)67 and federalistic limits on state power. The latter materials cover the “dormant commerce clause,” the interstate privileges and immunities clause, and the preemption doctrine.68 Chapter 8 then moves from federalism to separation of powers within the federal government. It includes coverage of the problem of “aggrandizement” (or the “Imperial Presidency”), the problem of “sloughing off” (or the “Lazy Congress”), and the problem of reshuffling disputes and judges.69

The FEF text concludes in Chapter 9 with materials on constitutional remedies that provide a fitting conclusion for the book and an opportunity to revisit and reflect on the various themes it develops. This chapter considers the constitutional and prudential barriers to adjudication presented by the political question doctrine, the standing doctrine, and other doctrines governing access to court,70 as well as issues concerning immunities from suit (or from damage awards) for state and federal governments and officials.71 The chapter then

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63. Id. at viii.
64. Id.
65. Id. at 581-663.
66. Id. at 663-772.
68. FARBER ET AL., supra note 2, at 862-915.
69. Id. at 917-1026. In the second edition, "sloughing off" has become "legislative overreaching" (or the "Meddlesome Congress").
70. Id. at 1028-83.
71. Id. at 1083-97.
concludes with a return to the Brown case study. The authors reconsider Brown in the context of modern public law litigation and present several recent cases (e.g., Freeman v. Pitts) that the authors view as signs of a retreat from Brown and a limit on desegregation remedies in the 1990s and beyond.

Throughout these materials, the cases are selected judiciously and are often heavily edited. The heavy editing serves the purpose of making the cases (and the materials overall) manageable for an introductory course. I believe that the editing is sometimes so heavy-handed, however, that passages critical for instructional purposes are eliminated. The edited version of Roe v. Wade, for example, does not include the Court's statement of the applicable standard of review; and the edited version of United States v. Darby does not include the Court's important statement about Congressional motive and purpose. (In the second edition, each of these missing statements has been added into the respective cases.)

The FEF casebook is accompanied by two auxiliary resources: a cumulative annual supplement, and a teacher's manual. Each

72. Id. at 1097-1127.
74. 410 U.S. 113 (1973), reprinted in FARBER ET AL., supra note 2, at 503-09.
75. "When certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." Roe v. Wade, 410 U.S. 113, 155 (1973) (citing Griswold v. Connecticut, 381 U.S. 479, 485 (1965)).
76. 312 U.S. 100 (1941), reprinted in FARBER ET AL., supra note 2, at 806-09.
77. "The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control." United States v. Darby, 312 U.S. 100, 115 (1941).
78. See FARBER ET AL., (2d ed) p. 497 (quoting from Roe) and FARBER ET AL., p. 786 (quoting from Darby).
79. See, e.g., DANIEL A. FARBER ET AL., 1997 SUPPLEMENT TO CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY (West, 1997) [hereinafter FARBER ET AL., 1997 SUPPLEMENT]. Most of the material in this supplement has been recited and included in the second edition (see supra note 2). The second edition will then have its own supplements, beginning with a tentatively planned 1998 supplement covering the 1997-1998 Term of the Court. Interview by William A. Kaplin with Philip P. Frickey, Faegre & Benson Professor of Law, University of Minnesota (March 1998).
supplement for the first edition contains court opinions and other materials from late in the 1992-93 Term through the end of the most recent Court term, as well as additional problems. The 1997 Supplement also directs attention to what the authors consider to be the emerging constitutional law issue of the 1990s: "the extent to which the Constitution protects gay men, lesbians, and bisexuals from discriminatory treatment." Supplements for the second edition will begin with cases and other materials from the 1997-1998 Term of the Court.

The Teacher's Manual provides lecture suggestions, topics for class discussions, and focal points for in-class analysis of issues—all of which correspond to the chapters, cases, and problems that appear in FEF. The manual also provides advice for the new teacher of constitutional law (or the experienced teacher seeking to learn new tricks)—for example, how to link key concepts in the course as the class progresses through the text. The manual concludes with a suggested syllabus setting out alternative arrangements for courses with more limited subject matter coverage or credit allocations.

As one might expect, when several professors collaborate on a casebook, each brings his own teaching skills, tactics, and methodology to the enterprise. The authors of FEF acknowledge this fact in their Teacher's Manual when they attempt to distill each of their own teaching preferences into a group of collective suggestions about how the text may best be used in teaching constitutional law. The manual is not an attempt to impose the authors' collective theory as the only "right way" to use the text; rather, it is intended to provide "some basic points as well as some more advanced pedagogical suggestions."

V. PROBLEM-SOLVING IN FARBER, ESKRIDGE, AND FRICKEY

The authors clearly expect that their text will be used for courses employing the traditional case method of instruction. The opportunity to use the materials for an alternative "problem method" approach cannot be ignored, however, since 24 problems or problem sets appear throughout the text. (The second edition has a considerably larger

81. FARBER ET AL., 1997 SUPPLEMENT, supra note 79, at iii.
82. Id.
84. TEACHER'S MANUAL, supra note 50, at iii.
85. See note 2, supra.
number of problems.) While the authors apparently did not intend that FEF would revolutionize both the methods and the substantive organization of constitutional law courses, their materials do nevertheless support the alternative problem-solving method and its attendant benefits in conjunction with the case method. 86

Problems appear frequently throughout the individual rights materials. The problems range in length from a few sentences to several paragraphs with the exception of one longer problem that appears near the end of the individual rights materials. 87 The problems present hypothetical scenarios that raise contemporary legal issues whose resolution requires students to apply the cases and materials in the immediately preceding pages and sections.

Through the individual rights problems, the authors ask students questions leading them to apply what is sometimes old law to very contemporary and hotly disputed issues. The following are some illustrative examples of the problems presented in the text: (1) In light of the materials on equal protection, students are asked to consider a state requirement that applicants for the state police force indicate their sexual preference on applications coupled with a state practice of informing applicants who reveal they are homosexual that they are not eligible for employment; 88 (2) in light of both the due process and equal protection clauses, students are asked to consider a state prison rule providing that inmates may not become married while in prison unless they have the approval of the prison superintendent; 89 and (3) in light of the First Amendment material on freedom of expression, students are asked to consider several issues regarding students' posting of placards in the entry foyer of a law school building. 90

The equal protection and due process materials culminate with a review problem asking students to consider the rights of unmarried parents with respect to their biological children. 91 The problem requires students to consider the potentially applicable law and make the most persuasive argument. In effect, it offers the opportunity to


87. FARBER ET AL., supra note 2, at 578-80.

88. Id. at 379. In the second edition, this problem is replaced with one on the military's Don't Ask, Don't Tell policy. FARBER ET AL., 2d ed., p. 374-75.

89. Id. at 560. This problem is deleted from the second edition.

90. Id. at 596-97. See also FARBER ET AL., 2d ed., p. 577.

91. Id. at 578-80.
confront a final exam-type question before moving into a new set of materials on the First Amendment.

Problems appear more sporadically in the FEF materials on federal powers. Like the individual rights problems, the power problems ask students to apply existing law to modern and contentious hypothetical situations. Examples include: (1) a problem set regarding federal regulation of nuclear energy that requires students to address preemption issues;92 and (2) a problem concerning the justiciability of a challenge to the President’s power to declare war against Iraq without first obtaining a congressional declaration of war, or at least reporting to Congress pursuant to the War Powers Resolution.93 Problems such as these support a pro-active approach to structural constitutional issues that allows students to confront the most ensconced of constitutional traditions in a modern setting and somewhat nontraditional manner.

The casebook, as expected, does not include suggested answers to the problems or other guidelines for resolving them: that is generally left to the individual instructor. The problems are frequently mentioned in the authors’ Teacher’s Manual,94 however, and the manual occasionally does include answer guidelines or suggestions for using the problems in class assignments or discussions. The major example is the manual’s discussion of the six problems that appear at the end of Chapter 1 in the casebook.95

While the problems usually do not ask students to assume specific roles, and usually contain only a minimal amount of new facts, they do challenge students to explore their understanding of the legal issues and confront the most unclear or complex elements of the case precedents. In this sense, many of the FEF problems are more like traditional classroom “hypos” than full-scale problems,96 but with the advantage of being available to students for study before class. Instructors seeking to employ a more fully developed problem-solving methodology, using longer and more complex problems, may wish to add roles

92. Id. at 913-15.
93. Id. at 1041-42. See also 50 U.S.C. § 1541.
94. See Teacher’s Manual, supra note 50, 2-4, 39-40, 86, 90, 96, 139.
95. Teacher’s Manual, supra note 50, at 2-4 (discussing problems on FEF p. 27).
96. Moskovitz, supra note 5, at 246, explains that “[A] hypo is not a problem. A hypo usually raises only one or two issues. A problem raises several issues, which must be organized before each can be separately analyzed . . . . Clients come to lawyers with problems, not hypos. A lawyer trained to analyze a hypo has not been trained to analyze a longer problem.” See also Moskovitz, supra note 5, at 250, which describes the “three essential features” of problems.
and other enhancements to the FEF problems,97 or may obtain more complex problems from other sources.98

VI. STORYTELLING IN FARBER, ESKRIDGE, AND FRICKEY

The authors introduce storytelling methodology in Chapter 2. The focus is the case-study on *Brown v. Board of Education*,99 set forth in the form of a "story".100 As the *Teacher's Manual* suggests, "One way to think about the chapter is that it tells a story . . . . The story of *Brown* is, in large part, the story of courageous people and efficacious strategies."101 To tell the *Brown* story, the authors must also tell "the story of the Fourteenth Amendment."102 In turn, to further understanding of *Brown* and the Supreme Court's role in the litigation, the authors revert to the story of *Marbury v. Madison*.103 "One of the uses of *Brown* in this chapter is to set up the *Marbury* discussion . . . . *Brown* gives the students a contemporary reason to wonder about judicial review . . . ."104

Chapter 2 is probably the best and most important chapter in the book. It introduces themes central to the study of constitutional law and provides a kind of backbone that structures and helps integrate the other chapters. Moreover, because much of this chapter is in the form of a story—a compelling story, well-told—the materials engage the students' interest, provide concreteness to what might otherwise be esoteric inquiries, and encourage student thinking about the institutional role of the courts and the roles of lawyers.

In fact, I am so convinced of the value of the *Brown* case study that I have extended it in my own course. I have done that by integrating other casebook materials into the case study—in particular, selected materials on state action,105 on Congress' authority to enforce

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97. I do this for the free speech problem about posting placards (note 90, supra, and accompanying text), which I think is a highly effective problem and better yet with some embellishment.

98. For example, KAPLIN, supra note 3, includes 14 complex, role-based problems along with an appendix of review guidelines (pp. 249-269) for each problem and various sets of "analytical frameworks" (e.g., pp. 91-93) for use in problem-solving. In any given year, I will use about 10 of these 14 problems in my introductory course.

99. FARBER ET AL., supra note 2, at 33-52. This is followed by the Court's opinion in *Brown I*, 347 U.S. 483 (1954), reprinted in id. at 52-60, and notes on the opinion.

100. FARBER ET AL., supra note 2, at 33 n.1; *Teacher's Manual*, supra note 50, at 7.


102. FARBER ET AL., supra note 2, at 35 n.1. This story is set out on FEF pp. 35-40.

103. FARBER ET AL., supra note 2, at 60-74, including the Court's opinion in *Marbury*, 5 U.S. (1 Cranch) 137 (1803), reprinted in FARBER ET AL., supra note 2, at 61-70.


105. FARBER ET AL., supra note 2, at 172-213 (Chapter 3, Section 2.A.&B).
the 13th, 14th, and 15th amendments,106 and on Congress' power to regulate race discrimination under the commerce clause.107 I assign McCulloch v. Maryland108 to introduce the study of Congressional (v. state) powers, and I ask students to "go back in time" from Brown to McCulloch just as I had earlier asked them to go back from Brown to Marbury,109 thus treating both Marbury and McCulloch as a "story within a story." I introduce these additional case study materials by asking, respectively, about the applicability of Brown to private schools, about Congress' role in prohibiting race discrimination in public schools and other public settings, and about Congress' role in prohibiting race discrimination in private schools and the private sector. The result is a more comprehensive case study that can fill several weeks of the course, and that underscores and supplements the authors' objectives by interrelating rights issues with power issues, introducing some substantive law of both rights and powers, comparing the judicial and Congressional roles in constitutional decisionmaking, and contrasting separation of powers issues with federalism issues.

The authors' storytelling methodology is mostly confined to Chapter 2. Chapter 9, however, does include a continuation of the Brown story that provides a fitting end to the casebook.110 And in Chapter 5, the authors do tell one other substantial story—the tragedy of Carrie Buck, the young woman whose institutionalization and sterilization was unsuccessfully challenged in Buck v. Bell.111 The authors effectively use this story to introduce the role of fundamental rights analysis,112 and I use it for the same purpose in my course.

To supplement the Brown story and the Carrie Buck story, I have added other stories to my course, and I am continuing to develop them. First is the story of Mildred and Richard Loving, the interracial couple whose conviction under a miscegenation statute was invalidated in Loving v. Virginia.113 I am enhancing this story with new information recently presented at a conference at my law school.114 Second

106. Id. at 213-38 (Chapter 3, Section 2.C).
107. Id. at 774-86 (Chapter 7) (discussion of McCulloch v. Maryland). Id. at 813-20 (Chapter 7) (discussion of Heart of Atlanta v. U.S. and Katzenbach v. McClung).
109. See text accompanying note 104, supra.
110. FARBER ET AL., supra note 2, at 1097-1127; see also notes 72-73, supra, and accompanying text.
111. 274 U.S. 200 (1927); FARBER ET AL., supra note 2, at 404-07.
112. FARBER ET AL., supra note 2, at 404-07.
114. Robert A. Pratt, The Drama of Loving: An Interracial Couple Meets the Courts, Remarks at Law and the Politics of Marriage: Loving v. Virginia After Thirty Years, (Nov. 19-
is the story of the Cruzan family, whose daughter Nancy was the subject of the U.S. Supreme Court’s first right-to-die case, *Cruzan v. Director, Missouri Department of Health.* 115 This compelling story extends far beyond the Court’s decision and culminates with the apparent suicide of Nancy’s father, Joe. 116 Third is the story of the “Okies” who migrated during the Depression from the “Dust Bowl” of the Midwest to the West Coast. 117 This story provides a perspective from which to consider the freedom of interstate movement and can be personalized into the substory of Fred Edwards, who was prosecuted for driving his unemployed and impoverished brother-in-law, Frank Duncan, from Texas into California, and whose plight reached the U.S. Supreme Court in *Edwards v. California.* 118 In a somewhat different vein, at the beginning of the course I also use the story of “The Prince’s Cook”—a magnificent story about the art of ox butchering—to introduce storytelling to the students and to make some points about the “art” of law study and practice. 119

In times past, I have also told other stories that, upon reevaluation, I no longer use, either because they now seem antiquated to the students or because I now spend less time on the constitutional issues related to the story. A primary example is the story of David O’Brien, the 19-year-old college student who burned his draft card on the South Boston Courthouse steps and whose conviction for violating the Universal Military Training and Service Act was affirmed in *United

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21, 1997), cosponsored by the schools of law of The Catholic University of America, Howard University, and Brigham Young University. Robert A. Pratt is an associate professor of history at the University of Georgia. His presentation from the conference will be published in vol. 41, no. 2 of the *Howard Law Journal* under the title “Crossing the Color Line.”


117. John Steinbeck frequently reported on this story during his days as a journalist in California and later memorialized the story in his novel *The Grapes of Wrath* (1939), for which he was awarded the Pulitzer Prize in 1940, and which was subsequently adapted into both a movie (starring Henry Fonda) and a play.

118. 314 U.S. 160 (1941). This case is referenced in FEF at page 478 but is not set out or summarized. See also REPORT OF SELECT COMMITTEE INVESTIGATING NATIONAL DEFENSE MIGRATION, 77TH CONG., 1st Sess. (1941) (which is subtitled “Analysis of Material Bearing on the Economic and Social Aspects of the Case of Fred F. Edwards v. the People of the State of California”).

States v. O'Brien. In context, this story also includes some enlightening legislative history about Congress' motives and methods in passing the 1995 draft-card burning amendment to the Act.

Usually I tell these stories myself during class time. Sometimes I solicit student reaction, often emphasizing affective reactions more than cognitive. At other times I suggest one or two points to be drawn from the story rather than engaging the class in discussion, or I merely ask the students to reflect on the story.

VII. CONCLUDING PERSPECTIVE

Many pedagogical challenges confront both instructors and students in constitutional law courses. For the instructor, pedagogical choices abound regarding course goals, teaching methods, and instructional materials. Each choice is important given the challenges of teaching the course, and each choice should be confronted with due regard for its pedagogical consequences and its interrelation with the other choices to be made.

The Farber, Eskridge, and Frickey casebook will support a range of traditional teaching methods. It will also support both the problem solving and storytelling methods, and for me the book works well in this respect. Most of the problems in FEF are narrow in scope, however, and the stories are limited in number. I therefore use other materials in conjunction with FEF, and other instructors would also likely need supplementary materials to effectuate substantial use of either the problem-solving or the storytelling method.

 Personally I am committed to the problem-solving method. My commitment grows the more I develop the method and materials to support it. I would advocate use of this method by others for constitutional law as well as other law school courses. I am also attracted to the storytelling method and believe it to be complementary to the problem-solving method. Though I am just in the process of

120. 391 U.S. 367 (1968).
122. For a suggested set of course goals for the introductory constitutional law course, see KAPLIN, supra note 3, at 9. For a general taxonomy of educational goals, see BLOOM, supra note 23.
123. See generally Eagar, supra note 15.
124. For suggestions on selecting one type of course material, see Muller, supra note 83.
125. For a suggestion about additional problems for a constitutional law course, see notes 97-98, supra, and accompanying text. For suggestions about additional stories, see notes 113-21, supra, and accompanying text.
developing my own storytelling materials, and am still working out the relationships between this method and problem solving, I am close to the point of advocating the storytelling method as well, either in combination with problem solving or in combination with other instructional methods. Both the problem-solving and story-telling methods, I believe, help my vines to grow stronger and to produce more plentiful and robust fruit as well as more premium vintage wine.