

Stone, Seidman, Sunstein, & Tushnet's *Constitutional Law: An Inclusive, Scholarly, and Comprehensive Constitutional Law Casebook*

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

*Reviewed by Sharon E. Rush**

When I first started teaching Constitutional Law, Professor Erwin Chemerinsky offered me his syllabus and notes. Anyone who has taught Constitutional Law understands what a gift this was! Indeed, without Professor Chemerinsky's help, I doubt I would have survived my initial encounter with the course; the volume alone is enough to swamp the first time teacher of Constitutional Law. Professor Chemerinsky's syllabus was premised upon the use of the Stone, Seidman, Sunstein, and Tushnet, *Constitutional Law* textbook¹ (hereinafter *Stone*), and I adopted it because of my faith in Professor Chemerinsky's judgment. Despite the book's limitations, I have found the *Stone* text to be the one most suited to the needs of my course.

Several years have gone by since I first taught Constitutional Law. The course has changed from six hours over two semesters to four hours in one semester. The shorter course has resulted in less coverage: we study separation of powers, federalism, due process, and equal protection. First Amendment issues are taught in a separate course. Still, I continue to use the *Stone* textbook.

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

Professors teaching Constitutional Law have many excellent textbook choices, and I rely on a number of texts in my class preparations and research. I am attached to the *Stone* textbook as a primary book because it coincides with my teaching needs, as I will explain. I should also add that my research interests in equal protection lead me to follow Professors Sunstein's and Tushnet's work quite closely, and my respect for their scholarship bears heavily on my commitment to their textbook.

My primary goal in teaching first year Constitutional Law is to inspire students to think creatively about the role of constitutional law in law.² With this as my goal, I think it is more important to explore in-depth select basic concepts rather than explore many concepts with little depth. Consequently, students read about 500 pages in the course, which is only 1/4-1/5 of what the *Stone* textbook offers.

With all these disclosures, then, let me highlight three qualities of the book that keep me committed to it. I will also touch on some areas where the book disappoints me. Even in those areas, however, it is my experience that most other textbooks also fall short of my needs.

The primary reasons I use the *Stone* textbook are its inclusiveness, its scholarly emphasis, and its commitment to exploring different schools of legal analysis. These are related qualities of the book and I will illustrate my thoughts by focusing on my favorite topic: race and equal protection.

The authors devote about 200 pages to this important topic. In fact, the first 100 pages of their coverage explore the history of race discrimination in the United States, laying an important foundation for modern equal protection analysis, beginning with *Korematsu v. United States*.³ In my opinion, it is essential to expose students to this history because many of them are unfamiliar with it except in the most general sense. Inclusion of this history also affirms its importance and relevance to modern equal protection analysis. Currently, there is a national movement toward "color blindness," which may stem from a belief by many Americans that racism is no longer a problem. An examination of the history helps dispel this notion, at least with many students who are studying it in-depth for the first time. Some white students have remarked that they are surprised that anyone could think

2. I wish I had a bumper sticker that read, "CON. LAW IS LAW," to tell how important I think constitutional law is.

3. 323 U.S. 214 (1944), *reprinted in* STONE ET AL., *supra* note 1, at 597 (upholding an Executive Order that required the internment of Japanese Americans during World War II).

that our society has overcome this profound history of discrimination in such a short time.

Given the history of race discrimination, most students agree that laws that discriminate on the basis of race should be subject to heightened scrutiny. Students willingly engage in discussions on the appropriateness of this, particularly on the question of whether it is the role of the Court to create different levels of equal protection review. They are also extremely interested in understanding how heightened scrutiny works, beginning with perhaps the most difficult question: How do you know whether a law racially discriminates? The textbook does an excellent job organizing and synthesizing the cases addressed to this question. Specifically, the authors distinguish four general types of race discrimination cases: race classifications that explicitly hurt minorities, classifications not based on race but that hurt minorities, classifications that are facially race-neutral but hurt minorities, and race classifications intended to help minorities.⁴

The categorization of the cases is immensely helpful to students because it is often not clear how race discrimination evidences itself in seemingly race-neutral laws. In addition, the authors also provide extensive case comments from scholars of different schools of legal thought. For example, in the note section focusing on nonrace-specific classifications, the authors include comments and insights on the cases from a variety of traditional and nontraditional scholars, including critical race theorists.⁵ Inclusion of critical race theorists' perspectives in this section is especially helpful in illuminating the unconscious racism lurking in the cases. Moreover, this juxtaposition of cases and theory is effective in provoking students to genuinely explore their thoughts and feelings about race discrimination in their own lives. Without the critical race perspective, in my opinion, it is all too easy to fail to grapple with the profundity of racism and with the reality that the precept of white superiority is built into traditional legal analysis. Unmasking racism is instrumental to an exploration of the role equal protection analysis plays or should play in promoting race equality.

I find the authors' references to the most recent prominent scholarly work in constitutional law invaluable. Not only do I feel up-to-date as I go into my classes, but I also find the book valuable in my research. The authors' annual supplement is like a summary of the *Index to Legal Periodicals*; all the cutting-edge references are there.

4. STONE ET AL., *supra* note 1, at 595-684.

5. *Id.* at 610-35.

Although I am attached to the book, it does not do an adequate job, in my opinion, in the benign race discrimination cases. For example, I think the authors made a mistake when they relegated the *Regents of the University of California v. Bakke*⁶ case to a short case note⁷ and highlighted *Richmond v. J.A. Croson Co.*⁸ and *Adarand Constructors, Inc. v. Peña*⁹ as the affirmative action cases.¹⁰ In my opinion, *Bakke* should be covered in much greater detail for a number of reasons. First, *Bakke* begins the unraveling of affirmative action. Today, the affirmative action debate is our nation's racial scapegoat and I believe it is important for students to study the beginning of its demise. Second, and closely related, Justice Powell's opinion is instrumental to understanding the relationship between affirmative action and diversity. In his opinion, Justice Powell suggested that it is constitutional for a state school to diversify its student body so long as the school did not make admissions decisions based on race.¹¹ The diversity rhetoric has essentially eviscerated the concept of affirmative action, as evidenced by the Court's opinion in *United States v. Virginia (VMI)*.¹² Note that Justice Ginsberg's majority opinion in that case suggests that an all-male state university might be constitutional if only it were truly created for the purpose of creating diversity.¹³ Again, an effective critique of this position necessitates a grounding in the origins of the diversity rationale. How can students critically analyze cases like *VMI* without an in-depth exploration of *Bakke*?

Moreover, *Bakke* is essential study material if students are to understand the relationship among the concepts of diversity, affirmative action, integration, and equality. In other words, when Justice Powell sanctioned the use of diversity in state school admissions programs but denounced affirmative action policies themselves,¹⁴ he left a mixed message about the role of equal protection in promoting racial equality. He suggested diversity is intrinsically valuable in a public school, but that it is not the responsibility of the state to ensure public schools actually have diverse student populations.¹⁵ This is a

6. 438 U.S. 265 (1978).

7. STONE ET AL., *supra* note 1, at 648-49.

8. 488 U.S. 469 (1989), *reprinted in* STONE ET AL., *supra* note 1, at 652.

9. 515 U.S. 200 (1995), *reprinted in* STONE ET AL., *supra* note 1, at 672.

10. STONE ET AL., *supra* note 1, at 648-97.

11. *Bakke*, 438 U.S. at 289-90, 319-20.

12. 116 S. Ct. 2264 (1996), *reprinted in* STONE ET AL., *supra* note 1, at 82 (3d ed. Supp. 1997).

13. *Id.* at 2273, 2277.

14. *See Bakke*, 438 U.S. at 269-320.

15. *See id.*

good place to reintroduce *Brown v. Board of Education*,¹⁶ which obligates the state to racially diversify its public schools in the context of desegregating them.¹⁷ I ask my students: "How was U.C. Davis Medical School supposed to desegregate without affirmative action programs?" This analysis, premised on a full rendition of *Bakke*, leads to further discussions about the differences, if any, between de jure and de facto segregation in the quest for racial equality. This is brought full-circle, of course, in *Missouri v. Jenkins*.¹⁸

Fourth, this whole discussion beginning with *Bakke* brings together all the prior lessons about unconscious racism. *Bakke* is a fine example of how unconscious racism works. How did a white man who got rejected from ten medical schools two years in a row (let's say he didn't qualify for 2,000 seats) lay claim to one of those sixteen spots at Davis? Why was reserving, in effect, eighty-four seats for whites not sufficient for him? Why did the Court accept the unstated assumption behind his claim that, in fact, all 100 seats should be reserved for whites, like they always had been? The more facts students have on *Bakke*, the more critical their analysis is likely to be on the case.

Finally, I think it is important to include *Bakke* as a case (rather than a case note) because it focuses on affirmative action in public education.¹⁹ I think the Court might be persuaded of the constitutionality of affirmative action programs in public education even if it chooses to reject such programs in public employment. The argument might begin from this premise: If public schools were racially equal and provided equal educations to all children, then perhaps there would be less need to employ affirmative action when the graduates of racially equal schools compete with one another in public employment. Significantly, educational equality eliminates questions about applicants' qualifications, which are always lurking in the affirmative action debate. Indeed, Allan Bakke's claim rested on the assertion that he was more qualified than minority candidates who got accepted with lower test scores.²⁰ One way around the debate about exam biases is

16. 347 U.S. 483 (1954), reprinted in STONE ET AL., *supra* note 1, at 523.

17. *Id.* See also *Brown v. Board of Educ. (Brown II)*, 349 U.S. 294, 301 (1955), reprinted in STONE ET AL., *supra* note 1, at 530 (demanding desegregation "with all deliberate speed").

18. 515 U.S. 70 (1995), cited in STONE ET AL., *supra* note 1, at 550-51 (holding equal per pupil expenditures constitutional for white and black students in de facto segregated public schools).

19. *Bakke*, 438 U.S. at 269 (presenting a challenge to a public medical school's admissions policies).

20. *Id.* at 277.

to ensure educational equality for all children. More importantly, when children grow up in integrated schools where they share equal status across the board, where their racial identities are respected, and where they enjoy equal success, then they will have a deeper appreciation of each other in the adult market world. Racial inequality would be foreign and repulsive to them. At least, this would be the hope in what appears now to be a rather hopeless backlash against affirmative action. *Bakke* needs to remain in the book because it is at odds with *Brown* and there are critical comparisons to be made between them.

I have focused on the authors' exploration of race to illustrate why I use the book and why I find it valuable. These outstanding qualities of the book are not limited to race, however. The authors provide excellent material on just about every possible area of discrimination law, as well as on the basics of separation of powers, federalism, and first amendment issues.

Inevitably, any textbook will be of limited use to a professor who has had time to reflect on the area of the law, and who has perhaps written in the field because the professor's personality will shape how the book is used. I like the *Stone* textbook because it is so thorough that I can use it to cover almost anything touching on constitutional law from the basic course to my Fourteenth Amendment class to my Outsider Jurisprudence Seminar (where it supplements a reader). I rely on it to present thought-provoking questions and to provide up-to-date case coverage and scholarly articles.