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# A Constitutional Law Casebook for the 21st Century: A Critical Essay on Cohen and Varat

CONSTITUTIONAL LAW, CASES AND MATERIALS. By William Cohen<sup>†</sup> and Jonathan D. Varat.<sup>‡</sup> Westbury, New York: Foundation Press, 1997. Pp. v, 1718.

*Reviewed by Bryan K. Fair\**

## INTRODUCTION

The purpose of this essay is to review the latest edition of Cohen and Varat,<sup>1</sup> its strengths and weaknesses. Ironically, Professor Cohen reviewed the original edition<sup>2</sup> in 1960, concluding it was "easily the best and most teachable collection of cases on constitutional problems in print. . . . It deserves to be widely used."<sup>3</sup> After teaching from it for seven years, I know it well enough to state unequivocally that it is a first-rate teaching tool—unquestionably one of the leading, traditional casebooks—enabling thousands of law students throughout the country to gain some insight on a vast array of constitutional questions.

Below, rather than simply describe the casebook's broad contents, I also want to illustrate how I use it in a class of 65 to 100 students, meeting for 50 minutes per class, 60 times during a semester, hoping perhaps to assist another new teacher embarking on understanding and presenting the mysteries of constitutional decision-making, many of which still evade me.

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1. WILLIAM COHEN & JONATHAN D. VARAT, *CONSTITUTIONAL LAW: CASES AND MATERIALS* (10th ed. 1997).

2. The first edition appeared in 1959. EDWARD L. BARRETT, JR. ET AL., *CONSTITUTIONAL LAW, CASES AND MATERIALS* (1959). Barrett and Bruton prepared the fourth edition. After Bruton's retirement from teaching, Barrett edited the fifth edition alone. Cohen became a coeditor of the substantially revised sixth edition, and Varat joined as coeditor on the eighth edition.

3. William Cohen & Arvo Van Alstyne, *Book Review*, 48 CAL. L. REV. 173 (1960).

Preliminarily, Cohen and Varat is long, and I do not attempt to race through its 1900 pages. Nor do I follow the editors' organizational framework or my same syllabus each year. Instead, I start over, creating a new syllabus which more accurately reflects my interest in subject matter coverage and what I can reasonably expect students to accomplish for the course. My scholarship also informs my course; as it evolves, so does my presentation and critique.

True to the editors' plan, Cohen and Varat is quite flexible, allowing the teacher to change organizational presentation. I take full advantage of this flexibility. In the spring of 1998, for example, I began the course with religion materials in Chapter 17 because of the current relevance of those issues in Alabama and because the initial religion cases introduce a number of broad themes that we will cover in more detail later. Other times, I have started with incorporation issues in Chapter 8 or judicial review in Chapter 1.

Moreover, I have supplemented the casebook with film segments of *Eyes on the Prize*, *Women in American Life*, and other educational documentaries that illustrate significant constitutional contradictions that have plagued this nation. I have been aided here by colleagues on the law faculty and the Women Studies Department to incorporate more fully, for example, the voices and experiences of diverse women, hopefully enriching the learning experience and environment for all my students.

For especially ambiguous materials I recommend that my students consult John Nowak and Ron Rotunda's excellent treatise.<sup>4</sup> I discourage them from relying solely on commercial outlines, explaining that the primary value of an outline is in its production. I also permit them to use their own outlines during the final exam.

My students have also provided constructive feedback about their needs, helping me improve the course. More than any other request, they want practice exercises, as many as I will provide. To aid my students, I brief the first case, illustrating how I read, analyzed, and distilled the case into the brief. I then assign each of them a case to brief in writing and to present to the rest of the class. As time permits, I have the students join me at a podium in front of the class.

Beyond briefing, we use some class time to apply the cases to practice questions. As we end each unit, I distribute sample questions testing material covered to that point. My goal is to encourage my students to keep up, applying the cases as we proceed through the material. I take the first question and illustrate how I would read the

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4. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW (5th ed. 1995).

question and how I would apply the cases. Thereafter, I ask my students to apply the cases to resolve the questions.

My course today is quite different from seven years ago, even though I have not adopted a different book. Indeed, only now do I know how well Cohen and Varat teaches. The best way to describe my Constitutional Law course, then, is as a work in progress that undoubtedly will benefit from this structural and substantive examination of Cohen and Varat.

Part One of this review explains my journey from law student to Constitutional Law teacher, and my selection of Cohen and Varat. Part Two examines Cohen and Varat as a teaching tool. In a word, it has proven excellent on most counts for that purpose and I recommend it highly. Part Three assesses the casebook's principal weaknesses, which I have found limited; and it offers suggestions for improvement, consistent with the goals set forth by the casebook's editors.

### I. REALIZING A DREAM

As a UCLA law student fifteen years ago, one of my favorite, yet most difficult courses was Professor Ken Karst's Survey of American Constitutional Law. I went to law school expecting to learn about elusive concepts like fairness and equality, especially from reading Supreme Court decisions. Most of all, I wanted to examine how African Americans had been excluded from basic privileges of American citizenship despite written constitutional safeguards. Much to my disappointment, the course was not designed for those specific purposes, but rather as a broad introduction to judicial interpretation and constitutional analysis. This alternate emphasis made the course much less interesting and more difficult to prepare for.

An additional obstacle was deciphering Gerald Gunther's gigantic casebook.<sup>5</sup> Its rich historical detail and extensive intellectual probing on seemingly esoteric points left me scratching my head or dozing off midpage. I was overwhelmed by its breadth (nearly 2000 pages with the supplement) and had neither the background experience nor the time to contextualize many of its exhaustive notes. Perhaps Gunther had in mind a broader audience than first- and second-year law students. Nonetheless, I ended that course as weary from the supplemental questions and notes as from the Court's long, often tortuous, opinions.

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5. See GERALD GUNTHER, *CONSTITUTIONAL LAW, CASES AND MATERIALS* (10th ed. 1980).

Fortunately, Karst gently guided his students through the labyrinth of judicial review, justiciability, separation of powers, federalism, due process, equal protection, and First Amendment cases, lecturing both on the decisions of the United States Supreme Court, as well as on the Court itself. Although Karst's lectures were intellectually sumptuous, revealing careful preparation and free thinking, they rarely afforded students opportunities to leave the sidelines to contest and debate him, the Court, or one another concerning the important constitutional dilemmas presented in virtually every case. Thus, I cannot say what many of my classmates thought about federalism, abortion, prayer in public school, or affirmative action, for example. I can state with certainty that within study groups, student organizations, and clandestine exchanges, my classmates had much to say. Moreover, just below the surface of that safe classroom environment fomented deep-seated hostilities and misperceptions.

Even though, at that time, I had no idea that I would later lead law students over much of the same terrain, I regretted the passive classroom format. And, not surprisingly, I eschew it now, preferring to let my students hear from each other, and from me, no matter how controversial the topic. Pedagogically, I think students learn by participating actively: presenting, debating, and responding.

Despite the fact that I rarely lecture, I owe Professor Karst an enormous debt, taking from him memories of a conscientious, model teacher, who made himself available to students despite his prolific scholarship demands.<sup>6</sup> I also took from him a keen interest in the Court as the final arbiter of constitutional justice and a profound concern about the Court's membership. Indeed, my central lesson was that the Constitution means what five Justices decide, making it critically important who is appointed to the Court.

My passion for constitutional law was reignited after writing a review of Derrick Bell's *And We Are Not Saved*,<sup>7</sup> his searing, allegorical examination of American constitutional history. I was so moved by Bell's penetrating analysis of constitutional *inequality* and its relevance to what I call the late twentieth century's constitutional retrogression, that, more than anything else, I wanted to teach Constitutional Law

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6. Indeed, perhaps the greatest benefit of attending UCLA was the remarkable collection of master teachers, many of whom I have borrowed from in my own teaching.

7. DERRICK A. BELL, JR., *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987).

and contribute to the tremendously important and exciting critique already underway by Bell, Richard Delgado, and others.<sup>8</sup>

At that time, I was Co-Director of the UCLA Academic Support Program, designing programs to improve student retention and bar passage, work that I found enormously inspiring and important to the legal academy. I would only give it up if I could find an entry level position teaching Constitutional Law. I informed Dean Susan Westerberg Prager of my goal and enlisted her assistance along with that of other colleagues at UCLA. I registered for the annual AALS Hiring Conference and, after extensive interviews, received a delightful offer from The University of Alabama to begin there as an assistant professor teaching Constitutional Law courses. My elation with the offer was tempered heavily by my departure from my wonderful, steady friends and familiar surroundings in Los Angeles, but Tuscaloosa promised a world of new challenges, and more important, a supportive, collegial environment in which I could tackle the jurisprudential and doctrinal intricacies of constitutional law.

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8. Bell's work has remained very influential to mine. DERRICK A. BELL, JR., *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992); DERRICK A. BELL, JR., *CONSTITUTIONAL CONFLICTS* (1997) (his new casebook). Indeed, I have used his first casebook in my course on Racism and the Law. DERRICK A. BELL, JR., *RACE, RACISM, AND AMERICAN LAW* (3d ed. 1992).

More recently, Richard Delgado and Jean Stefancic have made a major contribution to my intellectual growth, producing literally hundreds of articles, book reviews, and books about law's victims and law's power. I shall not catalogue here all their provocative and elegant writing, but do include some of those related to this review, especially the tendency of many white casebook editors to ignore critical scholarship by nonwhites. Delgado and Stefancic have helped me think beyond traditional boxes and introduced me to the work of critical legal scholars. More precisely, they have collaborated on a series of cutting-edge books and readers, establishing themselves as one of the most prolific scholarly teams in legal education today. Richard Delgado, *Why Universities are Morally Obligated to Strive for Diversity: Restoring the Remedial Rationale for Affirmative Action*, 68 U. COLO. L. REV. 1165 (1997); Richard Delgado, *The Colonial Scholar: Do Outsider Authors Replicate the Citation Practices of the Insiders, But in Reverse*, 71 CHI.-KENT L. REV. 969 (1996); Jean Stefancic & Richard Delgado, *Outsider Scholars: The Early Stories*, 71 CHI.-KENT L. REV. 1001 (1996); Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665 (1993); Richard Delgado, *The Inward Turn in Outsider Jurisprudence*, 34 WM. & MARY L. REV. 741 (1993); Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258 (1992); Richard Delgado, *Legal Scholarship: Insiders, Outsiders, Editors*, 63 U. COLO. L. REV. 717 (1992); Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349 (1992); Jean Stefancic & Richard Delgado, *Outsider Jurisprudence and the Electronic Revolution: Will Technology Help or Hinder the Cause of Law Reform?*, 52 OHIO ST. L.J. 847 (1991); Robert M. O'Neil & Richard Delgado, *A Reaction to 'The Imperial Scholar' and Professor Delgado's Proposed Solution*, 3 LAW & INEQ. J. 255 (1985); Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984).

As a new teacher, my first significant hurdle was to select a casebook for my survey course. Casebook publishers generously make their products available for examination at no cost, so I had no shortage of options to review that summer. Another choice would have been to create my own materials, perhaps leading to yet another entry in the casebook wars. I simply did not know enough about constitutional law yet to undertake preparation of my own materials. The more traditional approach (the one I followed), is for new, junior teachers to consult more senior colleagues to identify what books they have used and to seek out their advice. After those visits, I was confident I could select any book, but my colleagues then preferred those by Barrett, Cohen, and Varat (now Cohen and Varat)<sup>9</sup> and by Gunther (now Gunther and Sullivan).<sup>10</sup> Finally, because constitutional law at Alabama was taught in two separate courses by a combination of four professors, I had some incentive to select one of the preferred books so that my students would not have to purchase different ones for each course.

I chose Cohen and Varat for several reasons. First, my summer review did not persuade me that Gunther's book had changed substantially (although I am confident the recent addition of Professor Kathleen Sullivan as a co-editor on the thirteenth edition will rapidly make it a more effective teaching tool). Plus, my review of Cohen and Varat was enjoyable. The careful, well organized foundational work of Edward L. Barrett, Jr., Paul W. Bruton, and John Honnold, the original editors, has evolved now over four decades (Barrett participating in eight editions through 1989). When Cohen joined the sixth edition, he and Barrett had between them over fifty years in the classroom.

This tenth edition is another articulate distillation of all that experience and more, and those of us who use such works owe much to these accomplished teachers and their teachers. I especially liked the brief yet frequent historical notes throughout the book introducing sections and chapters, and the editors' efforts to pose probing questions between the primary cases. The book was long but not overwhelming. It seemed immensely more readable than Gunther.

More importantly, my new colleague, Martha Morgan, the other primary constitutional law teacher, with whom I was looking forward

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9. Edward L. Barrett, Jr., was one of the three editors on the first edition of what is now COHEN & VARAT. He remained an active editor through the 8th edition. EDWARD L. BARRETT, JR. ET AL., CONSTITUTIONAL LAW: CASES AND MATERIALS (8th ed. 1989).

10. GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW (13th ed. 1997).

to collaborating, used Cohen and Varat. I thought it would be wise to adopt a book that she had substantial experience teaching from. When I reached especially thorny problems, I could turn to her. Finally, Jon Varat had been my friend and colleague at UCLA, and I was confident that I could call on his assistance, if necessary. It simply could not hurt to know personally one of the editors. In retrospect, my reasons for selecting it still seem valid.

## II. TEACHING CONSTITUTIONAL LAW WITH COHEN AND VARAT

According to the editors, their primary goal is "to provide a book that is at the same time intellectually challenging and flexible enough to be used by law teachers with widely varying approaches to the material."<sup>11</sup> That goal is achieved by providing "the raw materials—cases, constitutional provisions, and statutes—allowing teachers maximum freedom to pursue their own teaching strategies and requiring students to create their own generalizations from the materials."<sup>12</sup> The casebook is far more than a shell containing the leading cases. It is clearly planned, generously edited and pruned, and written so that students can read it and construct a general understanding of constitutional doctrine, without inescapable resort to numerous uneven secondary sources, especially commercial outlines.

From the first prefatory note to the final appendix on the Justices of the Court, Cohen and Varat carefully move their readers through seventeen chapters of raw materials on constitutional doctrine, supplementing the principal cases with helpful introductions, background notes relating relevant historical, economic, and social context, and discussions and questions from scholarly writing and inconsistent opinions.

One of the best characteristics of their casebook is a rigorous organization. There are four large parts that introduce broad themes: the role and authority of the Court; the constitutional allocation of governmental powers; individual rights; and First Amendment doctrine. Each part contains a series of closely-related chapters, allowing significant opportunities for students to compare and distinguish analogous materials. This structure aids teaching without creating too false a sense of rigid analytic categories.

Chapter 1 sensibly sets out the Constitution of the United States as originally proposed and the twenty-seven amendments added

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11. COHEN & VARAT, *supra* note 1, at v.

12. *Id.*



between 1791 and 1992. I regularly begin my course by reviewing the Constitution primarily because many law students have never read it, yet most think they know what it says and what it means. Reading it with my students also allows me an opportunity to address constitutional contradictions as early as the first class meeting. Finally, before students read any cases, I can point out to them the handful of clauses that will occupy most of our time.

In addition to a readable reprint of the Constitution, the editors provide a historical note on the adoption of the Constitution, the Bill of Rights, and the Civil War Amendments. Here and throughout the book, the editors provide notes illuminating details from the writings of contemporaneous primary actors, scholarly critique of issues before the Court, or related developments. For students interested in the origins of the Bill of Rights, for instance, the editors suggest by their excerpts and footnotes that the most direct antecedents for such rights appeared in the constitutions that the colonists framed at the outbreak of the American Revolution.<sup>13</sup> That note is replete with references to the 1787 Federal Convention records and the writings of James Madison.<sup>14</sup> Finally, the note confronts the grave constitutional problems arising from the Constitution's recognition and sanction of slavery.<sup>15</sup> Chapter 1, then, sets the tone for the remainder of the casebook: the editors provide extensive raw materials, allowing the teacher and students to do with them what they will.

Chapter 2 introduces the doctrine of judicial review. Again, rather than simply throwing students into the bowels of *Marbury v. Madison*,<sup>16</sup> the editors begin with a short historical note including excerpts from Max Farrand.<sup>17</sup> In this note, students learn something of the flavor of the debates which occurred that summer in Philadelphia and that the original Constitution did not explicitly assign a power of judicial review to the Court. That information enables students to study *Marbury* in context and to examine it for its essential purpose and point:

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two

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13. *Id.* at 19 nn.6-7.

14. *Id.* at 20 nn.9-14.

15. *Id.* at 20-22 & accompanying notes.

16. 5 U.S. (1 Cranch) 137 (1803), reprinted in COHEN & VARAT, *supra* note 1, at 26-34.

17. Farrand was the leading scholar on the Constitutional Convention. See MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (1911).

laws conflict with each other, the courts must decide on the operation of each.<sup>18</sup>

*Marbury* is a challenging case also because of the numerous asides raised by Chief Justice John Marshall on his way to pronouncing the Federalist theory of judicial review. Rather than make these points explicitly, the editors illustrate them through a series of comments from other cases, scholarly works, and law reviews.<sup>19</sup>

The rest of the casebook sets out how the Court has used this enormous interpretive power during the past two centuries to tell the nation what provisions of our Constitution mean. I make this observation explicit to my students. We will study what the Court has said about various clauses of the Constitution through their decisions. I make no attempt to teach them the meaning of every word found in the Constitution. My hope is that they leave the course with a mastery of how the Court approaches constitutional analysis, as well as an ability to use the language from the covered cases to resolve hypothetical controversies. Toward this goal, I continue to use Cohen and Varat because the authors' fine editing almost always retains the decisive segments of the majority and dissenting opinions.

In addition, by necessity, I have found that I can omit entire sections or chapters, without significant consequence. In earlier editions, Professor Barrett would suggest pages for omission in limited courses, a feature that I wish the editors would bring back. I have learned the hard way that for time-limited courses like mine, it is simply not possible to cover 1900 pages. I intend to cover about 1200 pages, but rarely cover more than 1000. I trade off broader coverage for detailed analysis and discussion, hoping that less is more.

Chapter 3, introducing federal jurisdiction issues, is one unit that I often edit substantially. It is organized into three sections: (1) Supreme Court Review of State Court Decisions, (2) Constitutional Litigation Initiated in the Federal Courts—a panoply of Eleventh Amendment and abstention problems—and (3) Article III and Justiciability Issues. Usually, I drop most of the first two sections, referring interested students to our advanced course on Federal Jurisdiction. Moreover, in the third section on justiciability, I emphasize standing and leave mootness, ripeness, and political question cases for advanced courses. My view is simply that every student of Constitutional Law needs an introduction to Article III's minimum requirements, but that many of the broader issues concerning federal

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18. COHEN & VARAT, *supra* note 1, at 32.

19. *Id.* at 34-37.

court jurisdiction are better left to specialized courses. Thus, after *Marbury* and brief mention of *Ex parte McCardle* and *Martin v. Hunter's Lessee*, the next major discussion is on justiciability, especially standing.

Many of my students encounter difficulty with justiciability issues, principally because they are quite unfamiliar and often the principles seem imprecise and inconsistently applied. The editors set forth a concise, well-written summary of these problems and explain how the Court may use justiciability principles to expand or restrict the extent of its impact.<sup>20</sup> The editors make explicit the connection between *Marbury* and the prohibition on rendering advisory opinions. They then set forth the essential language from Chief Justice Warren's opinion for the Court in *Flast v. Cohen*.<sup>21</sup> Similar case abstracting appears efficaciously throughout the casebook.

To their credit, the editors include sufficient portions of *Warth v. Seldin*,<sup>22</sup> *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,<sup>23</sup> *Craig v. Boren*,<sup>24</sup> *Lujan v. Defenders of Wildlife*,<sup>25</sup> and *Raines v. Byrd*<sup>26</sup> to enable teachers to elicit the constitutional doctrine, while also elucidating the imprecision and contradictions reflected in the opinions. If I had more course time, I would assign the fine introductory materials on mootness, ripeness, and political questions. Occasionally, I have assigned one case from each area, usually *DeFunis v. Odegaard*,<sup>27</sup> *City of Los Angeles v. Lyons*,<sup>28</sup> and *Powell v. McCormack*.<sup>29</sup> Because the facts of these cases are controversial, I have never been able to cover the material in one class meeting and therefore generally omit them entirely.

Part Two of the casebook, Chapters 4 through 7, focuses on the constitutional allocation of governmental powers, underscoring that principal concern of the 1787 Constitutional Convention delegates. The editors deftly present cases and notes covering (1) the scope of the national power, (2) the scope of state power, (3) intergovernmental and

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20. *Id.* at 81.

21. 392 U.S. 83 (1968), *reprinted in* COHEN & VARAT, *supra* note 1, at 82-83.

22. 422 U.S. 490 (1975), *reprinted in* COHEN & VARAT, *supra* note 1, at 84-93.

23. 429 U.S. 252 (1977), *reprinted in* COHEN & VARAT, *supra* note 1, at 93-95.

24. 429 U.S. 190 (1976), *reprinted in* COHEN & VARAT, *supra* note 1, at 97-100.

25. 504 U.S. 555 (1992), *reprinted in* COHEN & VARAT, *supra* note 1, at 101-06.

26. 117 S. Ct. 2312 (1997), *reprinted in* WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW: CASES AND MATERIALS 1-10 (10th ed. Supp. 1997) [hereinafter COHEN & VARAT, SUPP.].

27. 416 U.S. 312 (1974), *reprinted in* COHEN & VARAT, *supra* note 1, at 106-09.

28. 461 U.S. 95 (1983), *reprinted in* COHEN & VARAT, *supra* note 1, at 116-23.

29. 395 U.S. 486 (1969), *reprinted in* COHEN & VARAT, *supra* note 1, at 126-29.

federalism issues, and (4) separation of powers. As I have found with Part One, the second part is well planned and concisely edited, and it contains many helpful prefatory and historical notes. For example, Chapter 4 begins with a series of excerpts from the 1787 Constitutional Convention to provide students with a window to the deliberations and compromises that produced our federal constitutional framework. The notes are not simply sidebars, but rather prepare the reader for the issues decided in *McCulloch v. Maryland*,<sup>30</sup> *Gibbons v. Ogden*,<sup>31</sup> and *Cooley v. Board of Wardens of the Port of Philadelphia*.<sup>32</sup>

The new edition includes some long-overdue pruning here. Rather than retain a synopsis of most of the cases decided between 1880 and 1940, the editors use a portion of Justice Kennedy's opinion from *United States v. Lopez* to summarize the primary points of those cases.<sup>33</sup> Then they set out the modern commerce power cases: *Heart of Atlanta Motel, Inc. v. United States*,<sup>34</sup> *Katzenbach v. McClung*,<sup>35</sup> and *United States v. Lopez*.<sup>36</sup> This approach works well. The students do not become bogged down unnecessarily in intricate details of old cases with little modern relevance. In addition, the emphasis on *Lopez* illustrates for students the current divisions within the Court over the nature and scope of the commerce power. The editors include judicious portions of the diverse opinions of the Justices so readers can decide for themselves who presents the most persuasive arguments. This is another consistent feature of the book; students must reach their own conclusions about the materials.

After setting out the landmark cases on commerce power, the editors include a series of short discussions on the nature and scope of other federal powers, such as the taxing, spending, war and treaty, and property powers.<sup>37</sup> I skip that material in favor of constructing the links between the scope of the national powers doctrine and the scope of the state powers cases in Chapter 5. I review such cases as *New Energy Co. of Indiana v. Limbach*,<sup>38</sup> *Dean Milk Co. v. City of Madison, Wisconsin*,<sup>39</sup> and *Maine v. Taylor*<sup>40</sup> to teach how the Commerce

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30. 17 U.S. (4 Wheat.) 316 (1819), *reprinted in* COHEN & VARAT, *supra* note 1, at 157-64.

31. 22 U.S. (9 Wheat.) 1 (1824), *reprinted in* COHEN & VARAT, *supra* note 1, at 167-74.

32. 53 U.S. (12 How.) 299 (1851), *reprinted in* COHEN & VARAT, *supra* note 1, at 177-80.

33. See COHEN & VARAT, *supra* note 1, at 185-90.

34. 397 U.S. 241 (1964), *reprinted in* COHEN & VARAT, *supra* note 1, at 193-96.

35. 379 U.S. 294 (1964), *reprinted in* COHEN & VARAT, *supra* note 1, at 196-98.

36. 514 U.S. 549 (1995), *reprinted in* COHEN & VARAT, *supra* note 1, at 198-215.

37. COHEN & VARAT, *supra* note 1, at 215-40.

38. 486 U.S. 269 (1988), *reprinted in* COHEN & VARAT, *supra* note 1, at 247-51.

39. 340 U.S. 349 (1951), *reprinted in* COHEN & VARAT, *supra* note 1, at 274-77.

40. 477 U.S. 131 (1986), *reprinted in* COHEN & VARAT, *supra* note 1, at 309-12.

Clause acts to limit some state regulations affecting interstate commerce. Over the years, I have cut back substantially the amount of class time spent on the dormant Commerce Clause cases. At most, I want my students to recognize the issue, not necessarily know every permutation of the doctrine. Overall, I continue to think this chapter is unnecessarily long, requiring some of the effective pruning that has occurred elsewhere. I would begin by eliminating most of the truck size and weight cases, which now seem obsolete given increasing federal regulation in these areas noted by the editors.<sup>41</sup>

Beyond reviewing the broad implications of the Commerce Clause on state regulatory power, the editors also set out in Chapter 5 leading cases on the Privileges and Immunities Clause of Article IV, the Twenty-First Amendment, and the Supremacy Clause. The editors include sufficient cases and notes for an introduction to each topic, although I often omit these topics altogether. Again, the casebook is nicely adaptable to many course variations.

Chapter 6 has had one substantial revision: the inclusion in the supplement of an extensive excerpt from the Brady Gun Control Case (*Printz v. United States*).<sup>42</sup> The editors are quite efficient here, effectively highlighting the sharp disagreement within the Court since the mid-1970s over federalism questions arising in cases where states claim that federal regulations exceed constitutional authority. The editors rely on *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>43</sup> *New York v. United States*,<sup>44</sup> and *Printz v. United States*<sup>45</sup> to illustrate the fierce struggle within the Court to articulate a clear, workable standard to resolve such disputes.

Chapter 7 completes the second part of the book, exposing readers to separation-of-powers issues arising among the three branches of the national government. The editors make no attempt to be exhaustive here. The materials are introductory and quite selective, focusing primarily on the division of power between the President and Congress. Despite this brevity, the editors include interesting, useful materials. One high point is the way they take the reader back to April 1952 when President Truman issued Executive Order 10340, seizing all the steel mills. The editors summarize the background controversy, including references to the fullest scholarly accounts.<sup>46</sup>

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41. COHEN & VARAT, *supra* note 1, at 271-72.

42. 117 S. Ct. 2365 (1997), *reprinted in* COHEN & VARAT, SUPP., *supra* note 26, at 27-46.

43. 469 U.S. 528 (1985), *reprinted in* COHEN & VARAT, *supra* note 1, at 376-87.

44. 505 U.S. 144 (1992), *reprinted in* COHEN & VARAT, *supra* note 1, at 387-406.

45. 117 S. Ct. 2365 (1997), *reprinted in* COHEN & VARAT, SUPP., *supra* note 26, at 27.

46. COHEN & VARAT, *supra* note 1, at 408-09 & n.a.

Then the student can read portions of Justice Hugo Black's opinion from the *Youngstown Sheet & Tube Co. v. Sawyer*<sup>47</sup> case, and selected excerpts from others, including Chief Justice Fred Vinson's dissent, and need not read the entire 130-page opinion.

The remainder of the chapter presents other conflicts between Congress and the President over international agreements, declaration of war, the exercise of such powers as a legislative veto, and presidential and congressional immunities. I have rarely included these materials in my course, simply encouraging interested students to skim those pages or to use them as a starting point for additional research.

Chapters 8 through 12, Part Three of the casebook, contain over 700 pages principally discussing the Due Process and Equal Protection Clauses, areas which have exploded during the life of this casebook. Although early editions contained no materials on gender discrimination, for example, nor much coverage of what we now call the right to privacy, the book has evolved to reflect the changing landscape. The central issue posited by the editors in this area is the "definition of the proper judicial role in giving content to the vague language of the Due Process Clauses of the Fifth and Fourteenth Amendments, and of the Equal Protection Clause of the Fourteenth Amendment."<sup>48</sup>

Chapter 8 presents the interrelationship between the Bill of Rights and the Civil War Amendments, focusing on the Court's early interpretations of each in *Barron v. Mayor and City Council of Baltimore*,<sup>49</sup> and the *Slaughter-House Cases*.<sup>50</sup> Next, the editors introduce the incorporation debate, as expressed in *Palko v. Connecticut*,<sup>51</sup> *Adamson v. California*,<sup>52</sup> and *Duncan v. Louisiana*<sup>53</sup> to illustrate the competing incorporation theories and how the selective incorporation doctrine prevailed. A nice feature is the note summarizing the leading cases where the Court held that various provisions of the Bill of Rights also limit state governmental restrictions.<sup>54</sup> The reader again finds throughout the chapter familiar prefatory and historical notes, revealing interesting background material and comments by Justices such as the colloquy between Justices Samuel Chase and James Iredell in *Calder v. Bull* regarding the possibility of

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47. 343 U.S. 579 (1952), reprinted in COHEN & VARAT, *supra* note 1, at 408-15.

48. COHEN & VARAT, *supra* note 1, at 458.

49. 32 U.S. (7 Pet.) 243 (1833), reprinted in COHEN & VARAT, *supra* note 1, at 463-66.

50. 83 U.S. (16 Wall.) 36 (1872), reprinted in COHEN & VARAT, *supra* note 1, at 466-78.

51. 302 U.S. 319 (1937), reprinted in COHEN & VARAT, *supra* note 1, at 482-85.

52. 332 U.S. 46 (1947), discussed in COHEN & VARAT, *supra* note 1, at 485-89.

53. 391 U.S. 145 (1968), reprinted in COHEN & VARAT, *supra* note 1, at 490-98.

54. COHEN & VARAT, *supra* note 1, at 501-03.

nontextual constitutional constraints stemming from principles of natural law.<sup>55</sup>

I follow Chapter 8 with Chapter 12 to introduce students to state action and discussions of congressional powers under the Enabling Clauses of Section 2 of the Thirteenth Amendment, Section 5 of the Fourteenth Amendment, and Section 2 of the Fifteenth Amendment, before the students try to tackle specific due process and equal protection cases. I then cover Chapters 9 and 11, completing substantive and procedural due process, before starting equal protection. I share this not so much as a criticism of how the editors organize these chapters, but rather to illustrate that one can deviate from their layout.

Chapter 9 is a hefty 200 pages, reflecting the editors' effort to introduce readers to the landmark cases interpreting the Due Process, Contract, and Just Compensation Clauses, especially the debate among Justices concerning the substantive scope of those provisions. The material covering state economic regulation is illustrative of the quality throughout this chapter. Students find a brief prefatory note, then another historical summary of the Court's early interpretations leading up to *Lochner v. New York*.<sup>56</sup> Following the excerpts from the opinions of Justices Rufus Peckham, John Marshall Harlan, and Oliver Wendell Holmes, and a brief summary of cases decided between 1905 and 1934, the editors use *Nebbia v. New York*,<sup>57</sup> *United States v. Carolene Products*,<sup>58</sup> *Williamson v. Lee Optical of Oklahoma, Inc.*,<sup>59</sup> and *Ferguson v. Skrupa*<sup>60</sup> to demonstrate the dramatic shift away from *Lochner*, at least in the economic regulation cases. I appreciate the concise case excerpts, although the editors miss an excellent opportunity to underscore the larger significance of *Muller v. Oregon*,<sup>61</sup> relegating it to a note.

The materials on impairment of contracts and takings—*United States Trust Co. of New York v. New Jersey*,<sup>62</sup> *Allied Structural Steel*

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55. *Id.* at 459-60.

56. 198 U.S. 45 (1905), reprinted in COHEN & VARAT, *supra* note 1, at 507-12.

57. 291 U.S. 502 (1934), reprinted in COHEN & VARAT, *supra* note 1, at 514-16.

58. 304 U.S. 144 (1938), reprinted in COHEN & VARAT, *supra* note 1, at 517-19.

59. 348 U.S. 483 (1955), reprinted in COHEN & VARAT, *supra* note 1, at 520-22.

60. 372 U.S. 726 (1963), reprinted in COHEN & VARAT, *supra* note 1, at 522-24.

61. 208 U.S. 412 (1986), discussed in COHEN & VARAT, *supra* note 1, at 512. That decision, under the guise of protective legislation, extended occupational discrimination and segregation against women through the 1960s, based on stereotypical views about the physical differences, abilities, and proper roles of women. The case provides a lively comparison to *Lochner v. New York*.

62. 431 U.S. 1 (1977), reprinted in COHEN & VARAT, *supra* note 1, at 525-32.

*Co. v. Spannaus*,<sup>63</sup> *Energy Resources Group, Inc. v. Kansas Power & Light Co.*,<sup>64</sup> *Lucas v. South Carolina Coastal Council*,<sup>65</sup> and *Dolan v. City of Tigard*<sup>66</sup>—are well-edited introductions, but time rarely allows me to include them. Instead, I cover in more detail the far more controversial cases on personal liberty and privacy cases ranging from *Griswold v. Connecticut*,<sup>67</sup> *Moore v. City of East Cleveland, Ohio*,<sup>68</sup> and *Zablocki v. Redhail*<sup>69</sup> to *Roe v. Wade*,<sup>70</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>71</sup> *Bowers v. Hardrick*,<sup>72</sup> and *Washington v. Glucksberg*.<sup>73</sup> These cases tend to evoke strong responses from the students, some wondering where a right to privacy comes from, while others lament the Court's refusal to interpret the Due Process Clause more expansively. The editors have not chosen sides, instead providing raw materials that reflect the sharp interpretive division among the Justices. The breadth of the case segments enables readers to discern where different Justices line up, and whether they have remained consistent or changed positions over time. The editors also set out fewer notes here, for example, not describing the two dozen significant abortion cases decided between *Roe* and *Casey*, or the debate over a right to die and euthanasia. While I agree that the emphasis on *Casey* is correct, a note placing *Glucksberg* in context would be valuable.

Chapter 10 follows the pattern of Chapter 9, running over 300 pages. Equal protection cases are divided between economic regulation cases and those meriting heightened scrutiny because they involve arguably suspect classifications or they burden fundamental interests. I want my students to recognize the similarities and differences between the Court's analysis of due process versus equal protection challenges to economic regulations. I also want them to understand that one case may implicate both clauses. The editors illustrate these points immediately, following the introductory note with a second excerpt from the *Lee Optical* case and the recent decision in *FCC v.*

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63. 438 U.S. 234 (1978), reprinted in COHEN & VARAT, *supra* note 1, at 532-38.

64. 459 U.S. 400 (1983), reprinted in COHEN & VARAT, *supra* note 1, at 538-41.

65. 505 U.S. 1003 (1992), reprinted in COHEN & VARAT, *supra* note 1, at 542-57.

66. 512 U.S. 374 (1994), reprinted in COHEN & VARAT, *supra* note 1, at 557-67.

67. 381 U.S. 479 (1965), reprinted in COHEN & VARAT, *supra* note 1, at 571-77.

68. 431 U.S. 494 (1977), reprinted in COHEN & VARAT, *supra* note 1, at 578-84.

69. 434 U.S. 374 (1978), reprinted in COHEN & VARAT, *supra* note 1, at 584-90.

70. 410 U.S. 113 (1973), reprinted in COHEN & VARAT, *supra* note 1, at 605-17.

71. 505 U.S. 833 (1992), reprinted in COHEN & VARAT, *supra* note 1, at 617-44.

72. 478 U.S. 186 (1986), reprinted in COHEN & VARAT, *supra* note 1, at 645-55.

73. 117 S. Ct. 2258 (1997), reprinted in COHEN & VARAT, SUPP., *supra* note 26, at 57-76.



*Beach Communications, Inc.*<sup>74</sup> Section 3, the core of the chapter, contains a series of subsections addressing various nuances of equal protection doctrine. The principal cases are *Loving v. Virginia*,<sup>75</sup> *Plessy v. Ferguson*,<sup>76</sup> *Brown v. Board of Education of Topeka*,<sup>77</sup> *Swann v. Charlotte-Mecklenburg Board of Education*,<sup>78</sup> *Missouri v. Jenkins*,<sup>79</sup> *Craig v. Boren*,<sup>80</sup> *United States v. Virginia*,<sup>81</sup> *Washington v. Davis*,<sup>82</sup> *Mississippi University for Women v. Hogan*,<sup>83</sup> *Regents of the University of California v. Bakke*,<sup>84</sup> *City of Richmond v. J.A. Croson Co.*,<sup>85</sup> *Adarand Constructors, Inc. v. Peña*,<sup>86</sup> and *Romer v. Evans*.<sup>87</sup> The current edition revises several of these units, dropping a large portion of outdated note cases. While more pruning would help, what remains is not too cumbersome, showing constitutional doctrine in action over a series of cases. Moreover, the principal cases are expertly edited, including for the reader the essential passages that disclose the grounds of difference between the Justices.

The weakest section of the casebook, which I think begs for a complete overhaul, is the unit on voting, especially those materials relating to legislative districting. The editors do incorporate *Miller v. Johnson*<sup>88</sup> and a related note on racial gerrymandering<sup>89</sup> discussing districting cases subsequent to *Miller*. However, the new materials are located beside cases that are not factually or analytically similar. I want my students to know how voting rights were denied to African Americans and other women for most of our nation's history. I want them to read about grandfather clauses, white primaries, poll taxes, literacy tests, and other devices used to abridge voting rights. And I want them to read *Gomillion v. Lightfoot*<sup>90</sup> and *United Jewish Organizations v. Carey*<sup>91</sup> before they try to understand *Miller*. Here, quite

74. 508 U.S. 307 (1993), reprinted in COHEN & VARAT, *supra* note 1, at 680-84.

75. 388 U.S. 1 (1967), reprinted in COHEN & VARAT, *supra* note 1, at 692-96.

76. 163 U.S. 537 (1896), reprinted in COHEN & VARAT, *supra* note 1, at 703-06.

77. 347 U.S. 483 (1954), reprinted in COHEN & VARAT, *supra* note 1, at 706-09.

78. 402 U.S. 1 (1971), reprinted in COHEN & VARAT, *supra* note 1, at 713-20.

79. 495 U.S. 33 (1990), reprinted in COHEN & VARAT, *supra* note 1, at 734-39.

80. 429 U.S. 190 (1976), reprinted in COHEN & VARAT, *supra* note 1, at 748-55.

81. 116 S. Ct. 2264 (1996), reprinted in COHEN & VARAT, *supra* note 1, at 771-84.

82. 426 U.S. 229 (1976), reprinted in COHEN & VARAT, *supra* note 1, at 786-92.

83. 458 U.S. 718 (1982), reprinted in COHEN & VARAT, *supra* note 1, at 816-20.

84. 438 U.S. 265 (1978), reprinted in COHEN & VARAT, *supra* note 1, at 821-47.

85. 488 U.S. 469 (1989), reprinted in COHEN & VARAT, *supra* note 1, at 847-67.

86. 515 U.S. 200 (1995), reprinted in COHEN & VARAT, *supra* note 1, at 867-86.

87. 517 U.S. 620 (1996), reprinted in COHEN & VARAT, *supra* note 1, at 915-25.

88. 515 U.S. 900 (1995), reprinted in COHEN & VARAT, *supra* note 1, at 962-74.

89. COHEN & VARAT, *supra* note 1, at 974-83.

90. 364 U.S. 339 (1960).

91. 430 U.S. 144 (1977).

uncharacteristically, the editors fail to provide the raw materials essential to understanding how the Court has interpreted the Fourteenth and Fifteenth Amendments in voting cases. A final weakness of this unit is that it in no way reflects contemporary scholarly debate on these issues or the current, conservative Court's role in rewriting nearly thirty years of constitutional precedent. These omissions will undoubtedly cause some teachers to adopt other casebooks. So far, my approach has been heavy supplementation. These issues are too important for the thin, noncontextual treatment currently provided.

Chapters 11 and 12 succinctly introduce procedural due process and state action issues. Many of my students have difficulty with the relationship between substantive and procedural due process claims: what interests are subject to procedural fairness standards? Are they the same as those given substantive protection? What constitutes a deprivation? What process is due, and when? I have not found that my students can answer these questions from the raw materials provided. One problem is that a crucial passage is omitted from *Board of Regents v. Roth*.<sup>92</sup> Justice Stewart's opinion for the Court explains what definition the Justices had in mind for the term "liberty":

While this Court has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.<sup>93</sup>

Without that passage, my students cannot recognize the Court's recollection of *Meyer v. Nebraska*<sup>94</sup> and, at least by implication, its reliance on *Griswold* and its progeny. I am unaware of any pedagogical reasons to omit this excerpt, so I usually provide it by handout, expecting my students then to compare substantive and procedural due process interests. This sort of editing of a principal case is a rarity in this casebook.

Before moving on to state action, there are at least three other important concerns with the due process materials. First, the editors

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92. 408 U.S. 564 (1972), reprinted in COHEN & VARAT, *supra* note 1, at 1069-73.

93. *Roth*, 408 U.S. at 572.

94. 262 U.S. 390, 399 (1923).

set out prison regulation cases such as *Sandin v. Conner*<sup>95</sup> and *Daniels v. Williams*<sup>96</sup> without explaining if those cases are controlling beyond the prison context. My students need to know what constitutes a deprivation outside of prison, conceding that within it, many due process interests are circumscribed. Second, if *Mathews v. Eldridge*<sup>97</sup> sets out the classic general formulation of what process is due, readers would benefit from more than a paragraph. Finally, the irrebuttable-presumption cases cry out for a note on the implications, if any, of *Michael H. v. Gerald D.*,<sup>98</sup> especially its effect on *Vlandis v. Kline*<sup>99</sup> and *Cleveland Board of Education v. LaFleur*,<sup>100</sup> as well as a brief discussion regarding the continuing vitality of the conclusive presumption doctrine. Currently, these raw materials raise more questions than they answer.

Chapter 12 recaptures all of the best qualities of the casebook, the useful prefatory and historical notes and a series of well-edited cases. Here, the reader can again work through the core materials and arrive at individual conclusions. The editors describe the materials as a collection of those issues raised in the *Civil Rights Cases*:<sup>101</sup> the scope of Section 1 of the Thirteenth Amendment and Sections 1 and 5 of the Fourteenth Amendment. I use the chapter to illustrate the evolution of the state action doctrine as articulated by Justice Joseph Bradley in the *Civil Rights Cases*, and later refined in *Shelley v. Kramer*,<sup>102</sup> *Burton v. Wilmington Parking Authority*,<sup>103</sup> *Moose Lodge No. 107 v. Irvis*,<sup>104</sup> and *Reitman v. Mulkey*.<sup>105</sup> The editors also provide an effective summary of the surviving Reconstruction era civil rights statutes and an interpretive note illustrating their modern dimensions. I am rarely able to cover the interesting constitutional questions raised by *City of Rome v. United States*<sup>106</sup> and *City of Boerne v. Flores*,<sup>107</sup> but I always try to compare their treatment of

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95. 515 U.S. 472 (1995), *reprinted in* COHEN & VARAT, *supra* note 1, at 1077-84.

96. 474 U.S. 327 (1986), *reprinted in* COHEN & VARAT, *supra* note 1, at 1086-89.

97. 424 U.S. 319 (1976), *discussed in* COHEN & VARAT, *supra* note 1, at 1091.

98. 491 U.S. 110 (1989), *reprinted in* COHEN & VARAT, *supra* note 1, at 591 (citing case on p. 1100 and referencing the report on p. 591).

99. 412 U.S. 441 (1973), *reprinted in* COHEN & VARAT, *supra* note 1, at 1091-93.

100. 414 U.S. 632 (1974), *reprinted in* COHEN & VARAT, *supra* note 1, at 1093-97.

101. 109 U.S. 3 (1883), *reprinted in* COHEN & VARAT, *supra* note 1, at 1101-07.

102. 334 U.S. 1 (1948), *reprinted in* COHEN & VARAT, *supra* note 1, at 1116-20.

103. 365 U.S. 715 (1961), *reprinted in* COHEN & VARAT, *supra* note 1, at 1125-27.

104. 407 U.S. 163 (1972), *reprinted in* COHEN & VARAT, *supra* note 1, at 1130-35.

105. 387 U.S. 369 (1967), *reprinted in* COHEN & VARAT, *supra* note 1, at 1139-44.

106. 446 U.S. 156 (1980), *reprinted in* COHEN & VARAT, *supra* note 1, at 1163-73.

107. 117 S. Ct. 2157 (1997), *reprinted in* COHEN & VARAT, SUPP., *supra* note 26, at 82-92.

federalism and scope of the national power with that in such earlier cases as *Lopez* and *Printz*.

Part Four, the final unit, provides a close look at constitutional protection of expression and religious conscience. Chapters 13 through 16 concern myriad speech issues, while Chapter 17 takes the reader through a limited number of establishment and free-exercise cases. Overall, the raw materials here provide a good introduction, with an emphasis on the meaning of the Free Speech Clause. Although they cannot match the more complete works focusing solely on First Amendment cases, the editors include enough of the principal cases to illustrate for students in survey courses many of the jurisprudential and doctrinal questions that those larger works treat in detail.

I use Chapter 13 to demonstrate to my students, borrowing a line from Stanley Fish, "there is no such thing as free speech."<sup>108</sup> The editors illustrate nicely, through an informative historical introduction, the numerous ways that state and federal government have sought to control the content of expression. While the editors include a good number of Espionage and Smith Act cases,<sup>109</sup> I focus on *Brandenburg v. Ohio*<sup>110</sup> to distinguish advocacy of an idea from advocacy of imminent, lawless action. Then I summarily treat vagueness, overbreadth, and prior restraint issues in *Coates v. Cincinnati*,<sup>111</sup> *Near v. Minnesota*,<sup>112</sup> and the accompanying notes on parade and demonstration permit systems.

The remaining cases, *New York Times Co. v. Sullivan*,<sup>113</sup> *Miller v. California*,<sup>114</sup> *Cohen v. California*,<sup>115</sup> and *Central Hudson Gas & Electric Corp. v. Public Service Commission*,<sup>116</sup> as well as related cases showing the application of their standards, allow readers to observe the Court's shift away from its categorical analysis of content-based regulations. This movement is best exemplified in *R.A.V. v. City of St. Paul, Minnesota*,<sup>117</sup> which might obliterate prior doctrine that some speech is "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the

108. STANLEY FISH, *THERE IS NO SUCH THING AS FREE SPEECH* (1994).

109. COHEN & VARAT, *supra* note 1, at 1198-1224.

110. 395 U.S. 444 (1969), *reprinted in* COHEN & VARAT, *supra* note 1, at 1224-27.

111. 402 U.S. 611 (1971), *reprinted in* COHEN & VARAT, *supra* note 1, at 1233-36.

112. 283 U.S. 697 (1931), *reprinted in* COHEN & VARAT, *supra* note 1, at 1242-45.

113. 376 U.S. 254 (1964), *reprinted in* COHEN & VARAT, *supra* note 1, at 1250-54.

114. 413 U.S. 15 (1973), *reprinted in* COHEN & VARAT, *supra* note 1, at 1278-82.

115. 403 U.S. 15 (1971), *reprinted in* COHEN & VARAT, *supra* note 1, at 1291-93.

116. 447 U.S. 557 (1980), *reprinted in* COHEN & VARAT, *supra* note 1, at 1342-48.

117. 505 U.S. 377 (1992), *reprinted in* COHEN & VARAT, *supra* note 1, at 1318-34.

social interest in order and morality."<sup>118</sup> The editors could easily enhance this section with an interpretive note on the impact of *R.A.V.* or the inclusion of some recent scholarly references.

In Chapter 14, the editors set forth the basic time, place, and manner regulation principles governing traditional public fora, nontraditional public fora, private premises, and schools, as well as restraints on using public funds for abortion-related activities. Illustrative cases, *Frisby v. Schultz*,<sup>119</sup> *Madsen v. Women's Health Center, Inc.*,<sup>120</sup> *Adderly v. Florida*,<sup>121</sup> *International Society of Krishna Consciousness, Inc. v. Lee*,<sup>122</sup> *City of Ladue v. Gillee*,<sup>123</sup> *Consolidated Edison Co. of New York v. Public Service Commission*,<sup>124</sup> *Tinker v. Des Moines Independent Community School District*,<sup>125</sup> and *Rust v. Sullivan*,<sup>126</sup> highlight these partially revised units. I think the exclusion of *Perry Education Association v. Perry Local Educators Association*<sup>127</sup> obfuscates the reader's general understanding of this set of cases by omitting the clearest summary of the three analytical standards for traditional public fora, designated public fora, and nonpublic fora. The materials would also improve from a contemporary assessment of recent scholarly writing on cases like *Madsen*, *Rust*, and *Ladue*.

Chapter 15 contains a diverse collection of cases discussing symbolic speech, compelled affirmation of belief, freedom of association, and First Amendment problems arising from governmental regulation of elections or governmental employees, under the heading, "Penumbral First Amendment Rights." I usually do not have time to cover these materials, but the editors include many of the most interesting principal cases, especially *United States v. O'Brien*,<sup>128</sup> *Texas v. Johnson*,<sup>129</sup> *Barnes v. Glen Theatre, Inc.*,<sup>130</sup> *West Virginia State Board of Education v. Barnette*,<sup>131</sup> and *NAACP v. Alabama*.<sup>132</sup> The limited notes here are more case-specific than earlier ones that

118. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

119. 487 U.S. 474 (1988), reprinted in COHEN & VARAT, *supra* note 1, at 1361-67.

120. 512 U.S. 753 (1994), reprinted in COHEN & VARAT, *supra* note 1, at 1367-77.

121. 385 U.S. 39 (1966), reprinted in COHEN & VARAT, *supra* note 1, at 1378-80.

122. 505 U.S. 672 (1992), reprinted in COHEN & VARAT, *supra* note 1, at 1380-93.

123. 512 U.S. 43 (1994), reprinted in COHEN & VARAT, *supra* note 1, at 1393-98.

124. 447 U.S. 530 (1980), reprinted in COHEN & VARAT, *supra* note 1, at 1403-07.

125. 393 U.S. 503 (1969), reprinted in COHEN & VARAT, *supra* note 1, at 1409-12.

126. 500 U.S. 173 (1991), reprinted in COHEN & VARAT, *supra* note 1, at 1428-38.

127. 460 U.S. 37, 44 (1983).

128. 391 U.S. 367 (1968), reprinted in COHEN & VARAT, *supra* note 1, 1439-42.

129. 491 U.S. 397 (1989), reprinted in COHEN & VARAT, *supra* note 1, at 1442-49.

130. 501 U.S. 560 (1991), reprinted in COHEN & VARAT, *supra* note 1, at 1449-55.

131. 319 U.S. 624 (1943), reprinted in COHEN & VARAT, *supra* note 1, at 1455-56.

132. 357 U.S. 449 (1958), reprinted in COHEN & VARAT, *supra* note 1, at 1457-58.

traced terrain before and after the primary cases. At bottom, as with Chapter 14, this edition's iteration of Chapter 15 has not changed much, save moving a couple of the post-1995 cases like *McIntyre v. Ohio Elections Commission*<sup>133</sup> into the main volume.

Chapter 16 deals with the dynamic issues arising from application of First Amendment protections to print and electronic media, an expected growth area in light of the Internet. The editors set out excerpts from Justice Potter Stewart and Chief Justice Warren Burger to frame the fundamental question regarding the scope of the Free Press Clause. What does it add to the Free Expression Clause? The reader must work through a half-dozen cases to decide whether Stewart or Burger got it right or whether there is a third view. I do not teach these materials, although the editors include sufficient excerpts and notes for a thin introduction to restraints on editorial judgment, confidential sources, press access to trials, and restrictions in electronic media. The best materials here are the carefully edited opinions from the *Pentagon Papers Cases*,<sup>134</sup> revealing the Court's difficult task of not abdicating its duty to say what the Constitution means, while, at the same time, not going beyond the Court's judicial function. The new edition also incorporates the *DAETC case*,<sup>135</sup> *Turner Broadcasting System, Inc. v. FCC*,<sup>136</sup> and *Reno v. ACLU*,<sup>137</sup> the most recent decisions from the last two terms addressing whether cable and Internet regulations exceeded constitutional limits.

In Chapter 17, the editors present the leading Establishment Clause and Free Exercise Clause materials, demonstrating the uneasy tension arising from attempts to meet the commands of each clause. How does government remain neutral on religious matters? Do these clauses require accommodation, noncoercion, or something else? This edition effectively retains a few of the older landmarks, such as *Everson v. Board of Education*,<sup>138</sup> *Zorach v. Clauson*,<sup>139</sup> *Sherbert v. Verner*,<sup>140</sup> and *Wisconsin v. Yoder*,<sup>141</sup> and incorporates sufficient segments of almost all the significant new cases since 1989, including

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133. 514 U.S. 334 (1995), *reprinted in* COHEN & VARAT, *supra* note 1, at 1518-25.

134. 403 U.S. 713 (1971), *reprinted in* COHEN & VARAT, *supra* note 1, at 1565-70.

135. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996), *reprinted in* COHEN & VARAT, *supra* note 1, at 1601 (citing case on p. 1061 and referencing the report on p. 1293).

136. 117 S. Ct. 1174 (1997), *reprinted in* COHEN & VARAT, *SUPP.*, *supra* note 26, at 124-38.

137. 117 S. Ct. 2329 (1997), *reprinted in* COHEN & VARAT, *SUPP.*, *supra* note 26, at 93-107.

138. 330 U.S. 1 (1947), *reprinted in* COHEN & VARAT, *supra* note 1, at 1602-07.

139. 343 U.S. 306 (1952), *reprinted in* COHEN & VARAT, *supra* note 1, at 1608-11.

140. 374 U.S. 398 (1963), *reprinted in* COHEN & VARAT, *supra* note 1, at 1688-91.

141. 406 U.S. 205 (1972), *reprinted in* COHEN & VARAT, *supra* note 1, at 1691-95.

*Lamb's Chapel v. Center Moriches Union Free School District*,<sup>142</sup> *Lee v. Weisman*,<sup>143</sup> *City of Allegheny v. ACLU*,<sup>144</sup> *Capitol Square Review and Advisory Board, Pinette*,<sup>145</sup> *Agostini v. Felton*,<sup>146</sup> *Rosenberger Rector and Visitors of the University of Virginia*,<sup>147</sup> *Employment Division, Department of Human Resources of Oregon v. Smith*,<sup>148</sup> *Church of the Lukumi; Babalu Aye, Inc. v. City of Hialeah*,<sup>149</sup> and *City of Boerne*.<sup>150</sup> These materials provide a brief glimpse at the competing interpretive philosophies currently employed by members of the Court, revealing numerous future battlegrounds within the Court and between the Court and Congress. The reader is left with the sense that much of the same angst seen in the sharp split in *Everson* still confounds the Court's interpretation of these mysterious clauses.

Finally, the editors have continued in this edition the excellent chart on the Court's membership, allowing readers to identify the composition of the Court at any specified time. Students can thereby track changes in personnel and constitutional doctrine.

### III. THE 21ST CENTURY CASEBOOK

While I continue to think Cohen and Varat is one of the leading traditional casebooks, I have noted some weaknesses, places that are uneven in quality, and the editors' failure to incorporate the challenging new voices that offer precise critiques of constitutional doctrine as a tool that maintains existing hierarchies of oppression.<sup>151</sup> Below, I want to briefly explore some broader pedagogical concerns about casebooks, looking to the next century.

Since it does not appear that law schools are poised to abandon the casebook, those of us who use or write them must ask more questions about the ways casebooks might serve our teaching goals. Who is the principal audience? My students tell me that the casebooks are too dense, too boring, too hard to read, and so on. Many of them cannot find the law in them. They remind me of myself and my classmates

142. 508 U.S. 384 (1993), discussed in COHEN & VARAT, *supra* note 1, at 1607-08.

143. 505 U.S. 577 (1992), reprinted in COHEN & VARAT, *supra* note 1, at 1611-21.

144. 492 U.S. 573 (1989), reprinted in COHEN & VARAT, *supra* note 1, at 1627-38.

145. 515 U.S. 753 (1995), reprinted in COHEN & VARAT, *supra* note 1, at 1638-46.

146. 117 S. Ct. 1997 (1997), reprinted in COHEN & VARAT, SUPP., *supra* note 26, at 139-54.

147. 515 U.S. 819 (1995), reprinted in COHEN & VARAT, *supra* note 1, at 1676-86.

148. 494 U.S. 872 (1990), reprinted in COHEN & VARAT, *supra* note 1, at 1695-1705.

149. 508 U.S. 520 (1993), discussed in COHEN & VARAT, *supra* note 1, at 1705-06.

150. 117 S. Ct. 2157 (1997), reprinted in COHEN & VARAT, SUPP., *supra* note 26, at 82-92.

151. See, e.g., STEPHANIE WILDMAN, PRIVILEGE REVEALED 28 (1996).

not so long ago. Because I observe my students hard at work, I know there is a larger problem: time. I do not think students have enough time to do what teachers expect of them. They cannot read cases as fast as we can. They do not know what to look for in cases the way we do. They have not read enough cases to recognize the standard parts of virtually every case. If casebooks are teaching tools, why don't they teach more, especially beginning students, the landscape of law? Why not include sample briefs of the first several cases? After my students read the first case, I give them a sample brief, explaining how I constructed it by asking questions about the case. I tell them it is only a sample, that they should compare it with their own. I encourage them to take notes as they read the cases and then to go back and write briefs. But, frankly, I have been at this enterprise a short time and I would benefit from the thinking of others who been at it for decades. Casebook editors seem well situated to make their materials more teachable.

Another longstanding criticism of casebook and law review authors is that too often they cite the work of a narrow group, namely white men citing other white men. A related concern is how well casebook editors keep up with the explosion in modern scholarly legal writing and the diversity of that scholarship. Critical legal theories, whether centered on race, gender, economics, or other political theories, have moved from the jurisprudential margins, requiring traditional casebooks to take note, especially of their impact in constitutional decision-making. In my mind, aging casebooks that do not stay current with interpretive, supplemental material will quickly lose their primacy in the academy. A key difference between aging leading casebooks and the newest ones is the freshness of the latter and frequent staleness of the former, reflected at least partly in the recent editors' efforts to present and discuss the landmark cases juxtaposed with some of the most influential recent scholarly commentary, including writing by white women and scholars of color.

For limited purposes of this review, I have compared Cohen and Varat with three other casebooks: Farber, Eskridge, and Frickey;<sup>152</sup> Stone, Seidman, Sunstein, and Tushnet;<sup>153</sup> and Lively, Haddon, Roberts, and Weaver.<sup>154</sup> For convenience, I will refer to them by the lead author's last name. The Farber editors, self-described as "three

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152. DANIEL A. FARBER ET AL., *CONSTITUTIONAL LAW, THEMES FOR THE CONSTITUTION'S THIRD CENTURY* (1993).

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

154. DONALD E. LIVELY ET AL., *CONSTITUTIONAL LAW: CASES, HISTORY, AND DIALOGUES* (1997).



bland middle class white men," explain early their need to incorporate the views of others:

Though one of us (Farber) is a Jew and one of us (Eskridge) is a gay man, we have not experienced exclusion in the same ways as women, lesbians, Asians, African Americans, Hispanics, and Native Americans. Partly for this reason, in our treatment of discrimination-related issues, we have relied less on our own textual exposition of different points (as we do in most of the book), and more on excerpting the views of scholars whose work reflects other perspectives.<sup>155</sup>

This confession is significant, telling the reader that the editors have great expertise in some areas, but that in others they do not, necessitating their reliance on other scholars who perhaps express views with which the editors do not agree. The students receive the benefit of exposure to competing contemporary visions of how the Court has resolved diverse issues. While it is the editors' prerogative to determine what raw and supplemental material to include in each revision, it seems counter-intuitive to exclude recent scholarly references, for example, on the meaning of the Ninth Amendment. Whatever a reader's ideological preference, it is helpful if the reader encounters what scholars are writing about a particular clause or problem now, not only thirty years ago. On this score, generally, Farber, Stone, and Lively all appear more current and more diverse, thus offering intellectual challenges over Cohen and Varat.<sup>156</sup>

I think Stone is especially rich because of the vigorous collaboration of its four superb editors and all of their assistants. When one scans Stone's list of excerpt acknowledgments, it reads like a Who's Who of the legal academy.<sup>157</sup> Not only does it reflect ideological diversity, but also a conscientious effort to combine contemporaneous and contemporary thought about the raw materials. My suspicion is that the addition of one or two more editors would allow Cohen and Varat to close this growing intellectual gap quickly.

Another exciting feature in some recent casebooks is the attempt to ground students more in the practical issues of lawyering, for example in illustrating through a representative case how litigation

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155. FARBER ET AL., *supra* note 152, at vii n.4.

156. My review of these other casebooks has not been exhaustive and I cannot say that any of them teaches better than COHEN & VARAT. I do think that they have done a better job of incorporating the freshest scholarship. Compare COHEN & VARAT, *supra* note 1, at 570-77 and accompanying notes, with STONE ET AL., *supra* note 153, at 941-55 and accompanying notes; FARBER ET AL., *supra* note 152, at 494-503; and LIVELY ET AL., *supra* note 154, at 101-03.

157. STONE ET AL., *supra* note 153, at xxxv-lviii.

proceeds to the Court. Many of my students display an interest in how the Court operates and reaches decisions, information readily available from former clerks and Court watchers like Cohen and Varat. A few well placed notes could set out such information without substantially increasing the text's size. Another approach might be to add an Appendix.

I also like to have my students apply what they learn to hypotheticals as we proceed through the materials. With my first-year students, I distribute as many as ten practice questions which I encourage them to complete. I try to illustrate how they might marshal material from the cases to resolve the hypos. Derrick Bell has effectively incorporated simulated exercises in his casebook, allowing students to do law, find it, read it, and argue it, rather than simply read cases.<sup>158</sup> As a new teacher, I would benefit from the experience of some of the classroom veterans, not so much from a teaching manual, but a set of materials that incorporates effective participatory exercises, helping students build their confidence before the exam.

Finally, I want to say a word about personal staleness which can arise from staying with the same casebook too long. Having learned that Cohen and Varat teaches well, I now think changing casebooks occasionally can have enormous benefits for both students and teachers. Although I am glad I chose Cohen and Varat initially, and while I recommend it for new teachers, I think it is a mistake to stay with one book for too long, especially when newer books often supplement the core materials with the latest critiques of the law, as well as other useful information.

The damage of staying with one book too long is perhaps greatest to students who rely on earlier work summarized by another student. I want my students to know how to brief cases, summarize materials, and stand before their peers and advocate points. I don't want them getting by on another student's sketch, either because they are overwhelmed by the demands of law school or because a topic is particularly confounding. Since the value of summaries is in their production, I want my students to create their own. Changing books occasionally increases the likelihood of more individual work and thus more complete learning.

We who teach these courses need the intellectual challenge of occasionally starting over with a fresh set of readings and problems. Changing casebooks can eliminate the tendency of faculty and students to rely on old outlines from earlier presentations, rather than doing

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158. BELL, *CONSTITUTIONAL CONFLICTS*, *supra* note 8.

original work. I am the first to admit that using the same casebook has made class preparation less time consuming. But I must also admit that unless I reread a case within a few days of the class discussion, I inevitably miss important points of coverage.

#### CONCLUSION

Overall, I give Cohen and Varat high marks, perhaps a B+. My highest compliment is that I continue to use it, primarily because I have not yet seen a more complete book, one that is better written and more readable, as carefully planned and edited, equally comprehensive in principal cases and abstracts, and as student-friendly with prefatory notes and relevant historical commentary. The editors, wisely I think, have not written a casebook for all seasons, but rather one which introduces its readers to many of the most salient questions of constitutional doctrine. On the other hand, a key limitation of the book is that as it has aged, its editors, in too many parts, have not updated the supplemental materials, especially with references to leading scholarly writing and debate, to reflect the vast array of new schools of legal thought and criticism. Because these new jurisprudential voices have taken their places in mainstream legal thought, their omission narrows the educational experience and lessens the intellectual challenge of the materials, undermining the editors' primary goal. This is the book's only glaring weakness when it is compared with newer, emerging casebooks.

In the end, the casebook can serve many purposes in legal education. As we enter the next century, I hope more editors will imagine broader, even more teachable casebooks. Each year, I find new ways to use Cohen and Varat. It has served many of my pedagogic goals and it remains worthy of broad consideration and use.