A Letter from the Section Chair
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December 8, 2010

During the past academic year, AY 09-10, a number of universities closed Legal Studies departments and programs, notably the two oldest in the United States—the University of California-Santa Barbara and the University of Massachusetts-Amherst. These closings, along with a significant drop in tenure-track faculty hiring in our sub-field, are no doubt related to the current, severe and ongoing economic recession. However, initial findings from the new Section Committee on the Status of the Profession, chaired by Mark Graber (former Section chair), suggest that adjuncts and instructors may be replacing more Public Law positions than positions in other sub-fields. The 2010 APSA Executive Committee decided in September to make this committee one of our standing, or regular, committees so that, among other things, we will be able to track hiring-trends by type of institution over time. I encourage all Members of the Section to provide information to this Committee about how your department’s staffing and hiring approach is impacting our sub-field.

We made significant progress this past year on developing a well-laid plan for the Section’s first journal, the Journal of Law & Courts. In the next Newsletter, look forward to hearing from Melinda Gann Hall (Section Chair for the 2011 APSA meetings) about the search underway for the first editor(s).

This issue of the Law and Courts Newsletter will be Art Ward’s last issue. Along with the members of the Editorial Advisory Board, Art has done a fantastic job assembling intellectually engaging symposiums and articles. A big “thank you” goes out to Art. And now, a big “welcome” goes out to the next Law and Courts Newsletter Editor, Kirk Randazzo, who begins his term as Editor with the Winter 2011 issue. Please note that all issues of the Newsletter (current and back issues) are available on the Law and Courts Website.

(Chair’s Column, continued from Page 1)
# Table of Contents

**Letter from the Section Chair**  
*by Christine B. Harrington*  
*pages 1, 4*

**Symposium: A Tribute to Sandy Levinson**

**Sandy Levinson: Enthusiast And Friend**  
*by Mark A. Graber*  
*pages 4—5*

**Sanford Levinson – Lifetime Achievement Award (APSA 2010)**  
*by Gary Jacobsohn*  
*pages 6—7*

**Tribute to Sandy Levinson**  
*by Stephen M. Griffin*  
*pages 8—9*

**Tribute to Sanford Victor Levinson**  
*by Kim Lane Scheppele*  
*pages 9—13*

**Protestant Constitutionalism: A Series of Footnotes to Sandy Levinson**  
*by Jack M. Balkin*  
*pages 13—16*

**An Embarrassing Second Amendment: A Proud Daughter Belatedly (1) Recognizes and (2) Celebrates her Father’s Influence on her Life and Work**  
*by Meira Levinson*  
*pages 16—17*

**Remarks Prepared for Lifetime Achievement Award Panel**  
*by Sanford Levinson*  
*pages 18—20*

**Expecting Justice and Hoping for Empathy**  
*by James L. Gibson*  
*pages 21—25*

**The Canon of Constitutional Law in 2010**  
*by Steven B. Lichtman*  
*pages 26—30*

**Images of APSA 2010**  
*pages 31*

**2010 APSA Awards**  
*pages 32—39*

**Fellowship Announcements**  
*pages 40—41*

**Books to Watch For**  
*pages 41—44*

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If there is one thing that constitutional law professors can agree on – no matter their ideological methodological, or institutional distinctions – it is that there is no shortage of textbook options for the teaching of this subject. This is the case even though for the most part, there is a significant degree of consensus on which cases are the “most important.”

What follows is the result of a study of eighteen leading constitutional law textbooks, designed either for law school courses or for undergraduate courses (a full list of the books in this study appears at the end). Each textbook has a current edition dated no earlier than 2006; twelve of the eighteen have current editions released in 2009 or 2010.

The study tracks which cases are excerpted in the textbooks as “major” cases; cases that are set off from the regular text of the book with their title and citation in a bold heading. The designation of a case as major by the authors of each textbook is a qualitative editorial decision, communicating to the reader that a given case has a special importance in the field.

So, what comprises the canon of constitutional law in 2010?

There are eight cases which are excerpted as major cases in every single textbook in this study:
- *Brown v. Board of Education*
- *Griswold v. Connecticut*
- *Lawrence v. Texas*
- *Lochner v. New York*
- *McCulloch v. Maryland*
- *Planned Parenthood of SE Pennsylvania v. Casey*
- *Roe v. Wade*
- *Youngstown Sheet & Tube Co. v. Sawyer*

There are eight other cases which are excerpted as major cases in 17 out of the 18 textbooks:
- *Boerne v. Flores*
- *Employment Division v. Smith*
- *Gibbons v. Ogden*
- *INS v. Chadha*
- *Marbury v. Madison*
- *Morrison v. Olson*
- *Plessy v. Ferguson*
- *Romer v. Evans*

If analysis expands to cases which are excerpted as major cases in at least ¾ of the textbooks in this study (14 out of 18 books), the list is as follows:
The Most-Excerpted Cases (At Least 14 of 18 Textbooks)

<table>
<thead>
<tr>
<th>BO OKS</th>
<th>CASE NAME</th>
<th>YEAR</th>
<th>AUTHOR</th>
</tr>
</thead>
<tbody>
<tr>
<td>15</td>
<td>BAKER v. CARR</td>
<td>1962</td>
<td>BRENNAN</td>
</tr>
<tr>
<td>17</td>
<td>BOERNE v. FLORES</td>
<td>1997</td>
<td>KENNEDY</td>
</tr>
<tr>
<td>15</td>
<td>BRANDENBURG v. OHIO</td>
<td>1969</td>
<td>per curiam</td>
</tr>
<tr>
<td>18</td>
<td>BROWN v. BOARD OF EDUCATION I</td>
<td>1954</td>
<td>WARREN</td>
</tr>
<tr>
<td>15</td>
<td>BUSH v. GORE</td>
<td>2000</td>
<td>REHNQUIST</td>
</tr>
<tr>
<td>14</td>
<td>THE CIVIL RIGHTS CASES</td>
<td>1883</td>
<td>BRADLEY</td>
</tr>
<tr>
<td>14</td>
<td>COHEN v. CALIFORNIA</td>
<td>1971</td>
<td>HARLAN 2</td>
</tr>
<tr>
<td>14</td>
<td>COOLEY v. BOARD OF WARDENS OF PHILADELPHIA</td>
<td>1852</td>
<td>CURTIS</td>
</tr>
<tr>
<td>15</td>
<td>CRAIG v. BOREN</td>
<td>1976</td>
<td>BRENNAN</td>
</tr>
<tr>
<td>17</td>
<td>EMPLOYMENT DIVISION v. SMITH</td>
<td>1990</td>
<td>SCALIA</td>
</tr>
<tr>
<td>17</td>
<td>GIBBONS v. OGDEN</td>
<td>1824</td>
<td>MARSHALL J</td>
</tr>
<tr>
<td>18</td>
<td>GRISWOLD v. CONNECTICUT</td>
<td>1965</td>
<td>DOUGLAS</td>
</tr>
<tr>
<td>16</td>
<td>GRUTTER v. BOLLINGER</td>
<td>2003</td>
<td>O'CONNOR</td>
</tr>
<tr>
<td>15</td>
<td>HAMDI v. RUMSFELD</td>
<td>2004</td>
<td>O'CONNOR</td>
</tr>
<tr>
<td>14</td>
<td>HAMMER v. DAGENHART</td>
<td>1918</td>
<td>DAY</td>
</tr>
<tr>
<td>14</td>
<td>HEART OF ATLANTA MOTEL v. UNITED STATES</td>
<td>1964</td>
<td>CLARK</td>
</tr>
<tr>
<td>14</td>
<td>HOME BUILDING AND LOAN ASSOCIATION v. BLAISDELL</td>
<td>1934</td>
<td>HUGHES</td>
</tr>
<tr>
<td>17</td>
<td>INS v. CHADHA</td>
<td>1983</td>
<td>BURGER</td>
</tr>
<tr>
<td>14</td>
<td>KELO v. NEW LONDON</td>
<td>2005</td>
<td>STEVENS</td>
</tr>
<tr>
<td>14</td>
<td>KOREMATSU v. UNITED STATES</td>
<td>1944</td>
<td>BLACK</td>
</tr>
<tr>
<td>18</td>
<td>LAWRENCE v. TEXAS</td>
<td>2003</td>
<td>KENNEDY</td>
</tr>
<tr>
<td>18</td>
<td>LOCHNER v. NEW YORK</td>
<td>1905</td>
<td>PECKHAM</td>
</tr>
<tr>
<td>17</td>
<td>MARBURY v. MADISON</td>
<td>1803</td>
<td>MARSHALL J</td>
</tr>
<tr>
<td>14</td>
<td>EX PARTE McCARDLE</td>
<td>1869</td>
<td>CHASE SL</td>
</tr>
<tr>
<td>18</td>
<td>McCULLOCH v. MARYLAND</td>
<td>1819</td>
<td>MARSHALL J</td>
</tr>
<tr>
<td>17</td>
<td>MORRISON v. OLSON</td>
<td>1988</td>
<td>REHNQUIST</td>
</tr>
<tr>
<td>16</td>
<td>NEW YORK TIMES v. SULLIVAN</td>
<td>1964</td>
<td>BRENNAN</td>
</tr>
<tr>
<td>15</td>
<td>NEW YORK TIMES v. UNITED STATES</td>
<td>1971</td>
<td>per curiam</td>
</tr>
<tr>
<td>14</td>
<td>PARENTS INVOLVED IN COMMUNITY SCHOOLS v. SEATTLE</td>
<td>2007</td>
<td>ROBERTS J</td>
</tr>
<tr>
<td>18</td>
<td>PLANNED PARENTHOOD OF SE PENNSYLVANIA v. CASEY</td>
<td>1992</td>
<td>KENNEDY O'CONNOR</td>
</tr>
<tr>
<td>17</td>
<td>PLESSY v. FERGUSON</td>
<td>1896</td>
<td>BROWN</td>
</tr>
<tr>
<td>15</td>
<td>R.A.V. v. CITY OF ST. PAUL</td>
<td>1992</td>
<td>SCALIA</td>
</tr>
<tr>
<td>15</td>
<td>REYNOLDS v. SIMS</td>
<td>1964</td>
<td>WARREN</td>
</tr>
<tr>
<td>18</td>
<td>ROE v. WADE</td>
<td>1973</td>
<td>BLACKMUN</td>
</tr>
<tr>
<td>17</td>
<td>ROMER v. EVANS</td>
<td>1996</td>
<td>KENNEDY</td>
</tr>
<tr>
<td>16</td>
<td>SAN ANTONIO INDEPENDENT SCHOOL DISTRICT v. RODRIGUE</td>
<td>1973</td>
<td>POWELL</td>
</tr>
<tr>
<td>16</td>
<td>THE SLAUGHTER-HOUSE CASES</td>
<td>1873</td>
<td>MILLER</td>
</tr>
<tr>
<td>15</td>
<td>TEXAS v. JOHNSON</td>
<td>1989</td>
<td>BRENNAN</td>
</tr>
<tr>
<td>16</td>
<td>UNITED STATES v. LOPEZ</td>
<td>1995</td>
<td>REHNQUIST</td>
</tr>
<tr>
<td>15</td>
<td>UNITED STATES v. MORRISON</td>
<td>2000</td>
<td>REHNQUIST</td>
</tr>
<tr>
<td>16</td>
<td>UNITED STATES v. NIXON</td>
<td>1974</td>
<td>BURGER</td>
</tr>
<tr>
<td>16</td>
<td>UNITED STATES v. VIRGINIA</td>
<td>1996</td>
<td>GINSBURG</td>
</tr>
<tr>
<td>15</td>
<td>WASHINGTON v. GLUCKSBERG</td>
<td>1997</td>
<td>REHNQUIST</td>
</tr>
<tr>
<td>18</td>
<td>YOUNGSTOWN SHEET &amp; TUBE CO. v. SAWYER</td>
<td>1952</td>
<td>BLACK</td>
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<tr>
<td>15</td>
<td>ZELMAN v. SIMMONS-HARRIS</td>
<td>2002</td>
<td>REHNQUIST</td>
</tr>
</tbody>
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This is a total of 45 cases. The average year for these cases is 1955; the median year is 1973.

The Justices who are responsible for the cases in “the canon” are a diverse group, both in terms of their jurisprudential philosophies as well as their historical reputations:
Kennedy, O’Connor, and Souter are each credited with authorship of Planned Parenthood of SE Pennsylvania v. Casey.

One striking feature of this list is the Justices who do not appear on it. In just about every survey identifying the “greatest” Justices of all time, Oliver Wendell Holmes and Louis Brandeis are ranked in the top five (John Marshall is typically ranked first). Yet neither of them wrote any of the most-commonly-excerpted major cases.

Perhaps an even more startling omission is Roger Taney. The surprise factor in Taney’s absence is not a function of Taney being as highly-regarded as Holmes and Brandeis (he is not, though it should be noted that Taney usually appears in the upper reaches of “greatest ever” surveys). Rather, Taney’s absence indicates that one of the most famous – and infamous – cases in Supreme Court history is not excerpted nearly as often as might have been expected. *Dred Scott v. Sandford* is only excerpted as a major case in 12 of the 18 textbooks in this study.
Of course, several of the Justices who are responsible for cases in “the canon” find themselves in the bottom reaches of most surveys ranking of the Justices … invariably because of their authorship of a prominent and reviled case which is still widely-taught: Rufus Peckham, author of *Lochner v. New York*; William Day, author of *Hammer v. Dagenhart*; Henry Brown, author of *Plessy v. Ferguson*.

It is also worth examining the legal issues at the center of the cases in this list. If the cases are grouped along a few broad subject-matter categories, they break down as follows:

**CIVIL LIBERTIES (RELIGION, SPEECH/PRESS, PRIVACY):** 12


**EQUAL PROTECTION:** 11


**INSTITUTIONAL POWERS:** 9

*Boerne, Chadha, Hamdi, Korematsu, Marbury, McCcardle, Morrison v. Olson, Nixon, Youngstown*

**FEDERALISM:** 4

*Gibbons, Lopez, McCulloch, US v. Morrison*

**COMMERCE CLAUSE:** 3

*Cooley, Hammer, Heart of Atlanta Motel*

**VOTING AND REPRESENTATION:** 3

*Baker, Bush v. Gore, Reynolds*

**CONTRACTS CLAUSE:** 1

*Blaisdell*

**DUE PROCESS / STATE POWERS:** 1

*Lochner*

**EMINENT DOMAIN:** 1

*Kelo*

Both *Heart of Atlanta Motel* and *Korematsu*, of course, have Equal Protection dimensions to them.

The paucity of consensus cases on freedom of religion is surprising; only one religion case, *Employment Division v. Smith*, makes the list. Even cases which provide longstanding methodological rubrics for deciding other religion cases are not excerpted on a consistent basis; *Lemon v. Kurtzman*, for example, is excerpted in only half of the textbooks. Given the Supreme Court’s notorious dithering on religion issues, however, the lack of consensus on which cases “ought” to be taught is perhaps understandable. It may be that selected recent hot-button religion cases such as *Pleasant Grove v. Summum* or *Salazar v. Buono* will find their way into a high percentage of future editions of these textbooks.

One final series of absences is in fact not surprising at all. There are no cases in the broad category of criminal procedure on the list, but there is a logical explanation for this. Law schools offer criminal procedure as an entirely separate course, which means that law school constitutional law courses do not cover these cases (and, consequently, law school constitutional law textbooks tend to omit them). Since 12 of the textbooks in this study are geared for law schools, this in turn means that key criminal procedure precedents will not feature often.

That is not to say, though, that renowned criminal procedure cases are being ignored by the textbooks in this study which are geared for undergraduate constitutional law courses. Indeed, as this selected list shows, certain criminal procedure cases are showing up on a near-constant basis in the undergraduate constitutional law textbooks.
The foregoing is, of course, hardly an exact science. This portion of the textbook study does not purport to measure “greatness” among Supreme Court Justices (although a more detailed analysis, tracking how often individual Justices are excerpted, and which also factors in the excerpting of concurrences and dissents, may shed now new light onto that question). But it is an interesting snapshot of contemporary constitutional law pedagogy.

NOTE:
The eighteen textbooks used in this study are as follows:

- Brest, Paul; Sanford Levinson; Jack M. Balkin; Akhil Reed Amar; and Reva B. Siegel, *Processes of Constitutional Decisionmaking*, 5th ed. (Aspen, 2006)
- Murphy, Walter F.; James E. Fleming; Sotirios A. Barber; and Stephen Macedo, *American Constitutional Interpretation*, 4th ed. (Foundation Press, 2008)
- Paulsen, Michael Stokes; Steven G. Calabresi; Michael W. McConnell; and Samuel L. Bray, *The Constitution of the United States* (Foundation Press, 2010)
- Schultz, David; John R. Vile; and Michelle D. Deardorff, *Constitutional Law in Contemporary America*, (Oxford University Press, 2010)

Six of these texts are designed for undergraduate constitutional law courses: Epstein/Walker, Fisher/Harriger, Mason/Stephenson, O’Brien, Rossum/Tarr, and Schultz/Vile/Deardorff. Five of these six texts are two-volume sets, geared towards the typical collegiate constitutional law regimen of separate semester classes in civil liberties and governmental powers/structure. Only the Mason/Stephenson text is a single volume designed for undergraduate courses.

The other twelve texts are law school casebooks.