



Law & Courts

NEWSLETTER OF THE LAW & COURTS SECTION OF
THE AMERICAN POLITICAL SCIENCE ASSOCIATION

A Letter from the Section Chair

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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](#).

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The Canon of Constitutional Law in 2010

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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 1
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 $\frac{3}{4}$ 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)

BO OKS	CASE NAME	YEAR	AUTHOR
15	BAKER v. CARR	1962	BRENNAN
17	BOERNE v. FLORES	1997	KENNEDY
15	BRANDENBURG v. OHIO	1969	per curiam
18	BROWN v. BOARD OF EDUCATION 1	1954	WARREN
15	BUSH v. GORE	2000	REHNQUIST
14	THE CIVIL RIGHTS CASES	1883	BRADLEY
14	COHEN v. CALIFORNIA	1971	HARLAN 2
14	COOLEY v. BOARD OF WARDENS OF PHILADELPHIA	1852	CURTIS
15	CRAIG v. BOREN	1976	BRENNAN
17	EMPLOYMENT DIVISION v. SMITH	1990	SCALIA
17	GIBBONS v. OGDEN	1824	MARSHALL J
18	GRISWOLD v. CONNECTICUT	1965	DOUGLAS
16	GRUTTER v. BOLLINGER	2003	O'CONNOR
15	HAMDI v. RUMSFELD	2004	O'CONNOR
14	HAMMER v. DAGENHART	1918	DAY
14	HEART OF ATLANTA MOTEL v. UNITED STATES	1964	CLARK
14	HOME BUILDING AND LOAN ASSOCIATION v. BLAISDELL	1934	HUGHES
17	INS v. CHADHA	1983	BURGER
14	KELO v. NEW LONDON	2005	STEVENS
14	KOREMATSU v. UNITED STATES	1944	BLACK
18	LAWRENCE v. TEXAS	2003	KENNEDY
18	LOCHNER v. NEW YORK	1905	PECKHAM
17	MARBURY v. MADISON	1803	MARSHALL J
14	EX PARTE McCARDLE	1869	CHASE SL
18	McCULLOCH v. MARYLAND	1819	MARSHALL J
17	MORRISON v. OLSON	1988	REHNQUIST
16	NEW YORK TIMES v. SULLIVAN	1964	BRENNAN
15	NEW YORK TIMES v. UNITED STATES	1971	per curiam
14	PARENTS INVOLVED IN COMMUNITY SCHOOLS v. SEATTLE	2007	ROBERTS J
18	PLANNED PARENTHOOD OF SE PENNSYLVANIA v. CASEY	1992	KENNEDY O'CONNOR SOUTER
17	PLESSY v. FERGUSON	1896	BROWN
15	R.A.V. v. CITY OF ST. PAUL	1992	SCALIA
15	REYNOLDS v. SIMS	1964	WARREN
18	ROE v. WADE	1973	BLACKMUN
17	ROMER v. EVANS	1996	KENNEDY
16	SAN ANTONIO INDEPENDENT SCHOOL DISTRICT v. RODRIGUEZ	1973	POWELL
16	THE SLAUGHTER-HOUSE CASES	1873	MILLER
15	TEXAS v. JOHNSON	1989	BRENNAN
16	UNITED STATES v. LOPEZ	1995	REHNQUIST
15	UNITED STATES v. MORRISON	2000	REHNQUIST
16	UNITED STATES v. NIXON	1974	BURGER
16	UNITED STATES v. VIRGINIA	1996	GINSBURG
15	WASHINGTON v. GLUCKSBERG	1997	REHNQUIST
18	YOUNGSTOWN SHEET & TUBE CO. v. SAWYER	1952	BLACK
15	ZELMAN v. SIMMONS-HARRIS	2002	REHNQUIST

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:

AUTHOR OF MAIN OPINION	# OF MAIN OPINIONS
HUGO BLACK	2
HARRY BLACKMUN	1
JOSEPHY BRADLEY	1
WILLIAM BRENNAN	4
HENRY BROWN	1
WARREN BURGER	2
SALMON CHASE	1
TOM CLARK	1
BENJAMIN CURTIS	1
WILLIAM DAY	1
WILLIAM O. DOUGLAS	1
RUTH BADER GINSBURG	1
JOHN HARLAN "the younger"	1
CHARLES EVANS HUGHES	1
ANTHONY KENNEDY *	4
JOHN MARSHALL	3
SAMUEL MILLER	1
SANDRA DAY O'CONNOR *	3
RUFUS PECKHAM	1
LEWIS POWELL	1
WILLIAM REHNQUIST	6
JOHN ROBERTS	1
ANTONIN SCALIA	2
DAVID SOUTER *	1
JOHN PAUL STEVENS	2
EARL WARREN	2
<i>per curiam</i>	2

** 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

Brandenburg, Casey, Cohen, Employment Div. v. Smith, Glucksberg, Griswold, Lawrence, NY Times v. Sullivan, NY Times v. US, R.A.V., Roe, Texas v. Johnson

EQUAL PROTECTION: 11

Brown, Civil Rights Cases, Craig v. Boren, Grutter, P.I.C.S. v. Seattle, Plessy, Romer, SAISD v. Rodriguez, Slaughter-House, US v. Virginia, Zelman

INSTITUTIONAL POWERS: 9

Boerne, Chadha, Hamdi, Korematsu, Marbury, McCardle, 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. Sumnum* 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

CRIMINAL PROCEDURE CASE	# OF UNDERGRADUATE TEXTBOOK EXCERPTS (out of 6)
<i>Gideon v. Wainwright</i> (1963)	6
<i>Katz v. United States</i> (1967)	6
<i>Mapp v. Ohio</i> (1961)	6
<i>Gregg v. Georgia</i> (1976)	5
<i>Miranda v. Arizona</i> (1966)	5
<i>Olmstead v. United States</i> (1928)	5
<i>Powell v. Alabama</i> (1932)	5
<i>United States v. Leon</i> (1984)	5

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 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:

- Barnett, Randy, *Constitutional Law* (Aspen, 2008)
- Brest, Paul; Sanford Levinson; Jack M. Balkin; Akhil Reed Amar; and Reva B. Siegel, *Processes of Constitutional Decisionmaking*, 5th ed. (Aspen, 2006)
- Chemerinsky, Erwin, *Constitutional Law*, 3rd ed. (Aspen, 2009)
- Choper, Jesse H.; Richard Fallon, Jr.; Yale Kamisar; and Steven H. Shiffrin, *Constitutional Law*, 10th ed. (West, 2006)
- Epstein, Lee; and Thomas G. Walker, *Constitutional Law for a Changing America*, 7th ed., (CQ Press, 2010)
- Farber, Daniel A.; William N. Eskridge, Jr.; and Philip P. Frickey, *Constitutional Law*, 4th ed. (West, 2009)
- Fisher, Louis; and Katy J. Harriger, *American Constitutional Law*, 8th ed., (Carolina Academic Press, 2009)
- Maggs, Gregory E.; and Peter J. Smith, *Constitutional Law: A Contemporary Approach* (West, 2009)
- Mason, Alpheus Thomas; and Donald Grier Stephenson, *American Constitutional Law*, 15th ed. (Pearson, 2007)
- Murphy, Walter F.; James E. Fleming; Sotirios A. Barber; and Stephen Macedo, *American Constitutional Interpretation*, 4th ed. (Foundation Press, 2008)
- O’Brien, David M. *Constitutional Law and Politics*, 7th ed. (Norton, 2008)
- Paulsen, Michael Stokes; Steven G. Calabresi; Michael W. McConnell; and Samuel L. Bray, *The Constitution of the United States* (Foundation Press, 2010)
- Rossum, Ralph A.; and G. Tarr, *American Constitutional Law*, 8th ed. (Westview Press, 2009)
- Rotunda, Ronald D., *Modern Constitutional Law*, 9th ed. (West, 2009)
- Schultz, David; John R. Vile; and Michelle D. Deardorff, *Constitutional Law in Contemporary America*, (Oxford University Press, 2010)
- Stone, Geoffrey R; Louis Michael Seidman; Cass R. Sunstein; Mark V. Tushnet; and Pamela S. Karlan, *Constitutional Law*, 6th ed. (Aspen 2009)
- Sullivan, Kathleen M.; and Gerald Gunther, *Constitutional Law*, 17th ed. (Foundation Press, 2010)
- Varat, Jonathan D; William Cohen; and Vikram D. Amar, *Constitutional Law*, 13th ed. (Foundation Press, 2009)

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.