1977

Processes of Constitutional Decisionmaking: Cases and Materials

Henry Paul Monaghan
Columbia Law School, monaghan@law.columbia.edu

BOOK REVIEW

PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS. By Paul Brest.[1] Boston: Little, Brown & Co. 1975. Pp. xlv, 1377. $22.50.

Reviewed by Henry P. Monaghan[2]

Authors of constitutional law casebooks traditionally have presented their subject through Supreme Court opinions arranged under the three general groupings of judicial review, distribution of powers (federalism and separation of powers), and individual liberties.[3] This organizational consensus rests upon two widely held and deep beliefs: a basic course in constitutional law should (1) consist of a rigorous and sustained study of substantive doctrine and (2) be undertaken principally through a detailed examination of Supreme Court decisions, albeit supplemented in varying degrees by authors' questions and law review excerpts.[4]

Paul Brest's *Processes of Constitutional Decisionmaking* poses a formidable challenge to this standing wisdom. The book is divided into two parts. Part I concentrates on the process by which constitutional principles are derived by any decisionmaker, whether that person be judge, legislator, or executive official, and Part II addresses the special role of the judiciary in constitutional exegesis. In place of substantive doctrinal exposition, Professor Brest's focus is on questions of process and methodology which cut across the standard substantive topics. Indeed, six of his fifteen chapters are entirely process-oriented; while the remaining nine chapters center on substantive doctrinal exposition within the traditional three groupings, even here the emphasis is upon methodology.

The end result is an important and exciting contribution. *Constitutional Decisionmaking* is certainly an appropriate vehicle for an advanced course in constitutional law. While I can readily understand a desire to use it in that context, I concur with Professor Brest's fundamental belief that questions of process and

---

[1] Professor of Law, Stanford University.

[2] Professor of Law, Boston University.

[3] There has been occasional effort at a historical development. *See* 1 P. FREUND, A. SUTHERLAND, M. HOWE & E. BROWN, CONSTITUTIONAL LAW: CASES AND OTHER PROBLEMS 3–42 (3d ed. 1967). More recently, there has been some move to omit or postpone to the end of the course detailed examination of materials on judicial review. *See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1532–652 (9th ed. 1975).

[4] Professor Gunther, while following the traditional format, has directed special attention to the constraints inherent in the institution of judicial review. *See* G. GUNTHER, *supra* note 3.

methodology are crucial intellectual questions which should be given far more emphasis in a first course in constitutional law.[5] For the answers posed, explicitly or (as is more often the case) implicitly, to these insistent questions shape the boundaries of substantive doctrinal developments.[6]

While *Constitutional Decisionmaking*'s major innovation lies in its focus on the process of decisionmaking,[7] its attention to the interaction of various decisionmakers and to the institutional constraints on judicial process also represents an important advance over previous casebooks. While showing in Part I that troublesome methodological problems exist regardless of the identity of the constitutional decisionmaker, Professor Brest repeatedly (pp. 87–101) emphasizes that the judicial perspective on constitutional questions is often a limited one. Far more frequently than realized, judicial rejection of challenges to specific conduct is not so much a positive declaration of constitutionality as it is a declaration that, given the institutional constraints limiting the judicial process, the challenged conduct cannot be adjudicated improper.[8] Part II of *Constitutional Decisionmaking*

[5] I recognize that a skillful teacher will deal to some degree with the problems of language, purpose, and history as well as other "process" questions in the context of the traditional subject matter categories, but I think it more satisfactory to have some materials in front of the student, explicitly doing so in a sustained manner. Moreover, a first-year course in constitutional law provides the student with a discrete and highly visible context for consideration of "legal process" questions, and this should generate a beneficial spillover for other courses.

[6] I, of course, put to one side as unacceptable the view that a court is merely a power organ and that, consequently, the study of its processes and methodology has little merit. *See* Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1363 n.3 (1973).

[7] The process questions considered by Professor Brest include the appropriate role of language, purpose, history, changed circumstances, structure and relationship, and extraconstitutional values in the formulation of constitutional principles. This inquiry is pursued in introductory materials on constitutional interpretation (pp. 1–171), and in subsequent chapters on the traditional subjects of federalism, separation of powers, and the fourteenth amendment (pp. 172–889). In addition, there is a chapter on "constitutional facts" (pp. 854–953) exploring the relevance and judicial ascertainment of facts in the context of the death penalty and race discrimination cases.

Since many of the issues listed above enter into the interpretation of any written document and concern the entire legal order, it is not surprising that much of the material initially considered is not concerned with constitutional law at all — for example, extracts from Wasserstrom's *The Judicial Decision* and from the exchange between Professors H.L.A. Hart and Lon Fuller over the relationship between language and purpose in statutory construction (pp. 3–5, 36–40).

[8] The intractable problem of racially rooted exclusionary zoning provides a recent illustration of the phenomenon. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 97 S. Ct. 555 (1977). Mr. Justice Powell's opinion apparently assumes, *compare id. with* Palmer v. Thompson, 403 U.S. 217 (1971), that if proven, an impermissible racial motive would justify voiding a facially

explores in detail the sources of these constitutional constraints and the ways in which courts operate within them. It deals with a wide range of problems, from the justifications for judicial review, the requirement of principled decisionmaking, modes of judicial review, judicial inquiry into the motives of other decisionmakers, and stare decisis, to the "case or controversy" requirement and its allied limitations.

Professor Brest also departs from tradition by relying heavily on source material other than Supreme Court decisions. For example, the book contains extracts from Senate hearings on the confirmation of a former attorney general (pp. 15–31), the debates of the framers of the fourteenth amendment (pp. 463–72), and the controversy between Hamilton and Madison on the nature of Presidential authority (pp. 411–16). Efforts are made through notes and copious law review extracts to acquaint the students with the wider intellectual and social context in which constitutional principles arise.[9] Most importantly, Professor Brest's thinking is very much in evidence throughout the book. He provides essays (often structured around law review excerpts) in which he suggests relevant inquiries and appropriate modes for analysis.[10] At times, the essays seem to overshadow the opinions of the Court; they, and not the opinions, seem to be primary material for class consideration. I do not make this remark disparagingly. For the essays are of the highest quality — lucid, stimulating, and illuminating.[11]

---

neutral and fairly applied zoning ordinance. On that unexamined substantive premise he deals at some length with the difficult question of ascertaining motive. Although his opinion goes as far as possible in allowing proof of discriminatory motive, 97 S. Ct. at 564–65, it is readily apparent that courts will have great difficulty in determining the motives of multimember bodies. This difficulty is, in fact, insurmountable if, as the opinion suggests, local officials might have some general privilege not to testify. *Id.* at 565. *See generally* Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 YALE L.J. 317 (1976).

[9] For example, prior to the excerpt of Lochner v. New York, 198 U.S. 45 (1905), there is an extensive note which introduces (or reintroduces, as the case may be) students not only to the influential proponents of Social Darwinism, but also to the organized bar's espousal of that and other doctrines of limited government.

[10] For example, Professor Brest provides essays on the validity of racially dependent classifications (pp. 480–89, 543–49), on the meaning of the minimum rationality test (pp. 557–66, 572–75), and on the requirement of principled decisionmaking (pp. 1099–118).

[11] Professor Brest's views are not beyond challenge, as he would be the first to acknowledge. He is apparently far more comfortable than I am with a spacious concept of judicial lawmaking under the general language of the fourteenth amendment. He seems to assume that this is permissible because the framers of that amendment did not expressly *restrict* the Court (*e.g.*, pp. 475 (question (d)), 557, 576, 733–34). As an original matter, I would have thought that the question was

While I subscribe to Professor Brest's fundamental approach and have considerable admiration for the teaching tool he has produced, I do have difficulty with the degree to which he has departed from the traditional view that a constitutional law course should focus primarily on case materials. *Constitutional Decisionmaking* has far fewer cases than its counterparts.[12] This is the result of omission of doctrinal subjects and reduction in the case material in the areas covered. The cases which are reproduced are frequently heavily edited. Even more importantly, the cases summarized in the notes are, in my judgment, often so truncated that they are pedagogically sterilized.

Since the reduction reflects Professor Brest's desire for an introductory teaching casebook, not a quasi-treatise, the reduction standing alone is not objectionable. However, the sparsity of court opinions poses problems transcending a first-year teacher's concern with the development of case-reading skills. Indeed, it detracts from the book's ability to explore the process issues, since the working of the legal process through case decisions is insufficiently illustrated. With the exception of the perhaps overemphasized racial equal protection cases,[13] this combination of fewer cases and heavy editing also presents real difficulties for anyone interested in sustained doctrinal analysis, the traditional staple of constitutional law courses. The impact of the editing process becomes immediately apparent in the federalism materials; [14] however, my general point is not confined to any

whether the framers had authorized (not restricted) that activity. Any assertion, therefore, that the due process and equal protection clauses are "avowedly developmental" (p. 1125), while it may be descriptively accurate, is normatively doubtful. It was, after all, the organized bar and the courts, not the framers of the fourteenth amendment, who loosened the equal protection clause from its moorings in racial discrimination. More importantly, it was they who wholly transformed the meaning of "liberty" and "process" in the due process clause. *See* Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L.J. 405 (1977). These developments are far too ingrained in the political-constitutional order to admit of any major reassessment, Paul v. Davis, 424 U.S. 693 (1976), *criticized in* Monaghan, *supra*, to the contrary notwithstanding. The remaining, but important, question is the extent to which the constitutional protection of "liberty" authorizes special judicial protection for extraconstitutional values, those not readily inferable from the constitutional text, structure, or history.

[12] Based on the table of cases and my use of the book, I estimate that the shortfall is about 50%.

[13] Even here, I wish that some explicit attention had been given to the "white flight-tipping point" problem.

[14] Federal power to spend and to tax for regulatory purposes is gone over hurriedly, and at the cost of an opportunity to focus on the limits of the judicial process. The case material on the negative impact of the commerce clause on state regulation is extremely truncated — South Carolina State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177 (1938), is stated in slightly over a single page — and consideration of state taxation of interstate commerce is entirely eli...

particular area — virtually wherever one turns, doctrinal exposition is at least difficult. Professor Brest's heavy editing represents, I think, an overreaction to prior casebooks' nearly exclusive reliance on substantive doctrinal exposition.

Beyond the heavy editing, there are other difficulties. Some (not including me) will regret the omission of any materials on the first amendment. Other omissions raise questions concerning the proper relationship between a first course in constitutional law and other more specialized courses with constitutional law dimensions — for example, administrative law, family law, the law of the federal courts, taxation, and property. Professor Brest's treatment of three traditional topics of a constitutional law course highlights this difficulty.

First, *Constitutional Decisionmaking* does not permit a close look at the protection afforded by the Constitution to private property. The economic substantive due process materials are adequate. But treatment of the contracts clause is not. *Home Building & Loan Association v. Blaisdell*[15] is taken up as a main case in a "process" chapter (p. 146) and is followed by a brief "before and after" developments note which treats the case in a cursory fashion. For example, the core of the *City of El Paso v. Simmons*[16] holding that the contract clause protects only promises central to the agreement[17] is not stated at all (p. 157). Except for a brief note, the related materials on the "taking" clause are eliminated on the premise that they are better considered in land use courses (pp. 739–40). I disagree. Examination of these materials in the context of the general "due process field theory" gives a student perspective on the fifth amendment and a feeling for the limited utility of its taking component as a principled device with which courts can protect private property from the reach of regulatory power.

Second, *Constitutional Decisionmaking*'s emphasis on deci-

---

inated. For teachers anxious to get past the federalism material all this will be a plus. But it is not for me.

My own practice had been to consider the negative impact materials after a consideration of the fourteenth amendment's minimum rationality restraints, thus emphasizing the possible differences between the two forms of attack in terms of both the substantive criteria employed and the resulting nature of the evidentiary problems presented. While the material lacked the glamour of the race cases, it was, I thought, "lawyers' law," an area where students do not start with strong preconceptions and where they could be led to examine the problems in a disciplined manner with (hopefully) a developing recognition of the institutional restraints limiting the courts.

[15] 290 U.S. 398 (1934). *See also* United States Trust Co. v. New Jersey, 45 U.S.L.W. 4418 (U.S. April 12, 1977).

[16] 379 U.S. 497 (1965).

[17] *See id.* at 514–15.

sionmakers other than courts coupled with the heavy editing of cases reveals a limitation more evident here than in most casebooks: a failure to reconcile the traditional subject matter of a constitutional law course with the growing statutory protection of civil rights.[18] The proliferation of recent federal civil rights legislation, coupled with the Supreme Court's expansive construction of the opaque Reconstruction acts, has meant that the subject of constitutional law may become increasingly divorced from that of civil rights. For the practicing lawyer, civil rights legislation, with all of its intricacies, and not the Constitution, has become the focus of attention. However, a constitutional law course still has a role in alerting students to the complexity and importance of civil rights legislation.

Third, while the chapter on separation of powers has much of interest, it too might be said to suffer from a tendency to defer certain issues for consideration in more specialized courses. This chapter has what are, to my mind, failings common to all casebooks in this area, both in terms of what is included and what is not. For example, I do not see the justification for extensive consideration of the marginally important impeachment device (pp. 358–70). On the other hand, while perhaps alone in my view, I think that constitutional law casebooks should consider in detail the quite basic question of Presidential power to control the administration of law. Professor Brest, following the general approach, presents the crucial cases in truncated form (pp. 368–70), and eliminates entirely the "standing" aspect of *United States v. Nixon*[19] (p. 382). I would also include far more on the delegation problems than customarily appears in a first book (pp. 356–58). That material is centrally important to an adequate understanding of the role of Congress in the constitutional order; moreover, it is important to consider the context of the *Steel Seizure Case*[20] (p. 393). I recognize that Presidential control and delegation problems are considered in administrative law casebooks. But I suspect that they are not emphasized there. In any event, I think they are at the core of any introduction to the doctrine of separation of powers.

[18] For example, the complex holding in Griffin v. Breckenridge, 403 U.S. 88 (1971), is summarized in ten lines (p. 674). The footnote asserting (p. 676 n.37) that *Griffin* overruled Collins v. Hardyman, 341 U.S. 651 (1951), is at best misleading. *Collins* did not involve racial discrimination or the right to travel. Accordingly, to overrule its *specific* holding and apply 42 U.S.C. § 1985(3) (1970) to private interference with freedom of speech would require an explicit overruling of The Civil Rights Cases, 109 U.S. 3 (1883). Compare the treatment of these statutes in G. GUNTHER, *supra* note 3, at 898–1039.

[19] 418 U.S. 683 (1974).

[20] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

Finally, I think material on the increasingly important "legislative veto" is needed.[21]

There are, in sum, costs [22] as well as advantages to the use of this casebook. For some those costs will be more weighty than for others. For myself the book represents an impressive work despite any flaws. Further, some of the defects are unnecessary and could be easily ameliorated in a subsequent edition. The crucial point remains that *Constitutional Decisionmaking* is an admirable, important, and exciting work which will, I believe, materially affect the format of future constitutional law casebooks and the way in which the subject is taught.

---

[21] *See* Clark v. Valeo, 45 U.S.L.W. 2349 (D.C. Cir. Jan. 21, 1977), *appeal docketed*, 45 U.S.L.W. 3544 (U.S. Feb. 9, 1977) (No. 76-1105).

[22] Nothing would be gained by attempting to catalogue more minor difficulties, which are often highly subjective. I would simply say that, from my perspective, some of the notes work well, some not so well. For example, the attempt to take up the "incorporation" debate by a law review extract and a note (pp. 693-704) seems to me not successful. Reproduction of Palko v. Connecticut, 302 U.S. 319 (1973), should have preceded these materials. On other occasions the detail of some of the notes seems to distract from the point being made.