

Catholic University Law Review

Volume 25
Issue 2 *Winter 1976*

Article 12

1976

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Recommended Citation

Jon Van Dyke, *PROCESS OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS*. By Paul Brest. Boston: Little Brown and Company. 1975. Pp. x, 1377., 25 Cath. U. L. Rev. 459 (1976). Available at: <https://scholarship.law.edu/lawreview/vol25/iss2/12>

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BOOK REVIEWS

PROCESS OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS. By Paul Brest.¹ Boston: Little Brown and Company. 1975. Pp. x, 1377.

Reviewed by Jon Van Dyke²

Paul Brest's new constitutional law casebook is one of the most important and innovative contributions ever made in this field. Because of the book's creative ordering of materials, it immediately demythologizes the decision-making process of the Supreme Court and makes understandable the doctrines that are being formed, particularly those involving the equal protection and due process clauses. This book will prove to be an invaluable aid to law students, practitioners, and judges alike.

Instead of proceeding substantively, examining one doctrinal problem after another, Professor Brest begins by surveying the different approaches that Justices of the Supreme Court have taken in interpreting the Constitution—ranging from a strict adherence to the language of the Constitution, to an examination of the historical setting of the constitutional provisions, to the more modern “functional” approach through which the Justices attempt to adhere to the spirit of the Constitution rather than to the letter of its language. By subjecting a number of different legal questions to this form of analysis, the author is able to demonstrate how malleable the supposedly rigid constitutional provisions are and thus to help the student realize how political all Supreme Court decisions ultimately can be. Once this process is made explicit, students need no longer flounder, searching for “law” as if it were written on tablets from heaven, and instead may feel free to examine the competing arguments and thereby arrive at an understanding of whether the Court's solution is, in fact, the best possible resolution of a problem.

I am using these materials for the second year, having used them in loose-leaf form two years ago, and I notice this year, as then, that students using the Brest materials seem to ask more basic and more fundamental questions

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from the outset of the course. The law that is more or less settled—the law involving the commerce clause, for instance—is presented in an orderly and understandable fashion consuming as few pages as possible. The space saved is then devoted to a fuller explanation of those problems that remain unresolved.

The book's greatest contribution is in helping to disperse the fog that has clouded understanding of the two important clauses of the fourteenth amendment—the equal protection and due process clauses. These subjects are introduced about one-third of the way into the book (p. 436), and the author uses them to explore thoroughly the process of judicial decisionmaking. He starts logically with the race cases, the first subject that the Court described as creating a "suspect category." Extensive historical information is provided about the writing and ratification of the fourteenth amendment which opens discussion of whether the amendment itself provides an answer to the question of school segregation. Other race cases are subsequently presented in a way that promotes discourse on the concept of "suspectness." Why are racial categories "suspect"? Are they always "suspect"? What is it about race that makes us "suspicious" about its use as a means of classification?

This material is fascinating in and of itself, but it is also enormously helpful when the focus turns to other suspect categories, since the method of presentation allows a class to discuss intelligently whether other traits should be viewed as suspiciously as race, in particular alienage, age, sex, illegitimacy, and socio-economic status. By using law journal articles and his own presentation of arguments, Professor Brest helps students try to resolve both the logical problems and the policy issues involved in the articulation of legal principles. The criteria developed to determine whether a category is suspect seem to indicate, for example, that the Court should be more willing than it has been to view sex as a suspect category.

Another example of how the use of materials assists student understanding is the attention given to the concept of a "rational basis" (pp. 552-75). The Court has stated in many contexts that most legislation will be deemed constitutional if the legislature has a rational basis for its enactment. But what constitutes rationality? Too frequently, judicial decisions seem to give that phrase no content whatsoever. Selecting (as he does throughout the book) the best paragraphs from among the most creative and carefully written law journal articles, the author provides the student with several examples of what a court might logically consider to be a workable definition of that term and thus enables the student to decipher judicial opinions with greater critical tools. Because the issues that our Constitution addresses are

too important to be delegated completely to the Supreme Court, and because the Justices inevitably need help in articulating doctrine in this politically volatile and conceptually difficult field, this reliance on the writings of scholars is particularly justified. I cannot help but feel that if the Justices read through the material on the equal protection and due process clauses collected in this book, they would be assisted in reaching more consistent decisions.

After exploring the contours of the suspect category component of the equal protection clause, Professor Brest inserts a chapter examining the problem of state action and then presents an enormously valuable 216-page chapter entitled "Fundamental Values," in which he follows the uneven path of the ground for decisionmaking usually described as "substantive due process" (pp. 678-894). The many manifestations of this judicial mechanism—"natural law," the ninth amendment, economic due process, the right to privacy, and the fundamental right component of the equal protection clause—are neatly brought together under one umbrella. They are linked by the common thread that the Justices using the doctrine must rely at least to some extent on their personal hierarchy of values. The question of what role the Court should play in our system of government is raised here, as in other parts of the book, and the power that the Court can wield in its almost unguided discretion is bared for all to view. Later, the author asks directly whether judicial review is justifiable (p. 956), outlines the methods by which the Court can justify a decision (p. 1086), and provides a stratification of the scope and stringency of the Court's scrutiny (p. 987).

This book contains other organizational features that deserve to be noted. The procedural problems normally taught in a constitutional law course are placed at the end of the book rather than at the beginning. My experience suggests that it is almost impossible to maintain student interest in the problems of standing, ripeness, mootness and abstention at the outset of the course when the students have no knowledge of the substantive issues at stake. Placed at the end of the course, however, their importance becomes clearer and student discussion becomes heated and concerned. Also, Professor Brest discusses judicial review of the legislature's motive at several points (*e.g.*, pp. 87-101, 515-16, 1018-32), and demonstrates how inconsistent the Court has been. He also looks at how the Court has used social science data (*e.g.*, pp. 113, 460-61, 894-955), and again shows that the Court has adopted different approaches from time to time.

One major omission detracts somewhat from this otherwise almost perfectly organized volume. Problems involving the first amendment (including the problem of "symbolic speech") are introduced at a number of places to

illustrate methods of reaching decisions, but the substantive content of the first amendment is not presented systematically or thoroughly. When I used Professor Brest's materials two years ago, I prepared a supplement on the first amendment consisting of edited versions of a number of cases³ and this year I will revise the package somewhat⁴ to demonstrate the Burger Court's new "balancing" approach toward the first amendment. Although *Paris Adult Theatre I v. Slaton*⁵ and *Stanley v. Georgia*⁶ are included in the book's examination of the Court's protection of "fundamental values," the use of additional cases helps to amplify the problems of regulating pornography.⁷

The book does not have any discussion of interstate taxation and has somewhat sketchy materials on the foreign affairs power. I would also have preferred some additional material on the war power and the problem of executive agreements. Otherwise, the book is excellent, continually refreshing, and challenging. The organization, editing and commentaries all aid in presenting a composite picture of how major decisions were made and how these precedents should be applied to current problems. Although the book is original and is a reflection of the creative thinking of Professor Brest, one senses in addition something of the judicial integrity that is associated with Bailey Aldrich and John M. Harlan, the two jurists in whose chambers the author clerked. Both of these judges' opinions reflect a complete understanding and deep concern for the implications of any doctrine they might employ in reaching a decision. This new casebook applies those high critical standards to the major constitutional decisions that guide our nation and reveals

3. The supplement included: *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973); *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973); *Branzburg v. Hayes*, 408 U.S. 665 (1972); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Gregory v. City of Chicago*, 394 U.S. 111 (1969); *Cox v. Louisiana (II)*, 379 U.S. 559 (1965); *Cox v. Louisiana (I)*, 379 U.S. 536 (1965); *Teamsters Local 695 v. Vogt, Inc.*, 354 U.S. 284 (1957); *Dennis v. United States*, 341 U.S. 494 (1951); *Feiner v. New York*, 340 U.S. 315 (1951); *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Saia v. New York*, 334 U.S. 558 (1948); *Cox v. New Hampshire*, 312 U.S. 569 (1941); *Near v. Minnesota*, 283 U.S. 697 (1931); *Whitney v. California*, 274 U.S. 357 (1927); *Gitlow v. New York*, 268 U.S. 652 (1925); *Abrams v. United States*, 250 U.S. 616 (1919); *Schenck v. United States*, 249 U.S. 47 (1919).

4. *Bigelow v. Virginia*, 421 U.S. 809 (1975), will replace *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973). The following cases will be added: *Lehman v. Shaker Heights*, 418 U.S. 298 (1974); *Pell v. Procunier*, 413 U.S. 817 (1974); *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

5. 413 U.S. 49 (1973).

6. 394 U.S. 557 (1969).

7. I plan to distribute *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), and *Miller v. California*, 413 U.S. 15 (1973).

that many of the decisions cannot withstand such careful scrutiny. Professor Brest then points us toward other grounds for decision or other possible results and assists us in moving toward a more logical and humane set of constitutional interpretations.

I would like to note in conclusion that although I have given high praise to Brest's new casebook (and although I expect to continue using this casebook for the next several years), I do not mean to imply that the other casebooks in the field are inadequate. In fact, we are fortunate in having a number of intelligently assembled casebooks in the constitutional law field and two of those have been improved through new editions that have been published this fall. I have used the eighth edition of Gunther and Dowling for a number of years, and Gerald Gunther's revision of this casebook is a substantial improvement of an already fine teaching tool.⁸ Like Professor Brest, he has placed the procedural material at the end of his volume and has combined substantive due process with the right to privacy. The fourth edition of Lockhart, Kamisar, and Choper⁹ continues to be the most comprehensive casebook in the field, and it is always the first book to which I turn when searching for an answer to any specific question.

THE MORALITY OF CONSENT. By Alexander M. Bickel.¹ New Haven and London: Yale University Press. 1975. Pp. vii, 156.

*Reviewed by Albert Broderick, O.P.*²

The morning's *Washington Post* editorial proclaimed do's and don'ts for a President looking for a Supreme Court nominee, reminding us that for the first time in half a century no member of academia sits on the Court. It is easy to forget that Justice Douglas was appointed as a professor from Connecticut, not as a lawyer from his beloved Washington state, and that

8. G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* (9th ed. 1975).

9. W. LOCKHART, Y. KAMISAR, & J. CHOPER, *CONSTITUTIONAL LAW, CASES—COMMENTS—QUESTIONS* (4th ed. 1975).

1. Professor Bickel, now deceased, was a Sterling Professor of Law at Yale Law School when he prepared this book.

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