this themselves. I am skeptical of the ability of first year students to do so.

Let me conclude by stating that Kalman's discussion of the intellectual background of legal realism is interesting, though not as deep or comprehensive as I would have liked. The principal value of her book is as an institutional history of Yale Law School. Anyone interested in that subject will find Kalman's book essential reading.

TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE. By Ronald D. Rotunda,[1] John E. Nowak,[2] and J. Nelson Young.[3] St. Paul, Mn.: West Publishing Co. 1986. 3 Volumes, $240.00.

Ralph A. Rossum[4]

Most revised editions of constitutional treatises and casebooks are merely updates of the previous edition, with only marginal changes made in the bulk of the text. But there are exceptions. In the process of revising the second edition of their constitutional treatise, Professors Ronald Rotunda, John Nowak, and J. Nelson Young have gone from 1317 pages of material in a single volume to 2581 pages in three volumes. They thereby confirmed their fear, expressed in the first edition, that it "may be impossible to prepare a single volume treatise on Constitutional law."

The authors state that their purpose is to provide an up-to-date summary and analysis of the principal areas of constitutional law. They disclaim originality of argument: "It is far too late in the history of constitutional scholarship for the authors of a treatise such as this to claim full credit for the ideas presented in their work." Appropriately for a treatise, the organization is conventional: they address governmental power in Volume I and limitations on governmental power and the protection of individual rights and liberties, as secured by the Bill of Rights and the post-Civil War amendments, in Volumes II and III. In one of the most valuable features of the work, they append at the end of Volume III the Dec-

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laration of Independence; the Articles of Confederation; the Northwest Ordinance; the Judiciary Act of 1789; the post-civil war and modern civil rights statutes; a list of all Supreme Court Justices as well as current judges on the courts of appeal, district courts, and the bankruptcy courts; maps of the courts of appeal and district courts and of the national reporter system; a list of all presidents and vice-presidents; historical data on the states of the union; the texts of all amendments not ratified by the states; the Constitution; and an appendix on the use of Westlaw, a computer-assisted legal research service of West Publishing Company.

The publication of this three-volume treatise provides a useful occasion to recall the first three-volume treatise on the Constitution, published by Joseph Story some 150 years earlier,[5] and to consider our contemporary understanding of the Constitution and constitutional law, reflected in the Rotunda treatise, in light of Story's classic work. Rotunda, Nowak, and Young have written their treatise for the same audience that Story sought to reach: "scholars, practitioners, judges, legislators, and other state and federal officials sworn to uphold the Constitution." Rotunda, Nowak, and Young are law professors, as was Story, who while he served on the Supreme Court was also the Dane Professor of Law at Harvard Law School where he was instrumental in the revitalization of what was a near-moribund institution.[6] Rotunda, Nowak, and Young acknowledge that "in a very real sense we are indebted to all of those scholars whose works have gone before us . . . ." Story, of course, is one of those scholars who has "gone before" and who may be justly proclaimed one of the principal founders of modern legal education—the enterprise in which Rotunda, Nowak, and Young are engaged. What has 150 years of legal education and scholarship about the meaning of the Constitution wrought? What will those who have "sworn to uphold the Constitution" learn of the Constitution from Rotunda, Nowak, and Young that they would not learn from Story? Alternatively, what would they learn from Story that they will not glean from this contemporary source?

The readers of Rotunda, Nowak, and Young will surely learn a great deal about certain trees currently growing in the constitutional forest. The authors provide, for example, a 166-page chapter on federal jurisdiction, a 305-page chapter on equal protection, a

5. J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES. 3 vols. (1833).

6. *See* G. DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT (1970); J. MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION: A STUDY IN POLITIAL AND LEGAL THOUGHT (1971); R. NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC (1985).

334-page chapter on freedom of speech, and a 103-page chapter on freedom of religion. In these chapters, and indeed throughout the treatise, the authors generally succeed in achieving one of their two stated objectives: to provide an "accurate picture of what the Supreme Court has done." They are far less successful, however, in realizing their other objective: to present "a careful evaluation, analysis, and interpretation of that work."

Their surprisingly superficial and one-sided analysis of Congress's power under article III, section 2, to make exceptions to the Court's appellate jurisdiction is a glaring case in point. They argue, quite correctly, that this power is subject to the due process clause of the fifth amendment and to all the other constitutional provisions that apply uniformly to any act of Congress. They fail to acknowledge, however, that the Supreme Court need not necessarily be the ultimate judicial tribunal to review Congress's actions. They seem unaware, or unwilling to admit, that the opportunity to seek enforcement of constitutional claims would still exist in the lower federal and state courts, even if Congress were to strip the Supreme Court of its entire appellate jurisdiction, or in the state courts alone, if Congress were to go further still and deny all lower federal court jurisdiction as well. As prominent legal scholars have argued, nothing less than the total denial by Congress of any judicial forum—state or federal—raises any valid constitutional objection to its use of the exceptions clause,[7] a contention that should be included in a "careful" evaluation and analysis of the Court's decisions in *Ex Parte McCardle* and related cases. In this instance, as in so many others, the authors are reluctant to complicate their argument by offering evidence and contentions that are inconvenient to their predilections. As a result, they confirm what they confess and what is readily apparent throughout the work, viz., that theirs is not "an entirely neutral or dispassionate analysis."[8]

It is easy to find other examples of the authors' difficulties in preparing a careful evaluation and analysis of the central issues of constitutional law. Thus, they proceed on the assumption that "a primary purpose of the equal protection clause [was] to protect citi-

7. *See* R. ROSSUM, CONGRESSIONAL CONTROL OF THE JUDICIARY: THE ARTICLE III OPTION (1987); Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U.L. REV. 143 (1982); Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45 (1975).

8. 3 R. ROTUNDA, J. NOWAK, & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW 466 (1986) [hereinafter R. ROTUNDA]. It should be acknowledged that Rotunda, Nowak, and Young are much more even-handed in their copious footnotes, where they provide references to, if not summaries of, a wide range of contentions and points of view on the particular constitutional issue under discussion.

zens' rights under the fourteenth amendment against a hostile Congress."[9] While they identify "self-fulfillment" as one purpose of freedom of speech, they fail even to mention in passing that free speech is an essential means to the end of self-government, crucial to the political needs of a representative democracy that depends upon free discussion of public affairs. And, in their chapter on freedom of religion, they abandon all their evaluative pretenses as well as their commitment to provide "the political, historic, and economic background of the Court's decisions" by declaring that "we have only the modern court's view of history and the justices' current tests to guide us."[10]

While the readers of Rotunda, Nowak, and Young will learn much about particular trees in the constitutional forest (although not as much or in as balanced a manner as the authors would have them believe), they will learn very little about the constitutional forest itself. It is here that the comparison of their treatise with Story's becomes most striking, for, unlike Story, the authors largely ignore the Constitution—their work is almost devoid of discussion of the ends the Constitution seeks to achieve, the means by which it achieves them, or the extent to which Supreme Court decisions display an awareness of, or consistency with, these ends and means. This is a major shortcoming.

Granted, the authors consider their work a treatise on constitutional law, not on the Constitution. Moreover, since they seem at times to operate from the perspective that the Constitution is merely what the Supreme Court says it is, they probably view themselves as relieved of any obligation to study the Constitution independently. This defense fails, however, when one considers its implications. By treating the Constitution as identical to its judicial gloss, the authors are deprived of any principled basis for criticizing what Philip Kurland has called the "derelicts of constitutional law."[11] Mere reference to such notorious cases as *Dred Scott*, *Plessy v. Ferguson*, and *Lochner v. New York* suffices to highlight this difficulty. Either the Court was correct in its interpretations of the Constitution in these decisions, in which case criticisms of the Court's opinions and efforts to convince the Court itself or the other branches of the federal government to overturn them are outright attacks on the Constitution, or the Court was mistaken in its inter-

9. 2 R. ROTUNDA, *supra* note 8, at 736.

10. Interestingly, Justice Rehnquist's re-examination of the history concerning the meaning of the establishment clause in Wallace v. Jaffree, 472 U.S. 38 (1985), merits only two brief sentences in a footnote.

11. P. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT 23, 186 (1970).

pretations, in which case the Constitution is not simply what the Court says it is but has some independent meaning. Since the authors reject the first possibility out of hand, they would seem to be required to accept the second and consequently to concede that, as Justice Frankfurter put it so well, "the ultimate touchstone of constitutionality is the Constitution itself and not what [the judges] have said about it."[12]

If, as the authors would seem forced to concede, the Constitution is not simply what the Court says it is, then they are obliged to indicate what it is. If they are to succeed in presenting a "careful evaluation, analysis, and interpretation" of constitutional law, then they must evaluate, analyze, and interpret the Court's work in the light of an independent understanding of what the Constitution is and assess the degree to which the Court's actions conform to the Constitution. It is on this vital aspect of the study of constitutional law that the readers will learn almost nothing from Rotunda, Nowak, and Young but a great deal from Story.

Story begins his *Commentaries* by reviewing the history of the pre-revolutionary era and the Articles of Confederation in order to establish why the Constitution was adopted and why it was drafted as it was. By so doing, he identifies the evils that the framers wanted the new Constitution to avert and the ends that they wished it to achieve. Put simply, Story shows that the evils to be averted were the rival defects to which all previous republican governments had succumbed—democratic ineptitude on the one hand and majority tyranny on the other—and the ends to be achieved were the establishment of a powerful guarantor of rights and liberties organized around the principle of qualitative majority rule.[13] He sums up his understanding in a lengthy chapter on the preamble, in which he observes that: "It is an admitted maxim in the ordinary course of the administration of justice, that the preamble of a statute is a key to open the mind of the makers, as to the mischiefs, which are to be remedied, and the objects, which are to be accomplished by the provisions of the statute . . . There does not seem any reason why, in a fundamental law or constitution of government, an equal attention should not be given to the intention of the framers, as stated in the preamble."[14] He then proceeds to describe and explain the means by which these evils are averted and these ends achieved, focusing on such features as federalism, separation of powers, and the mod-

12. Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 491-92 (1939).

13. Qualitative majority rule is concerned not only with the quantity of consent that a policy receives but also with the quality of the policy to which consent is given.

14. 1 J. STORY, *supra* note 5, at 443-44.

erating influence of a multiplicity of interests present and operating in an extensive republic.

Story also makes clear early on that interpreting the Constitution is not the exclusive responsibility of the Supreme Court but is one shared jointly and equally by all three branches. Noting that the question of the constitutionality of a governmental action "may arise in the course of the discharge of the functions of any one, or of all, of the great departments of government, the executive, the legislative, and the judicial,"[15] he contends that "the supreme authority, as to these questions," belongs to whichever department is involved and "cannot be re-examined elsewhere. Thus, congress having the power to declare war, to levy taxes, to appropriate money, to regulate intercourse and commerce with foreign nations, their mode of executing these powers can never become the subject of re-examination in any other tribunal." Likewise for the treaty-making power of the President and Senate: "When a treaty is properly ratified, it becomes the law of the land, and no other tribunal can gainsay its stipulations." Story is aware that the other branches of government—and the judiciary in particular—may differ concerning the constitutionality of these acts. But, he continues, in those cases "in which a tax may be laid, or a treaty made, upon motives and grounds wholly beside the intention of the constitution, the remedy . . . is solely by an appeal to the people at the elections; or by the salutary power of amendment, provided by the constitution itself."[16]

Since all three branches of government are to interpret the Constitution equally, Story proceeds to offer for their guidance what he calls "the true rules of interpretation."[17] He summarizes these as follows:

> In construing the constitution of the United States, we are, in the first instance, to consider, what are its nature and objects, its scope and design, as apparent from the structure of the instrument, viewed as a whole, and also viewed in its component parts. Where its words are plain, clear, and determinate, they require no interpretation; and it should, therefore, be admitted, if at all, with great caution, and only from necessity, either to escape some absurd consequence, or to guard against some fatal evil. Where the words admit of two senses, each of which is conformable to common usage, that sense is to be adopted, which, without departing from the literal import of the words, best harmonizes with the nature and objects, the scope and design of the instrument.[18]

Only after Story has reviewed the ends of the Constitution, the

15. *Id.* at 345.
16. *Id.* at 346-47.
17. *Id.* at 383.
18. *Id.* at 387.

means it employs to achieve these ends, the obligation equally borne by all the branches to interpret the Constitution, and the "true rules" for interpreting it, does he move on to comment on the specific provisions of the Constitution, beginning with article I, section 1, and proceeding to the last ratified amendment (i.e., the twelfth amendment).

Story's approach to the study of the Constitution and its place in constitutional law contrasts strikingly with that of Rotunda, Nowak, and Young. They take up the judiciary first (not after the legislative and executive branches, as Story does) and its power of judicial review (which they present in a non-problematic fashion and with no distinction between what Christopher Wolfe has described as the "traditional form" of judicial review—embraced, for example, by the founding generation and by members of the early Supreme Court such as Chief Justice Marshall and Joseph Story—and the "modern form"—dominant at the Supreme Court level since 1937).[19]

After a chapter on federal jurisdiction, they turn to a consideration of the powers of the national and state governments. They do not preface these considerations with a discussion of what the Constitution was to accomplish (they completely ignore the preamble which is not even listed in the index)[20] or how it was to accomplish it (they devote only four short paragraphs to the events leading up to the Constitutional Convention, and they include them at the very end of Volume III). They do not discuss the separation of powers, except to imply that its sole purpose is to prevent tyranny, because "there is no fruitful rule or test which governs decisions relating to separation of powers;" they seem unaware of its ability to avoid democratic imbecility—the opposite defect of republican government—in that government is more efficient if its various functions are performed by separate and distinct agencies.[21] Their treatment of federalism is equally deficient; they see it merely as a means for dividing power between the national and state governments and thereby fail to appreciate how federalism dims the prospects for majority tyranny by the way in which it blends federal elements into the structure and procedures of the central government itself.[22] In

19. *See generally* C. WOLFE, THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW (1986); Wolfe, *A Theory of U.S. Constitutional History*, 43 JOURNAL OF POLITICS 292-316 (1981).

20. This is a common failing among constitutional casebooks and treatises. For another volume that ignores the preamble see R. ROSSUM & G. TARR, AMERICAN CONSTITUTION LAW: CASES AND INTERPRETATION (2d ed. 1987).

21. THE WORKS OF JAMES WILSON 294, 296 (R. McCloskey ed. 1967).

22. The presence in the Senate of the federal principle of equal representation of all states provides an instructive illustration. Given the restraints of separation of powers and

fact, Rotunda, Nowak, and Young completely fail to comprehend what Story knew so well: that the Constitution itself is a means of protecting individual liberties. They show no appreciation for the fact that the rights and liberties that they devote two entire volumes to analyzing are secured not only (and not particularly) by the Bill of Rights and the post-Civil War amendments aggressively protected by an activist Supreme Court but also (and primarily) by the political structure and institutional arrangements of the Constitution itself.[23]

Rotunda, Nowak, and Young differ from Story and his approach to the Constitution in one final and decisive respect: they reject the notion that there are "true rules" of constitutional interpretation. The authors conclude their work with a chapter on the theories and methods of constitutional construction and interpretation. Where they place this chapter is noteworthy; unlike Story who includes his chapter on the rules of interpretation early on, so that it will guide the analysis that follows, Rotunda, Nowak, and Young place theirs at the end, so that it will not. The authors wish to do no more than offer a catalog of the theories and methods of interpretation that have been advanced in the scholarly literature and case law from which their readers may choose. They explicitly decline to offer a criterion for choosing among these theories save whatever is "useful to the reader's purposes." By so doing, however, they make clear their own approach to the Constitution and constitutional law, an approach that may be described as a sophisticated, academically-respectable version of result-oriented jurisprudence. Rotunda, Nowak, and Young present the Constitution, constitutional law, and theories of constitutional interpretation as tools to be manipulated to achieve "the reader's purposes." They escape from the difficulties posed by the view that the Constitution is simply what the Court says it is by embracing the view that the Constitution is whatever the reader wishes it to be. Their understanding of the Constitution should gratify those for whom this treatise was intended—i.e., those "sworn to uphold the constitution"—for they will find that the oath that they have taken is not a heavy yoke, but merely obliges them to succumb to their predilec-

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bicameralism, for a measure to become law, it must pass the Senate, where, because of the federal principle of equal representation of all states, the presence of a nationally-distributed majority (with all the moderating tendencies that it provides) is virtually assured. The threat of tyranny from regionally-concentrated factious majorities is substantially reduced. *See* Diamond, *The Federalist on Federalism: Neither a National Nor a Federal Constitution, But a Composition of Both*, 86 YALE L.J. 1273-85 (1977).

23. *See* Rossum, *The Federalist's Understanding of the Constitution as a Bill of Rights*, in SAVING THE REVOLUTION: THE FEDERALIST PAPERS AND THE AMERICAN FOUNDING (C. Kesler ed. 1987).

tions. For those of us, however, who view the Constitution as more than an empty vessel into which personal preferences are to be poured—for those of us who join with Joseph Story in regarding the Constitution "as the truest security of the Union, and the only solid basis, on which to rest the private rights, the public liberties, and the substantial prosperity of the people composing the American Republic,"[24] their understanding is profoundly mistaken.

REDEFINING THE SUPREME COURT'S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS.

By Samuel Estreicher[1] and John Sexton.[2] New Haven, Ct. and London: Yale University Press. 1986. Pp. x, 201. $20.00.

Thomas D. Rowe, Jr.[3]

If Benjamin Franklin knew about modern policy analysis, he might amend his famous maxim to say that in this world nothing is certain but death, taxes, and unanticipated consequences. One of the substantial legacies of Chief Justice Warren Burger's tenure is an unanticipated (and to Chief Justice Burger probably unwelcome) consequence of his frequent contentions that our courts are overburdened.[4] Professor Marc Galanter and others have responded with substantial empirical evidence that America really is not experiencing a "litigation explosion" with extraordinary caseloads, cost, and delay in the lower courts.[5]

Chief Justice Burger's view that the courts are overloaded may have begun at home, for he consistently pointed to the Supreme

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24. 1 J. STORY, *supra* note 5, at 2.

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2. Professor of Law, New York University.

3. Professor of Law, Duke University.

4. *See, e.g.*, W. Burger, *Opening Remarks*, in AMERICAN LAW INSTITUTE, REMARKS AND ADDRESSES AT THE 63RD ANNUAL MEETING 3, 6-7 (1986).

5. *See* Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986); Galanter, *Reading the Landscape of Disputes; What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983). *See also, e.g.*, Daniels, *We're Not a Litigious Society*, 24:2 JUDGES' J. 18 (Spring 1985); Trubek, Sarat, Felstiner, Kritzer, & Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983); NATIONAL CENTER FOR STATE COURTS, A PRELIMINARY EXAMINATION OF AVAILABLE CIVIL AND CRIMINAL TREND DATA IN STATE TRIAL COURTS FOR 1978, 1981, AND 1984 (1986). The questioning of the "litigation explosion" view has produced its own counter-literature. *See, e.g.*, R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 63-65, 76 (1985); Marvell, *There Is a Litigation Explosion*, NAT'L L.J., May 19, 1986, at 13.