Review Essays

INCULCATING CONSTITUTIONAL VALUES

CONSTITUTIONAL LAW. By Gerald Gunther & Kathleen M. Sullivan. Westbury, New York: Foundation Press. 13th edition, 1997. Pp. xciii, 1553. Cloth, $55.95.

CONSTITUTIONAL LAW. By Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, & Mark V. Tushnet. Boston: Aspen Law and Business Education. 3d Edition, 1996. Pp. ciii, 1814. Cloth, $60.00.

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The two leading casebooks on Constitutional Law[1]—one an acknowledged classic and the other fast on its way to becoming one—were recently released in new editions at a time when the challenges facing casebook authors seem greater than ever. Despite the Supreme Court's diminishing docket, its continuing output of significant constitutional cases remains breathtaking in number and scope. The Court's work runs the gamut from refining the fine points of the latest compelled speech dispute in first amendment law,[2] to determining whether the dormant commerce clause bars a State from giving preferred treatment to

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1. Gerald Gunther & Kathleen M. Sullivan, *Constitutional Law* (Foundation Press, 13th ed. 1997) ("Gunther & Sullivan"); Geoffrey R. Stone, et al., *Constitutional Law* (Aspen Law and Business Education, 3d ed. 1996)("Stone").

2. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 115 S. Ct. 2338 (1995).

in-state charitable institutions.[3] And while it continues its yearly work of adding layers of nuance to doctrine in established areas, the Court in recent years has decided a series of cases that break significant new ground, particularly in the areas of federalism, racial preferences, and voting rights.[4] It is no small task to produce a new edition of an established book that maintains the breadth and depth of coverage of prior editions, while simultaneously taking account of what might well turn out to be sea changes in particular areas, and to do so while also conveying a coherent and complete picture of constitutional jurisprudence.

Two books that continue to strike that balance are the third edition of Constitutional Law, by Geoffrey Stone, Louis Seidman, Cass Sunstein and Mark Tushnet, and the thirteenth edition of Gerald Gunther's Constitutional Law, which Kathleen Sullivan has joined as a co-author. Given the fame each of these authors has attained for his or her prior contributions to constitutional law scholarship, and the obvious prominence of prior editions of these casebooks, it is inevitable that the new editions will be widely used in law schools across the country. Thousands of law students will therefore have their conception of constitutional law shaped by the composition and editorial choices of these books. That imposes a significant responsibility on these authors, for constitutional law casebooks are unusually, perhaps uniquely, influential in the formation of students' values about the appropriate roles of governmental institutions in a constitutional democracy.

This transmission of values has a serious impact on the way our society governs itself. We have long since ceased living in an era in which Presidents appoint Justices who became lawyers through apprenticeship rather than through formalized law study.[5] Rather, our judges, and the lawyers who make constitutional arguments to them, form their constitutional values in the legal culture that prevails in the law schools. Today, it is the course in constitutional law that begins to prepare future judges

3. *Camps Newfound/Owatonnia, Inc. v. Town of Harrison*, 117 S. Ct. 1590 (1997).

4. On federalism, see *New York v. United States*, 505 U.S. 144 (1992); *United States v. Lopez*, 514 U.S. 549 (1995); *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996); *Printz v. United States*, 117 S. Ct. 2365 (1997); *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997). On racial preferences, see *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995). On voting rights, see the line of cases beginning with *Shaw v. Reno*, 509 U.S. 630 (1993), and continuing through *Bush v. Vera*, 116 S. Ct. 1941 (1996).

5. Justice Robert Jackson, appointed in 1941, was the last Justice who received the bulk of his legal training through apprenticeship. See Eugene C. Gerhart, *America's Advocate: Robert H. Jackson* 34-35 (Bobbs-Merrill, 1958).

for what Justice Holmes called "the gravest and most delicate duty [they are] called upon to perform"[6]—deciding whether to invalidate the product of the democratic process on constitutional grounds.

So the materials to which one is exposed in constitutional law, and the habits of constitutional mind that are developed (in part) as a result, have an impact not only on the practice of constitutional law, but also on the legal profession and our public life generally. For many, the basic course in constitutional law will amount to the sum total of their training in the field. Although some law students will have studied American government and constitutional theory at sophisticated levels, most will have not. And although some will have studied constitutional law in some other forum (usually an undergraduate political science course), again most will have not. Moreover, although law schools commonly offer advanced courses in constitutional law (most often, I imagine, first amendment courses), by no mean all students partake of such offerings. Thus, the basic law school course in constitutional law will be the beginning and, for many, the end of our students' exposure to constitutional law and theory.

In this essay, I will examine some ways in which these casebooks (which I will refer to as Stone and Gunther & Sullivan, respectively, with apologies to the unmentioned co-authors[7]) will inculcate ways of thinking about constitutional law and particularly the role of the Supreme Court of the United States in our constitutional order. Both books are monumental works of scholarship that reflect lifetimes of thinking and reading by their

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6. *Blodgett v. Holden*, 275 U.S. 142, 148 (1927).

7. Professor Sullivan's addition as Professor Gunther's co-author merits some comment, because it is a significant event. She now has the responsibility for carrying on the tradition of one of the classic works of American legal scholarship, which Professor Gunther's book undoubtedly is. (In the interest of giving due respect to the past, it is worth noting that Professor Gunther's book was a successor to a series begun by Professor Noel Dowling, a debt that Gunther has acknowledged. See Gerald Gunther, *Constitutional Law* xvii-xviii (Foundation Press, 9th ed. 1975)). One cannot identify, of course, Professor Sullivan's particular contributions to the book, but it is worth noting that the most significant changes from the twelfth to the thirteenth editions—for example, moving the materials on justiciability from the last chapter to the first and substantially reorganizing them—are significant improvements. Another example is Chapters 12 and 13, which flesh out in great detail the particulars of free speech doctrine. While Chapter 11, the first of the three free speech chapters, is quite similar to prior editions, the subsequent two chapters represent a significant rewriting and reorganization of the materials. In particular, the sections on "Money and Political Campaigns," (pp. 1400-1420) and on "New Media: Cable Television and the Internet," (pp. 1455-1461) are substantially new and tightly written and organized.

distinguished authors. It would be surprising if their views did not affect the presentation of the materials to the students. That is, of course, inevitable and unobjectionable. Choices about what cases to include and how to edit them will have a huge impact on the values that students take with them into the legal profession. And the organizational choices—how the authors arrange the materials that they have chosen—will as well.

It would be impractical to attempt a full canvassing of the ways in which the casebooks perform their function of inculcating constitutional values. I will therefore focus on the choices made in Stone and Gunther & Sullivan in just a few areas. I will examine how Gunther & Sullivan's organization of the materials on justiciability and equal protection will affect how students will learn to think about constitutional law. With respect to Stone, my focus is on the general pedagogic structure of the book as a whole and the impact that it will have on how and what students learn. I also will examine in some depth—using the example of the joint opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[8]—how editing choices within the cases that Stone includes will affect *what* students know, in addition to how they think.

I

I will begin with Gunther & Sullivan. The strengths that have helped the book achieve such prominence in the past remain in the new edition. Above all, this casebook has always been an unsurpassed collection of *legal* materials. The thirteenth, as in past editions, chooses the correct main cases and edits them judiciously. That is no small feat. Due to the sheer volume of cases to be dealt with and the Supreme Court's loquaciousness, casebook editors must be ruthless in cutting the cases down to manageable size. Gunther & Sullivan performs that task admirably, and also manages to retain the flavor and character of the opinions. If one contrasts, for example, Gunther & Sullivan's edit of Justice Robert Jackson's famous concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*,[9] with the version in other major casebooks, it is apparent just how skillful Gunther & Sullivan is in providing a compact, yet nonetheless

8. 505 U.S. 833 (1992).

9. 343 U.S. 579 (1952) (reprinted in part in Gunther & Sullivan at p. 356 (cited in note 1)).

comprehensive, excerpt; the book retains just enough of the cases, but not too much.

In my judgment, though, what made prior editions of Gunther so extraordinary—a feature that is retained in Gunther & Sullivan—is the textual discussions of the doctrinal developments that led up to the main cases and of the developments that followed them. Constitutional decisions are not, and should not be, disconnected from what came before. They build upon political, legal, and judicial traditions. The further that constitutional decision-making is removed from its historical context, the greater the danger becomes that the law will be reduced to the preferences of judges. Gunther & Sullivan describes and synthesizes the materials in a way that enables students to understand them in their own right and, just as important, to place them in their historical context.

Consider Gunther & Sullivan's handling of the law of economic substantive due process. In just a few pages, (pp. 454-460) Gunther & Sullivan explains the development of the law from the time of *Calder v. Bull* through *Lochner*; in a few more pages, (pp. 465-470) the book then explores the range of possible theoretical objections to (or defenses of) *Lochner* and its style of constitutional reasoning; it then succinctly notes (pp. 470-474) the development of doctrine during the *Lochner* era up to its New Deal repudiation; finally it details (pp. 476-486) the post-New Deal abdication of any judicial scrutiny of economic regulation, from *Carolene Products* through *Williamson v. Lee Optical* and beyond. And all of this is done in a way that describes the doctrinal developments clearly and at the same time raises the salient theoretical points. In about thirty elegant pages, then, Gunther & Sullivan provides the materials for the student to become literate in a major sequence of events in our constitutional history, to think critically about the underlying issues, and also to learn the modern state of the law.

This is Gunther & Sullivan at its best, and it is largely unchanged from the twelfth edition. Besides updating doctrine, though, the thirteenth edition makes some important changes. For instance, in the twelfth edition the materials on justiciability—those dealing with advisory opinions, ripeness, standing, mootness, and political questions—were literally an afterthought, coming in the final chapter of the book. In the new edition, those materials have been integrated into Chapter 1, which presents the materials on the establishment of the judicial power and then explores its limits. The change is a good one, and the

reasons why involve the messages the book sends to students through its editing and organization. The placement of the justiciability materials at the end of the book, and by implication of the constitutional law course (if they are taught at all), spoke volumes, however subtly, about their importance.[10]

Under the twelfth edition's organization, by the time the student came to justiciability, he or she had spent weeks, and some 1000 pages, learning about the important role of the Supreme Court in protecting due process rights, ensuring the equal protection of the laws, and policing the freedom of speech. At that point, it would not have been surprising if that student was unimpressed by, not to mention uninterested in, a study of the circumstances in which Article III gives— or, horrors, might *not* give—the Court the power to do all these good things. By contrast, placing the materials immediately after *Marbury*, which the thirteenth edition does,[11] signals that they are important, indeed central, to what the judicial power is all about.

The law of justiciability is the most important structural check that the Constitution imposes on the judiciary.[12] Article III gives the Supreme Court (and the lower courts that Congress sees fit to establish) the power to decide cases, and *Marbury* established that in the course of exercising that function the Court necessarily has the power, indeed the obligation if the occasion should arise, to declare acts of the coordinate departments unconstitutional. But Article III itself significantly constrains the Court in exercising the power: The invocation of the power of judicial review is justified only by the need to decide the rights of individuals who have a distinct and palpable injury that implicates a legally-protected right. In short, it requires a case or controversy.[13]

All of this is basic, even simple, to any teacher of constitutional law. Not so for students, who do not come to the subject

10. Like Gunther & Sullivan, Stone includes the justiciability materials in its first chapter. See *Stone* at 88-145 (cited in note 1).

11. The first main case following *Marbury* deals with the law of standing. Gunther & Sullivan at 30 (cited in note 1) (reprinting *Warth v. Seldin*, 422 U.S. 490 (1975)).

12. If you doubt this, consider either how blunt the other checks are (e.g., political control through the nomination and confirmation process), or how infrequently they are used (e.g., constitutional amendment or jurisdiction stripping).

13. See, e.g., Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881 (1983). There is, of course, an extensive literature on this question. My purpose is not to defend here the outcome of any particular standing case, but simply to point out the fact that the doctrine of standing, as a subset of the justiciability rules, operates as a check on the Court. Whether and to what degree that is a good or bad thing is a different question.

with Article III as the first of their concerns. Unless these materials are at least introduced in the basic constitutional law course, students will not understand the importance of justiciability doctrines and their centrality to the place of judicial review in our constitutional system. And students who learn this at the beginning, when they learn about the other checks on the Court (for example, jurisdiction stripping), will have a different conception of the Supreme Court's role than will students who learn this at the end.[14]

The inclusion of the justiciability materials at the beginning of Gunther & Sullivan, moreover, only builds upon one of the strongest features of prior editions. In the past, the first chapter of Gunther effectively laid out the development of the law of judicial review, while at the same time exposing the tensions and difficulties in analyzing the proper scope of judicial power and of the Supreme Court's role. Gunther & Sullivan retains that strength; after the materials devoted to the establishment of the power of judicial review, (pp. 2-27) it leads the student through an exploration of the checks that the constitutional structure imposes on the Court in the exercise of that power. In particular, the materials on "The Authoritativeness of Supreme Court Decisions," which include (pp. 20-25) an excellent and illuminating series of quotations from the most admired of our Presidents challenging the notion that the Supreme Court's role in constitutional interpretation is exclusive, demand that students question their common instinct that the Supreme Court is the only, or even primary, institution with the power and responsibility to safeguard our constitutional liberties.[15] Precisely because it now includes the justiciability materials, Gunther & Sullivan goes even further than prior editions in emphasizing the importance of the limits on the Supreme Court's power.

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14. It is worth noting that the justiciability materials in Gunther & Sullivan have been considerably condensed from the twelfth edition. For example, in the twelfth edition, see Gerald Gunther, *Constitutional Law* 1600-10 (Foundation Press, 12th ed. 1991), the problem of taxpayer standing led off the standing materials and occupied over 10 pages, whereas Gunther & Sullivan limits (pp. 37-38) those materials to a page-long textual note. The deemphasis of cases such as *Frothingham v. Mellon*, 262 U.S. 447 (1923), and *Flast v. Cohen*, 392 U.S. 83 (1968), is accompanied by an emphasis on more recent developments. The inclusion in Gunther & Sullivan (pp. 38-43) of *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), as a main case was a wise choice, given its emphasis on the Article III nature of standing.

15. Cf. Frank H. Easterbrook, *Presidential Review*, 40 Case Western L. Rev. 905 (1989-90); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Geo. L. J. 217 (1994).

Other significant choices made by Gunther & Sullivan will have an impact on the student's thinking about fundamental questions. The Court's recent cases involving the law of federalism might well turn out to reflect a fundamental rethinking of the law of state-federal relations,[16] a development that Gunther & Sullivan terms an "antifederalist revival." (p. 113) Emphasizing the significance of this development, the book includes (pp. 113-140) an extended treatment of *U.S. Term Limits v. Thornton.*[17] Not only does the book devote many pages to the term limits issue, but it does so immediately after the materials dealing with *McCulloch v. Maryland* and its inauguration of the constitutional tradition of expansively construing the scope of federal powers under the Necessary and Proper Clause and narrowly interpreting the powers of the States to act upon the federal government.

Although *U.S. Term Limits* in one sense is the exception to the rule of the Court's recent federalism cases—its holding was that the States have no power to impose term limits on federal legislators—the debate on the Court was explicitly over the fundamentals of federalism. Was the formation of the Union the act of the States or only of the people? Did the reserved powers of the States encompass acts that might affect the newly formed federal government? What substance should be given to the default position that the States have power (if their domestic law gives it to them) unless something in the Constitution specifically divests them of it? Did the reserved powers of the States by definition fail to include anything concerning relations with the federal government, as *McCulloch* seemed to hold? Gunther & Sullivan's juxtaposition of the debate in *U.S. Term Limits* with Chief Justice Marshall's opinion in *McCulloch* is striking. Until very recently, it had been generations since the issues at stake in *McCulloch* had any substantial real world doctrinal relevance. Notwithstanding the result in *U.S. Term Limits*, the debate in that case, along with the Court's other recent federalism holdings, shows that those issues are once again on the table. In emphasizing these materials, and particularly in contrasting them with *McCulloch*, Gunther & Sullivan indicates to students their historical importance as well as their centrality to the recently-renewed struggle on the Court over fundamental questions of federal versus state power. This is an excellent example of the casebook bringing to the fore current issues while none-

16. See the federalism cases cited in note 4.
17. 514 U.S. 779 (1995).

theless ensuring that they are placed in the context of prior history and doctrine.

I have detailed some ways in which Gunther & Sullivan's organization will necessarily affect habits of thinking that students develop. The book will affect how students think in any number of additional ways, of course, and I will just mention a few others. As a general matter, the book is not one that goes out its way to push the views of Professor Gunther or Professor Sullivan. The sympathies of the authors are nonetheless apparent. For example, one cannot get through the equal protection materials (Chapter 9) without repeatedly confronting Professor Gunther's theory of the "newer" equal protection, which can be colloquially summed up as a rational basis approach with "bite."[18] An excerpt from Professor Gunther's famous article leads off (pp. 630-632) the equal protection chapter, and the materials later include (pp. 646-647) an explanation and defense of his argument—that even within the lowest, most deferential, tier of equal protection scrutiny the Court ought to require the government to defend its classifications based upon a genuine connection between the means and ends that it seeks to pursue rather than relying on the Court to conjure up a hypothetical rationale.

The degree to which the Court's doctrine justifies the attention Gunther & Sullivan gives to Professor Gunther's approach is disputable. On the one hand, where classifications dealing with economic matters are at stake, the Court continues to be extremely deferential; laws appearing to make irrational classifications are routinely upheld, with the Court rejecting outright the notion that legislatures are bound to justify their enactments with any real showing of a connection between means and ends.[19] On the other hand, where different sorts of interests are at stake, but not ones that the Court can bring itself to exalt with the status of "suspect" or "quasi-suspect" classifications, the Court has been willing to step in and invalidate distinctions as irrational. The two most salient examples are *Cleburne v. Cleburne Living Center, Inc.*,[20] and *Romer v. Evans*.[21] In the first,

18. See Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972). According to Gunther & Sullivan's Table of Authorities, (pp. lxxx-lxxxi) there are 12 references to this article in the book, which makes it the second most cited source in the book. (John Hart Ely, *Democracy and Distrust* (Harvard U. Press, 1980), is first, with 14 citations.)

19. See, e.g., *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993); *U.S. Railroad Retirement Bd. v. Fritz*, 449 U.S. 166 (1980).

20. 473 U.S. 432 (1985).

the Court struck down a requirement that a group home for mentally retarded persons obtain a special zoning permit while exempting from the permit requirement other group housing arrangements. In the latter, the Court struck down Colorado's Amendment 2, the state referendum dealing with the status of homosexuals under state law.[22] In neither case, however, was the Court willing to admit that the level or nature of scrutiny it was employing was any different from traditional rationality review, under which any conceivable justification will sustain the law. But neither requirement would have been invalid if the Court had consistently applied the deferential standard of rationality review.[23] Cases like *Cleburne* and *Romer* thus suggest the continued possibility that the Court might someday adopt as a general matter Professor Gunther's prescription of rational basis review with bite. It is not surprising, then, that Gunther & Sullivan notes the connection between Professor Gunther's equal protection theory and *Romer* (p. 631 n.5), and that it discusses in some detail the possible inconsistency between traditional rational basis scrutiny and the analysis in *Cleburne* and *Romer*. (pp. 746-747)

The authors' sensibilities are particularly revealed in their note discussion of *Romer*. Gunther & Sullivan seems to recognize how uneasily the case fits into the fabric of prior law, questioning the lack of substance in the Court's claim that it was truly applying rational basis review and asking rhetorically how the Court's failure to distinguish or even cite *Bowers v. Hardwick*[24] can be explained. (p. 746) The authors even go so far as to allow that Justice Scalia's dissent might have some "logical

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21. 116 S. Ct. 1620 (1996).

22. In *Romer* the Court adopted, at least in major part, an argument presented in an *amicus* brief that Amendment 2 violated equal protection "on its face," because it irrationally set apart a class of citizens as beyond the protection of the law. Two of the named *amici* were Professor Gunther and Professor Sullivan. See Brief of Laurence H. Tribe, John Hart Ely, Gerald Gunther, Philip B. Kurland, and Kathleen M. Sullivan, as Amici Curiae In Support of Respondents, *Romer v. Evans*, 116 S. Ct. 1620 (1996) (No. 94-1039).

23. The Court easily could have imagined rationales to sustain the provisions at stake in *Cleburne* and *Romer*, as the dissenting opinions in the cases were quick to point out. Justice Marshall lamented in *Cleburne* the Court's "refusal to acknowledge that something more than minimum rationality review [was] at work." *Cleburne*, 473 U.S. at 459 (Marshall, J., concurring in the judgment in part and dissenting in part). Justice Scalia argued in *Romer* that there "obviously" was a legitimate rational basis to support the referendum at issue. *Romer*, 116 S. Ct. at 1631 (Scalia, J., dissenting); see also id. at 1631-36 (Scalia, J., dissenting) (offering rationales to support the constitutionality of Amendment 2).

24. 478 U.S. 186 (1985) (upholding as consistent with due process Georgia's anti-sodomy law insofar as it applies to homosexual behavior).

merit."[25] (p. 747) But having acknowledged, if only obliquely, the shortcomings in the Court's reasoning, Gunther & Sullivan immediately launches into a note suggesting "Alternative justifications for Romer." (Id.)

It is one traditional function of casebook note discussions to raise the possibility of alternative rationales that might support the result of a case, even if its reasoning is inadequate. With respect to *Romer*, however, Gunther & Sullivan immediately leads students to consider how that might be so without even pausing to consider as an alternative that the case is simply wrong. Indeed, apart from some questioning of the Court's reasoning, Gunther & Sullivan does not even pursue this latter possibility. The book instead deals with the shortcomings of the Court's opinion only by offering alternative rationales in support of the same result.

In the wake of *Romer* commentators quickly offered arguments to justify the case's outcome.[26] That was, of course, neither surprising nor troubling. It is disquieting, however, for a casebook to lead students to think about a controversial issue in a particular way without seriously considering the alternatives. Moreover, Gunther & Sullivan's discussion of *Romer* indicates that it was something of a strain for the book not to suggest to students that *Romer* was wrongly decided. In discussing the alternative justifications that have been offered to overcome what it terms "defects in [*Romer*'s] technical analysis," Gunther & Sullivan includes a quote from Professor Sunstein suggesting that the opinion's inadequacies "may actually be a virtue," because "[a]n adequate treatment would have required the Court to write with a breadth and a depth that could not easily have commanded a majority opinion." (p. 747) In light of the opinion's "technical defects" and the difficulty of writing an "adequate treatment" of the problem that would garner five

25. The book asks the students to consider this possibility, but only after admonishing them to leave aside the "most acerbic passages" in Justice Scalia's dissent. Gunther & Sullivan at 747 (cited in note 1).

26. See Daniel A. Farber & Suzanna M. Sherry, *The Pariah Principle*, 13 Const. Comm. 257 (1996) (arguing that *Romer* was correctly decided on a theory much like the Court's); Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 Mich. L. Rev. 203 (1996) (arguing that Amendment 2 was an unconstitutional bill of attainder). Cf. Roderick M. Hills, Jr., Correspondence, *Is Amendment 2 Really A Bill of Attainder? Some Questions About Professor Amar's Analysis of Romer*, 95 Mich. L. Rev. (1996) (arguing that Amar's attainder analysis is incorrect and defending the Court's result). But cf. Richard F. Duncan, *Wigstock and the Kulterkampf: Supreme Court Storytelling, the Culture War, and* Romer v. Evans, 72 Notre Dame L. Rev. 345 (1997) (arguing that *Romer* is wrongly decided).

votes, one might have thought that Gunther & Sullivan would have at least raised the possibility that the case was wrongly decided. Students ought to be challenged to consider both sides of difficult constitutional questions, and a casebook's pedagogical value is reduced when it fails to do so. Gunther & Sullivan's treatment of *Romer* is one of the few times that the book falls short in this respect.

II

Although Stone is generally organized as constitutional law casebooks traditionally are,[27] its content is far different from most, and certainly from Gunther & Sullivan. Just as Gunther & Sullivan is unsurpassed as a collection of legal materials, Stone is unsurpassed as a collection of *interdisciplinary* materials. It intersperses among the cases excerpts from scholarly materials bringing the insights of political science, philosophy, economics, and history to bear upon constitutional law. Of course, most casebooks, including Gunther & Sullivan, also refer to sources in addition to cases. But Stone is different in its emphasis on such materials, and in its inclusion of extensive quotations from sources ranging from the Federalist Papers and the views of the anti-federalists, to Bork and Bickel, to critical race theorists and modern republican revivalists. The amount of reading and scholarship that Stone reflects, and the masterful job it does of weaving choice excerpts from the literature into the discussion between cases, is simply staggering. While Gunther & Sullivan mainly *refers* the reader to such secondary sources (and to fewer of them), Stone exposes the reader to the words of those who have thought and written about constitutional law and theory from the time of the founding through today.

Stone's focus on materials apart from the cases is both good and bad. It is good in that it forces students to confront the vast theory beneath the surface of virtually every area of constitutional doctrine. Literally from its first page, the book exposes students to the political theory and history of the founding, which is a valuable service to those who come to constitutional law untrained in those disciplines. The book begins with a note discussion of the political circumstances in the country under the Articles of Confederation and of the forces that led to the call-

27. See William P. Marshall, *An Advance in Tradition*, 53 U. Chi. L. Rev. 1508 (1986) (reviewing first edition of Stone and noting that, although its organization was by and large traditional, it differed from the norm in significant ways).

ing of the Philadelphia convention. (pp. 1-5) It then moves to a discussion of the competing political philosophies of the anti-federalists and the federalists, (pp. 5-12) and includes extensive excerpts from Federalist No. 10 and No. 51. (pp. 8-17) It explains the republicanism of the founding, (pp. 12-14, 18-20) and introduces the continuing influence of neo-republicanism on contemporary constitutional theory. (pp. 20-23)

Only then does the book bring *Marbury v. Madison* on the scene. (pp. 23-31) The differing organizational strategies of Stone and Gunther & Sullivan at their respective beginnings perhaps best exemplifies the differences between the two books. Whereas Stone provides an extensive and rich introduction to the political theory of the founding before it even thinks about the law, Gunther & Sullivan launches straight into *Marbury*. Given the likelihood that many students will be unsophisticated in the ways of American political theory, Stone's choice will make it more likely that students will be better equipped from the beginning of the course to engage in critical analysis of what is at stake in questions of judicial power and the role of the Supreme Court in American government.

The cost of Stone's heavy emphasis on secondary sources is that it threatens to overwhelm students, as well as their teachers. The book asks its reader to do an unrealistic amount of reading and thinking about the law and the commentary on it. At the same time that it includes encyclopedic references to the secondary literature, Stone does not slight the law—excerpts from or references to all the cases are there. For instance, the almost-fifty pages (pp. 697-743) of equal protection materials relating to sex-based classifications are divided almost equally between case excerpts and secondary materials. The notes and questions in those materials, like the notes and questions throughout the book, would take the most conscientious and perspicacious teacher a huge amount of time to deal with coherently and fully. A student would be swamped.

The pedagogical difficulties created by this are significant. While it might be true that "over-simplification is no service to advanced students,"[28] neither is it in their interest to be overwhelmed. (Not to mention the fact that many, if not most, students in basic constitutional law courses are in their first year of law school.) Students who are unable to slog through the mate-

28. Henry M. Hart, Jr. & Herbert Wechsler, *The Federal Courts and the Federal System* xv (Foundation Press, 1st ed. 1953).

rials with any confidence that they are making progress are likely to become dispirited about the book and cynical about the subject. Of course, instructors can (indeed, must) deal with this problem by cutting and pasting in making assignments. But that is not a costless solution. The instructor is likely going to feel some pressure to address for himself or herself the unassigned materials, even though his or her students are not required to pay attention to them. And it interrupts the flow of the course if the syllabus consists of jumps and starts throughout the materials. Incomplete coverage of the reading materials is inevitable these days, given the sheer amount of law on the books and the resultant size of casebooks. But Stone is unusual even among modern constitutional law casebooks in the degree to which it relies so heavily on selections from secondary sources in exploring the depths of the materials, and in the amount of materials that consequently cannot be covered.

If teachers must pick and choose what to cover,[29] the necessity of doing so is particularly regrettable in the case of Stone, since the materials that are likely not to be covered in most courses are among the most original and interesting in the book. Take, for example, the chapter on state action (Chapter X). It is a systematic treatment, aimed at demonstrating that the choice of baseline determines whether the law treats conduct as the responsibility of the state. Sometimes our choice of baseline makes the state responsible for what might seem like private conduct,[30] sometimes not.[31] Are the lines between public and

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29. In some ways, it bears noting, Stone offers more flexibility to instructors than Gunther & Sullivan. For example, an instructor wishing to emphasize the history of slavery and reconstruction in teaching the materials on race would find much more extensive and rich materials in Stone. Stone provides (pp. 495-512) an extensive background note, a generous excerpt from the opinion in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), and a series of challenging notes and questions on the reconstruction period and the legislative and judicial action that took place at the time. Stone then covers *Plessy*, the Jim Crow period, and the legal attack on the separate but equal doctrine. (pp. 512-522) Only then does Stone turn to *Brown I*. (pp. 523-525) By contrast, Gunther & Sullivan begins (pp. 663-664) its materials on race with a note on *Strauder v. West Virginia*, 100 U.S. 303 (1880), and covers the entirety of the separate but equal era in just a couple of pages of notes. (pp. 671-673) The only mention of *Dred Scott* in the entire book is a one-sentence footnote description of its holding that the editors added to their version of *The Slaughter-House Cases*. (p. 424 n.2) Gunther & Sullivan's slighting of *Dred Scott* is a serious defect. That case merits a more extended treatment, if only for its historical significance. For purposes of learning current doctrine and its underlying theoretical tensions, *Dred Scott* is not commonly seen as essential. But see Christopher L. Eisgruber, Dred *Again: Originalism's Forgotten Past*, 10 Const. Comm. 37 (1993) (arguing that originalist constitutional interpretation would lead to the conclusion that *Dred Scott* was correctly decided).

30. See *Shelley v. Kraemer*, 334 U.S. 1 (1948).

private in this and other contexts in any sense neutral? Prepolitical? Even if they are not neutral or prepolitical, are they nonetheless prescribed by (or traceable to) baselines contemplated when the Constitution and its amendments were drafted and ratified? Throughout the book, but particularly in its last chapter on state action, Stone raises these kinds of questions, and self-consciously leads the reader to recognize that constitutional law frequently depends on choices between baselines.

That the book would inculcate this way of critical thinking should come as no surprise, of course, since it is the common thread that runs through much of the authors' other academic work.[32] While the book does not deny the legitimacy of doctrine that is grounded in the political choices reflected in the text or history of the Constitution itself,[33] it is fair to say that the book thematically exposes the importance and contestability of the baselines chosen in resolving constitutional questions.[34] Students who learn this way of thinking about constitutional law will inevitably be suspicious of the status quo, particularly the status quo imposed by our legal traditions, as having any claim of constitutional legitimacy.

In addition to affecting *how* students think about constitutional law—what their baselines will be, in Stone's terms—a casebook will determine *what* they know. Constitutional law casebooks generally cover about the same doctrinal areas and

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31. See *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), noted and discussed in *Stone* at pp. 1701-03 (cited in note 1).

32. See, e.g., Cass R. Sunstein, *The Partial Constitution* (Harvard U. Press, 1993); Cass R. Sunstein, Lochner*'s Legacy*, 87 Colum. L. Rev. 873 (1987); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 Harv. L. Rev. 781 (1983); Louis Michael Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 Yale L. J. 1006 (1987); Louis Michael Seidman, *Confusion at the Border:* Cruzan, *"The Right to Die," and the Public/Private Distinction*, 1991 Sup. Ct. Rev. 47.

33. For example, the book's treatment of takings law allows that the Fifth Amendment itself incorporated an explicit baseline in favor of protecting private property rights. (p. 1681) Of course, the text of the Takings Clause, see U.S. Const. amend. V, can hardly be given any meaning without recognizing some priority for property rights; so in that sense it poses an easy case for discerning, at least roughly, the constitutionally-imposed baseline.

34. For examples of this theme in addition to the state action materials in Chapter X, see the equal protection materials on race and government motive, (pp. 613-631, 645-648) on sex-based classifications, (pp. 721-730) and on wealth-based classifications; (pp. 759-765) the materials on implied fundamental rights, particularly those on economic rights, (pp. 822-829) and on abortion funding; (pp. 974-978) the materials on defining interests for purposes of procedural due process; (pp. 1053-1059) parts of the free speech materials; (pp. 1301-1323, 1329-1334, 1384-1386, 1417-1421) and the materials on takings and the Contracts Clause. (pp. 1635-1645, 1660-1673, 1681-1692)

include many of the same cases.[35] Perhaps because of its copious use of secondary materials, however, Stone's editing of the traditional materials sometimes omits important discussions. If language from a case is not included in a casebook, a student will never know it is on the books unless he or she has reason to read the case in the United States Reports. Such omissions are important, for materials that are *not* covered can influence students just as much as those that are. Indeed, because students will not have the chance to evaluate for themselves what they never know exists, particular attention to what Stone leaves out is warranted.

Consider Stone's treatment of *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[36] The book contains an extensive excerpt from the joint opinion of Justices O'Connor, Kennedy and Souter.[37] And well that it should, since *Casey* is undoubtedly one of the most important cases decided by the Court in modern times. Indeed, the book's excerpt of all the opinions in *Casey* runs 26 pages—which ties for the longest case in the entire volume.[38] Despite the length of the excerpt it includes, the edited version of *Casey* in Stone fails in important ways to provide students with the tools for developing a full understanding of the joint opinion's explanation for why it was necessary to retain what it termed the "central holding" of *Roe v. Wade*,[39] and of the issues at stake in thinking about the problem of substantive due process generally. To see why that is so, it is first necessary to describe in some detail the joint opinion's analysis of why abortion must remain a constitutionally-protected liberty.

In explaining and grounding the source of constitutional protection for the decision to obtain an abortion, the joint opinion speaks generally about the law of substantive due proc-

35. Neither Stone nor Gunther & Sullivan departs from the traditional coverage of casebooks, although there are some unusual case-coverage choices in both. For example, in its freedom of speech materials, Gunther & Sullivan includes (pp. 1151-1155) as a main case *American Booksellers Assn, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), aff'd mem., 475 U.S. 1001 (1986), which struck down Indianapolis's anti-pornography ordinance. The choice to feature the case was a wise one, since that opinion is one of the clearest and most persuasive renderings of traditional freedom of speech principles that one can find. For another example, for its main preemption case, Stone includes (pp. 373-380) *Gade v. National Solid Waste Management Assn.*, 505 U.S. 88 (1992). That case merits just a brief note citation in most other constitutional law casebooks.

36. 505 U.S. 833 (1992).

37. Stone's excerpt of the joint opinion alone is a little more than 17 pages (pp. 990-1007).

38. With *United States v. Lopez*, 115 S. Ct. 1624 (1995) (pp. 154-180).

39. 410 U.S. 113 (1973).

ess; it endorses the Court's prior substantive due process jurisprudence[40] and describes and defends its conception of how the Court ought to make decisions in that line of cases.[41] The joint opinion frankly states that the protection of liberty in the Due Process Clause of the Fourteenth Amendment contains a "substantive component," including, but also going beyond, most of the rights protected by the first eight amendments.[42] But how are such substantive rights to be identified? The joint opinion's answer is extremely significant to an understanding of the law and the stakes in the continuing debate over the scope of the law of substantive due process.

Among the passages left out of Stone are those in which the joint opinion explains its methodology for identifying and defining the scope of substantive due process rights. Perhaps that is because the joint opinion's exposition is itself so thin. Indeed, the joint opinion admits that, in its conception of the law, it is not possible to offer any general rule that can be applied from case to case:

> The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts have always exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule.[43]

In the very next sentence, though, the joint opinion's authors assure us that their mandate does not leave them "free to invalidate state policy choices with which [they] disagree."[44] Yet they are also not "permit[ted] to shrink from the duties of [their] office."[45]

What content, though, does this concept of reasoned judgment have, other than not authorizing judges to impose their value preferences while also not shrinking from the duties of their office? The joint opinion turns to Justice Harlan, and offers an extended quote from his famous dissenting opinion in *Poe v. Ullman*.[46] Justice Harlan emphasized there his view that

40. With the notable exception of *Bowers v. Hardwick*, 478 U.S. 186 (1986), a case which seems not to fit easily with the joint opinion's conception of the scope of personal liberty protected by due process. Justice O'Connor is the only Justice who was in the majority in both *Casey* (on the question whether *Roe* should be retained) and *Hardwick*.

41. *Casey*, 505 U.S. at 846-53 (joint opinion of O'Connor, Kennedy & Souter, JJ.)

42. Id. at 846-49.

43. Id. at 849.

44. Id.

45. Id.

46. 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

substantive due process analysis depended upon careful discernment of the "balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society."[47] That balance, Justice Harlan said, "is the [one] struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke."[48]

One would expect, then, the joint opinion to ground the abortion liberty in a Harlanesque analysis of the traditions of this country. What follows instead is a series of citations of the Court's substantive due process cases relating to contraception and the "private realm of family life which the state cannot enter."[49] Then the joint opinion synthesizes the Court's cases in the following way:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. *At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe and of the mystery of human life.*[50]

Remember that the authors of the joint opinion earlier explicitly invoked Justice Harlan's approach to deciding substantive due process cases. It is plain, however, that Justice Harlan—who was deeply concerned with the legitimacy of the Court's exercise of the power to invalidate the product of the democratic lawmaking process—would not have conceived of his tradition-based analysis as embracing the unfocused, ahistorical slogan that the state has no business meddling in how people define the mystery of human life.[51] In contrast to Justice Harlan's focus on

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47. Id. at 542 (Harlan, J., dissenting) (quoted in *Casey*, 505 U.S. at 850 (joint opinion)).

48. Id.

49. *Casey*, 505 U.S. at 851 (quoting *Prince v Massachusetts*, 321 U.S. 158, 166 (1944)). The other cases cited at this point in the *Casey* joint opinion are *Carey v. Population Services International*, 431 U.S. 678 (1977), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). See *Casey*, 505 U.S. at 851. In describing the development of the law of substantive due process in the prior few pages, the joint opinion cites most of the leading cases on the subject (again with the notable exception of *Bowers v. Hardwick*.) Id. at 846-50.

50. Id. at 851 (emphasis added).

51. In *Poe v. Ullman*, Justice Harlan was clear about this point. He went out of his way to state that the due process clause would not protect from state regulation in matters such as adultery, fornication and homosexual sex, precisely because the interest in

societally-protected traditions, the joint opinion's analysis of *why* a woman's liberty depends on the right to abortion focuses entirely on the importance of the decision whether to continue the pregnancy to the particular woman.[52] For the joint opinion, the decision is *so* important that it is a basic requirement of justice, or ordered liberty if you will, that women make this choice for themselves. What is more, the Constitution, through the Due Process Clause, enshrines that principle of justice into American law.

What will students using Stone learn about this crucial part of constitutional law? What will they learn about the joint opinion's treatment of the principles underlying the law of substantive due process, and about how to distinguish between conduct that is protected by the right to define the "mystery of human life" and conduct that is not?

The answer is that students will learn *nothing* about these matters. None of the materials from *Casey* that I have quoted are included in the edited version appearing in Stone. No frank admission that it is "inescapable" that judges will decide these cases by exercising "reasoned judgment." No "heart of liberty" or "mystery of human life" passages. These are significant omissions. Students who do not read these parts of the case will not have a full appreciation of the debate over the scope of substantive due process. As a matter of theory, Stone's omission of these passages relieves students from confronting the joint opinion's admission that there are no external standards to constrain judicial action in this field other than a sense of reasoned judgment. As a matter of doctrine, the mystery passage has obvious implications for other claims of freedom.[53] To analyze the legitimacy of the Court's methodology, students must be invited to evaluate whether it has any meaningful content and limits, and if so, what they are. But the student who is not aware of the passage will never have the chance.[54]

Stone also omits a telling portion of the Court's 1989 decision in *Michael H. v. Gerald D.*[55]—an omission that is related to the *Casey* opinion's conception of substantive due process. The

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protecting the sanctity of marital relationships justifies the regulation of non-marital sexual conduct. 367 U.S. at 545-46.

52. *Casey*, 505 U.S. at 852-53.

53. See the discussion of the "right to die," at pp. 621-23.

54. It is worth noting that Gunther & Sullivan's edit of *Casey* includes the portions that I have criticized Stone for leaving out. See Gunther & Sullivan at 559 (cited in note 1).

55. 491 U.S. 110 (1989).

Court held in *Michael H.* that the putative father of a child conceived as the result of an adulterous relationship has no substantive due process right to have his parental interests recognized. Beyond its holding, however, the case quickly gained attention because of a debate between Justice Scalia, who wrote the plurality opinion, and Justice Brennan, who wrote the principal dissent, over the proper methodology for identifying substantive rights protected by due process. Justice Scalia argued that substantive due process protected only those rights that have a pedigree in the traditions of the nation, identified at the most specific level of generality that is feasible.[56] Only through such a methodology, he urged, can judges in such cases claim to be implementing societal values rather than their own.[57] Justice Brennan, by contrast, argued that due process is about protecting the fundamental value of freedom, and that Justice Scalia's reliance on history and tradition as a constraining force offered illusory benefits since such concepts are just as manipulable as an open reliance on value judgments.[58] This debate was an unusual, and unusually frank, exchange over the issues at stake in substantive due process analysis, and commentators soon chimed in with their views.[59] Thus, it is no surprise that constitutional law casebooks, including Stone[60] (and Gunther & Sullivan[61]), now feature the *Michael H.* debate between Justice Scalia and Justice Brennan.

There was a concurring opinion in *Michael H.*, however, that should have attracted as much attention as the others. That concurring opinion,[62] authored by Justice O'Connor and joined by Justice Kennedy, was portentous of the substantive due process analysis that was to come in *Casey*. In that concurrence, Justice O'Connor stated that although she agreed with (and therefore joined) most of Justice Scalia's opinion, she could not join his footnote 6, which was the heart of his response to Justice

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56. 491 U.S. at 127-28 n.6.

57. Id.

58. Id. at 137-41.

59. See, e.g., Laurence H. Tribe & Michael C. Dorf, *On Reading the Constitution* (Harvard U. Press, 1991); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. Chi. L. Rev. 1057 (1990); Frank H. Easterbrook, *Abstraction and Authority*, 59 U. Chi. L. Rev. 349 (1992); J. M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 Cardozo. L. Rev. 1613 (1990); Note, *Footnote 6: Justice Scalia's Attempt to Impose A Rule of Law on Substantive Due Process*, 14 Harv. J. L. & Pub. Pol. 853 (1991).

60. *Stone* at 1025-27 (cited in note 1).

61. Gunther & Sullivan at 590-92 (cited in note 1).

62. *Michael H.*, 491 U.S. at 132 (O'Connor, J., concurring in part).

Brennan's criticisms and of his position regarding the level of generality at which societal traditions should be identified in performing substantive due process analysis.[63] Her language bears quoting. Justice Scalia's argument in footnote 6, she says:

> sketches a mode of historical analysis . . . [that] may be somewhat inconsistent with our past decisions in this area. On occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be 'the most specific level' available. I would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis.[64] (citations omitted)

In light of this opinion it seems that Justice O'Connor and Justice Kennedy thought that Justice Scalia's footnote 6 was an inadequate response to Justice Brennan's dissent, at least if they were to retain prior cases of which they approved (although they failed to cite *Roe v. Wade* as one of those cases), and the flexibility to decide future cases as they saw fit. Yet they nonetheless *voted* with Justice Scalia and the majority and against the dissent. It is remarkable that these Justices—the decisive votes on substantive due process issues for a decade—contented themselves with deciding the case by merely stating their disagreement with passages in Justice Scalia's opinion, while refusing to give any meaningful account of why they preferred the majority's result rather than the dissent's.

Although Stone mentions (p. 1026) Justice O'Connor's *Michael H.* concurrence, it does not include any of its text.[65] The text of that opinion is significant, however, especially in light of what happened three years later in *Casey*. The views as expressed in *Michael H.* and the joint opinion in *Casey* must be confronted by students seeking a full understanding of the development of the law of substantive due process and the underlying theoretical issues. Justice O'Connor and Justice Kennedy might be correct in their view that judges ought not to "foreclose the unanticipated" by binding themselves to follow a consistent historical approach from case to case; perhaps it is right that judges properly exercise the capacity of "reasoned judgment" in this field. Students using Stone, however, will not

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63. Id.

64. Id. The block quote in the text contains virtually the entirety of Justice O'Connor's concurrence; the ellipses represent citations of the Court's leading substantive due process cases and nothing more.

65. Again, in contrast to Stone, Gunther & Sullivan includes (p. 591) the bulk of the text of Justice O'Connor's concurrence.

even know exactly where these Justices stand. And they will not be forced to think hard about whether the joint opinion's approach is sustainable.

The failure to include the crucial portions of the *Casey* joint opinion or any portions of the *Michael H.* also renders students using Stone less able to deal with subsequent doctrinal developments. That is particularly so in thinking about the so-called "right to die." In *Washington v. Glucksberg*[66] and *Vacco v. Quill*,[67] the Supreme Court recently rejected the claim that due process confers upon individuals any broad right to physician-assisted suicide.[68] The lower court in *Glucksberg* had concluded that due process confers a right upon the terminally ill to choose the circumstances of their deaths. It was not surprising that its reasoning rested squarely on *Casey*'s discussion of the heart of liberty. The Ninth Circuit referred to *Casey* as "a powerful precedent," which had as its "fundamental message" the lesson that "'matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.'"[69] The Ninth Circuit surveyed the law of substantive due process and concluded that it was properly distilled to a legal principle represented by the mystery passage from *Casey*.[70] That conclusion was entirely consistent with what seemed to be the views of the joint opinion's authors on the same question; after all, the paragraph culminating in the mystery passage was itself precisely a distillation of legal principle from the Court's prior cases. In short, if one reads the mystery passage for all it is worth, as the Ninth Circuit did, it is by no means unreasonable to conclude that the Supreme Court's abor-

66. 117 S. Ct. 2258 (1997).

67. 117 S. Ct. 2293 (1997).

68. See *Glucksberg*, 117 S. Ct. at 2258.

69. *Compassion in Dying v. Washington*, 79 F.3d 790, 801 (9th Cir. 1996) (en banc) (quoting *Casey*, 505 U.S. at 851), rev'd, 117 S. Ct. 2293 (1997).

70. Id. at 813-14. The Ninth Circuit was not alone in so reading *Casey*. Several of the most eminent English-speaking philosophers in the world submitted an *amicus* brief to the Supreme Court endorsing the Ninth Circuit's analysis and the correctness of the *Casey* mystery passage. See Brief for Ronald Dworkin, Thomas Nagel, Robert Nozick, John Rawls, Thomas Scanlon, and Judith Jarvis Thompson as Amici Curiae In Support of Respondents, *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997) (No. 95-1858) & *Vacco v. Quill*, 117 S. Ct. 2293 (1997) (No. 96-110). As it turns out, the Supreme Court disagreed, stating that the *Casey* statement in effect did not mean everything it appeared to say; according to the *Glucksberg* Court, although *Casey* spoke in terms of personal autonomy as an end to be protected by due process, it just so happens that the values protected by due process—matters involving marriage, child bearing, child rearing—involve elements of autonomy as well. See *Glucksberg*, 117 S. Ct. at 2270-71. (The Supreme Court did not cite the philosophers' brief.)

tion jurisprudence dictates the recognition of a broad right to determine how and when one dies. Again, though, the student using Stone will be ignorant of the crucial passages from *Casey* and therefore less able to evaluate whether the Court's cases properly encompass such a right.

What is to explain these omissions in Stone? There is no way to say, of course, for there is no source to which we can turn for an explanation of the authors' editing decisions, particularly those to omit portions of decisions. The simplest explanation is just that something (indeed, a whole lot) had to go. The *Casey* decision runs over 175 pages in the United States Reports, and even the most generous casebook version of it cannot come close to providing a complete rendition of the opinions in the case. And I suppose it would not be difficult to identify significant omissions from many other important cases, both in Stone and in other casebooks.

Upon reading the full text of the joint opinion, though, it is hard to miss the unusual significance of the portions on which I have focused. It was not difficult to see that those parts of the joint opinion would affect the terms of the debate on future doctrinal developments in the law not only of abortion but of substantive due process generally. It was no accident that the lower courts in *Glucksberg* regarded the mystery passage in *Casey* as "almost prescriptive" of a broad right to physician-assisted suicide.[71] Although space is surely at a premium, even in a 1750-page casebook, Stone's authors would serve the book's users by providing a fuller version of *Casey* in the fourth edition.

III

Both Gunther & Sullivan and Stone are great works of synthesis and scholarship. Both achieve virtually encyclopedic coverage of constitutional law, while also exposing the theoretical issues that underlie the every part of the field. They surely deserve the prominence they have achieved. Yet even with books as prominent and important as these—perhaps *especially* with such books—we must nonetheless be attentive to what materials are included, and how they are edited and organized. Decisions about those matters will, after all, go a long way toward inculcating the constitutional values of the next generation.

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71. *Compassion in Dying*, 79 F.3d at 801 (quoting *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1459 (W.D. Wash. 1994)).