'THE CANON' OF CONSTITUTIONAL LAW FOR UNDERGRADUATE TEACHING: THE MELDING OF CONSTITUTIONAL THEORY, LAW, AND INTERPRETIVE/EMPIRICAL POLITICAL SCIENCE

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As a teacher of undergraduates, I want to make the argument that courses in American Constitutional Law should emphasize a wide range of topics, including constitutional theory, the process of Supreme Court decision-making, and how the Supreme Court brings change in political, economic, and social life into constitutional law. We should also present students with some of the methods of analysis and definitions of institutions and institutional change that inform the emerging historical institutional or politics and history approach to American political development. I have written elsewhere about the importance of teaching constitutional theory and the process of social construction by the Supreme Court as ways to bring the outside world into supreme Court decision-making. The following eight paragraphs are taken from that article, which may be hard for readers of this journal to locate.[1]

Intellectual movements, such as Feminist Theory, Critical Legal Studies, and Critical Race Theory, are central to understanding how political and social change is facilitated through law. Students want to know how change in constitutional law occurs and how such changes inform the process of change in the wider society. The link between such intellectual movements and legal change requires a consideration of the role of the interpretive community in the development of constitutional law. Why do very smart constitutional scholars seek to develop new

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1. See Ronald Kahn, *Bringing the Outside World into Supreme Court Decision Making*, 14 *Focus on Law Studies: Teaching About Law in the Liberal Arts* 5, 16 (Fall 1998).

constitutional movements, theories, and ways of looking at constitutional questions? Why is so much passion exhibited by scholars and their students in support of or in opposition to feminist, critical legal studies, and critical race approaches to the law?

One reason for the important role of such intellectual movements is that scholars are trying to influence the "interpretive community." According to Owen Fiss, the interpretive community includes jurists, legal journalists, practitioners, legal change advocates, other scholars, and the informed public. Scholars are trying to persuade the interpretive community to accept new conceptions of what the polity and principles in constitutional law should be, as well as how they should be applied. For instance, civic republicans, such as Cass Sunstein and Frank Michelman, contend that ensuring rigorous informed deliberation on constitutional matters can only be facilitated by engaging the general public. For feminist scholars like Catharine MacKinnon, the objective is to demonstrate the impact of gender-based power disparities in society at large on law and the legal system. Critical legal scholars argue that "the law" is what judges say it is. Since judges are from the upper class and accept the value premises of the wider society, such as those of capitalism and pluralism, court decision-making is not viewed as autonomous from class, social, and political structures in societies. Thus, for critical legal scholars, class, social, and political inequalities are simply reflected in the law. They therefore understate the force of law and legal institutions on social change.

To understand how the Supreme Court is influenced from without by social and political forces, students should become aware of differences that exist among members of the interpretive community on how individual rights intersect with judicial decision making. Additionally, they should be exposed to the role that courts play in the wider political system, as well as how political, social, and economic considerations affect court decisions. They must consider such questions through the study of conventional constitutional theories as well as in representative scholarship from new intellectual movements. These intellectual movements allow new questions to be asked about social and political change, questions whose answers could positively affect society as a whole. Examples include: To what degree has constitutional law met the needs of a changing society? Which ideas central to these intellectual movements have made their way into constitutional law and why? How is the rule of law affected,

positively or negatively, by the central contentions developed by Critical Legal Studies (CLS), Critical Race Theory (CRT), and Feminist Jurisprudence? What elements from more conventional constitutional theory can actually help sustain political and social change in a diverse society?

Students should also come to see how scholars from these intellectual movements understand the role of law and courts in the process of political and social change. They should begin to evaluate the implications of focusing on the critical approaches to constitutional law just as they must consider the implications of relying on conventional rights-based constitutional theory. Similarly, in exploring cases with students, instructors need to identify examples in which Supreme Court justices accept or reject premises that are central to these critical intellectual movements. This practice is consistent with what we do in our analysis of more conventional approaches, including our theoretical assessments of originalism and non-originalism in constitutional interpretation. For example, why does the Supreme Court talk of "personhood" rather than privacy in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the decision in which a Supreme Court consisting of a majority of Reagan-Bush appointees refused to overturn the fundamental right to abortion choice first enunciated in *Roe v. Wade*?

Study of these intellectual movements is very exciting to students because it opens up for them the possibilities and limits of law in effecting social change. Most importantly, through comparison of conventional and critical approaches to law and legal theory, students can ask themselves whether they wish to participate—as lawyers, judges, legal scholars, or political scientists—in the interpretive community. I must emphasize that the primary objective in my American Constitutional Law class is not to produce lawyers or members of the interpretive community. However, one of the major reasons that students become scholars or practitioners in any particular field—whether the field is chemistry, political science, or law—is that they see us as teachers and mentors who enjoy engaging in research and exploring new intellectual puzzles. That is why so many Ph.D.s, scholars, and legal theorists traditionally come from liberal arts colleges, where they have opportunities to work closely with instructors in research seminars, in honors courses, and as research assistants.

There are drawbacks to presenting only one approach to Supreme Court decision making: students may come to view one

movement as the "correct" one, rather than affording due consideration to divergent approaches, be they conventional or critical. If we as teachers were to present only one approach, we would deny to students the opportunity to fairly evaluate conflicting interpretive models. At the undergraduate level, presenting the competing interpretive frameworks allows students to make authentic assessments of their theoretical coherence and practical value. By imparting to students the ability to critically analyze such approaches, instructors are passing on "tools" which will be invaluable in graduate, law, and professional school. On the personal side, although I am an interpretive empiricist and a non-originalist, I am proud of the fact that my students have become behavioral political scientists and originalist scholars.

However, studying new intellectual movements will not necessarily explain how social, economic, and political change directly influence Supreme Court decision making. For example, Justices might accept or reject John Hart Ely's vision of rights under the equal protection clause, or Lani Guinier's vision of representation and voting rights. In so doing, one can identify which conceptions from the interpretive community have affected actual court decisions. However, to explain how the outside world comes into constitutional law, we need to do more. We need to place the Supreme Court decision making process into a wider historical framework, beyond the level of intellectual movements, ideas, and interpretation. To do this we need to ask under what conditions new social constructs come into the law, which become part of precedents.[2] It is quite clear that

2. See Ronald Kahn, *Liberalism, Political Culture, and the Rights of Subordinated Groups: Constitutional Theory and Practice at a Crossroads*, in David F. Ericson and Louisa Bertch Green, eds., *The Liberal Tradition In American Politics: Reassessing The Legacy Of American Liberalism* 171-97, 254-59 (Routledge, 1999). See also Ronald Kahn, *Institutional Norms and the Historical Development of Supreme Court Politics: Changing "Social Facts" and Doctrinal Development*, in Howard Gillman and Cornell Clayton, eds., *The Supreme Court in American Politics: New Institutionalist Interpretations* 43-59 (U. Press of Kansas, 1999); and Ronald Kahn, *New (Historical) Institutionalism: Relating Supreme Court Decision Making to Social, Political and Economic Change*, in Ronald Kahn, ed., 9 *A Law and Courts Symposium: Courts, Law, and the New (Historical) Institutionalism, Law and Courts* 1, 3, 12-13 (Spring, 1999). Finally, see two recent papers on the role of social constructs in Supreme Court decision-making and American constitutional development: *The Role of "Precedential Social Facts" in Reversals of Landmark Supreme Court Decisions: The Rights of Subordinated Groups to Expression, Religion, Privacy, and Equal Protection*, (Paper presented to Panel on Legitimacy of Arguments, Evidence, and Amendments, 1999 Annual Meeting, American Political Science Association, Atlanta, GA, September 2-5, 1999) (on file with author); and *New Historical Institutionalism, Precedential Social Constructs, Political Culture, and Doctrinal Change: Gender Discrimination in the Twentieth Century* (with Susan Den-

judges ask what constitutes "liberty" interests in light of a changing society, as we saw in Justice Harlan's concept of "ordered liberty" in *Poe v. Ullman* and *Griswold v. Connecticut.* Yet too few scholars of Supreme Court decision making have studied the role and development of social constructs in the law. Do such visions of society get passed on from landmark cases, as the Court considers new constitutional questions? What is the relationship of policy and principles to the way social constructs are formulated by non-originalists on the Court? Exploring new intellectual developments can help us gain a more precise understanding of social constructs in the law and begin to see how they effect change.

My students are excited about studying intellectual movements and appropriating ideas from a wide range of scholars to construct their own conceptions of the role of law in ameliorating problems of race, gender, and class in our society. Critical engagement with these differing theoretical traditions helps students synthesize, as well as controvert, ideas that they encounter in other courses. Indeed, this is the very mark of a serious liberal arts education. Additionally, it brings great pleasure to teach American Constitutional Law at the undergraduate level precisely because there are many important issues which are best illuminated at the intersection of the humanities and social sciences. Studying intellectual movements stimulates such cross-currents of knowledge. By examining the role that courts play as forums for social change and introducing different views about what values should be incorporated into constitutional law, students learn to both respect and question different perspectives on constitutional interpretation.

In arguing for the inclusion of constitutional theory and the process through which the Supreme Court brings the outside social, economic, and political world into its decision making, I am taking issue with some, but not all, of what my colleagues in this discussion group are advocating.

I am asking that we do more than expand the cases which are considered necessary for the teaching of constitutional law. We have seen numerous examples of this in the articles in this Symposium. Some make valid arguments for innovation in "the taught" canon and constitutional law textbooks, with insights on

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nehy) (paper presented to Panel on Historical Institutionalism and the Politics of Courts, 1999 Annual Meeting, Western Political Science Association, Seattle, WA, Mar. 25-27, 1999) (on file with author).

the pedagogical advantages and disadvantages of such changes for law school students. Louis Fisher wants students using his textbook to study the dialogue among the judiciary, Congress, the president, the states and the general public, and the role of the Supreme Court and courts in our political system. John Nowak explores the role of casebooks in law school teaching and the development of his textbook in the future. William Banks and Daan Braveman discuss how their law school text differs from others by including additional material on the structure of government and the integration of constitutional theory and doctrine with practical problems. J. M. Balkin and Sandy Levinson question the role of constitutional theory in law school teaching. They argue that "constitutional theories actually tend to avoid putting the basic justice of the legal system into question by offering intricate and intellectually demanding forms of legal analysis as a substitute for and are a diversion from potentially de-legitimating inquiries about our constitutional system."[3]

Many contributors make arguments for including in 'the canon' contributions from outside the courtroom and what Owen Fiss has called "the interpretive community."[4] One might argue that they are seeking to expand the definition of the interpretive community.[5] J.M. Balkin and Sandy Levinson, in what may be called keynote contributions for discussion, make superb arguments as to what the term canon means and why and how we should expand it.[6] They call for law professors to expand the contribution of non-governmental, non-judicial, and non-professionally trained lawyers, such as Frederick Douglass, to the canon of constitutional law.[7] They argue for the inclusion into the canon of the words of leaders of social movements. I agree with them that students should not view constitutional law simply as a history of great jurists, because at key times throughout our history, including today, the words of important agents of social change in and out of government are central to the de-

3. See J. M. Balkin and Sanford Levinson, *The Canons of Constitutional Law*, 111 Harv. L. Rev. 963, 1020-2021 (1998).

4. See generally Owen M. Fiss, *Objectivity and Interpretation*, 34 Stan. L. Rev. 739 (1982) (urging recovery of "an old and familiar idea . . . that adjudication is a form of interpretation").

5. See generally Ronald Kahn, *The Supreme Court and Constitutional Theory, 1953-1993* (U. Press of Kansas, 1994), for an analysis of the limitations of viewing Supreme Court decision making in instrumental rather than constitutive terms and an analysis of how the interpretive community informs the development of constitutional law in the Warren, Burger, and Rehnquist eras of the Supreme Court.

6. See Balkin and Levinson, 111 Harv. L. Rev. at 970-1002 (cited in note 3).

7. See id. at 1023.

velopment of constitutional questions, although their words are not viewed as part of the taught canon. They argue that judge-centered law "neglects the fact that constitutional changes–including changes in constitutional interpretation–are often the result of mass political action, which is later recognized and sanctified by various legal and judicial elites."[8]

Levinson and Balkin argue that constitutional law textbooks, like their own, should place more emphasis on the realities of American politics: if constitutional law teachers do this, then the nature of the scholarly and pedagogical problematics will be quite different than those of too many law professors, who center their teaching on the counter-majoritarian difficulty of the Supreme Court.[9] Through the expansion of "the canon," legal academics will ask more than whether courts should defer to legislatures or wait for the creation of new rights through the amendment process. They argue that constitutional law teachers and scholars should ask themselves instead "whether judicial decisions do not already reflect the political and ideological struggles playing out in the larger culture, translated into the professional discourse of the law."[10] For example, Levinson and Balkin suggest that the issue of homosexual rights is important in the Supreme Court, and in lesser courts, because of the development of a social movement that has forced courts to acknowledge that how we treat gay men and lesbians is a legal problem facing our nation, with Justices and judges now "discovering" rights in response to a social movement that has existed outside the courts for a long time.[11]

Levinson and Balkin make the argument for an expansion of the canon because they believe all Americans have the right and duty to interpret the Constitution and decide for themselves what it means. For this reason, expansion of the canon should be the pedagogical strategy for all teachers of constitutional law, at both the law school and undergraduate levels. According to Levinson and Balkin, constitutional law teachers have a responsibility to understand that the development of the law is not simply a creation of courts, but of courts responding to social movements and the world outside. Such study, they say, will also reduce the degree to which students blindly respect the law and the major formal institutions which interpret it—the Supreme

8. Id. at 1022.
9. See id.
10. Id. at 1023.
11. See id.

Court, lower federal courts, and state courts. This concern for the expansion of the canon is based on our admission that the oppression of many of our citizens has been a central part of our history to this day, and that the Supreme Court and lesser courts, compared to legislatures at all levels and mass politics, have not always led us to see and reduce that oppression. Law and legal change may have been socially transformative, but the Supreme Court and lesser courts have not always led this transformation.[12]

While I agree that the Constitution outside the Court should be studied, I question whether such a bright line should be drawn as Balkin and Levinson do between law and politics. I also question their downplaying of the impact of the role played by the Supreme Court and lesser courts on social change, compared to outside court political action. Also, they too frequently assume that the Supreme Court is not considering the social, economic, and political realities of the day as it makes constitutional choices, and that only the introduction into the canon of the words of leaders of mass movements will meet this problem. Moreover, they do not address the process through which there is a cross-fertilization between political, economic, and social changes in the wider society. I think that the introduction of the words of leaders of mass movements into the canon is not a sufficient palliative for this needed cross-fertilization. However, as argued above, emphasizing the study of Supreme Court decision making, specifically with regard to the introduction of social constructions by the Supreme Court and lesser appellate courts, into case law as precedents, and the impact of constitutional theory on such introductions, may do more to help us understand the Constitution outside the courts than simply adding new cases and introducing students to the ideas of leaders of social movements. The study of constitutional theory, which is oftentimes built upon constitutional scholars' views as to what aspects of social, economic, and political life must be brought into the law, may do more to expand the canon of constitutional law vertically, and get our students to engage in such a process of change, than the addition of this or that set of admittedly important cases that have been ignored for too many years.

In making this argument, I join Mark Graber, who urges us to expand the cases that we as constitutional law teachers should know, so that teachers in and out of law schools place into the canon insights from political science and history, thereby con-

12. See id. at 1021-24.

tinuing the process through which the study of constitutional law is inter-disciplinary.[13] I agree that we must draw upon the best work from political science, political culture, the sociology of mass movements, and social history, as the contributions of Louis Fisher, Maxwell L. Stearns, and William Wiecek also emphasize.

This trend towards the inter-disciplinary study of constitutional law is visible in much recent work in constitutional law and political science. Mark Tushnet's superb *Taking the Constitution Away From the Courts* builds on his prior work, *Red, White, and Blue: A Critical Analysis of Constitutional Law*.[14] In *Taking the Constitution Away From the Courts,* Tushnet argues for a "populist" constitutional law in which judicial decisions do not receive special consideration; he recommends that we not favor judicial review as a process for considering constitutional issues above the broader process of dialogue in the nation.[15]

Tushnet argues for this position because he considers judicial review to consist of a record of errors brought about by the Supreme Court's refusal to follow the "thin Constitution." The "thin Constitution," according to Tushnet, includes the fundamental American principles in the Declaration of Independence and the Preamble to the Constitution, which constitute a set of principles that the full citizenry, not just courts, should protect.[16] The notion here is that the Supreme Court and the process of judicial review should not be trusted more than Congress and other institutions, and clearly not more than the American citizenry, which should participate in a broader deliberative process.

For years Tushnet, Levinson, and Balkin have bridged the gap between constitutional law/theory and political science; too few law school-centered constitutional law scholars and teachers have done this. Political scientists have been bridging the gap for years. A less than full listing of political scientists who have been bridging the gap include: Edward Corwin, Walter Murphy,

13. See generally Mark A. Graber, *Law and Sports Officiating: A Misunderstood and Justly Neglected Relationship,* 16 Const. Comm. 293 (1999), in which he argues for the interdisciplinary analysis of the merits of Ronald Dworkin's constitutional theories.

14. See generally Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton U. Press, 1999) (discussion of tension between Supreme Court decisions on liberty and popular political power); and *Red, White, and Blue: A Critical Analysis of Constitutional Law* (Harvard U. Press, 1988) (examination of arguments on judicial review).

15. See Tushnet, *Taking the Constitution Away From the Courts* at 182-87 (cited in note 14).

16. See id. at 9-14.

C. Herman Pritchett, and, more recently, Howard Gillman, Michael McCann, Rogers Smith, and Gerry Rosenberg, in addition to Sotirios Barber and James E. Fleming, Malcolm Feeley, Louis Fisher, Mark Graber, and Joel B. Grossman.[17]

In addition to Tushnet, Levinson, and Balkin, Cass Sunstein is another law school scholar who has attempted to bridge the gap between constitutional law/theory and political science. In his most recent book, *One Case at a Time: Judicial Minimalism on the Supreme Court*, Sunstein argues for the incremental approach to legal change by the Supreme Court, that is, for the Court to decide one case at a time and to avoid broad rulings.[18] This would allow the political system to deliberate on constitutional questions and ensure flexibility in the development of the law. All the Justices on the contemporary Rehnquist Court, other than the originalists, who are maximalists, not minimalists, in Sunstein's terms, engage in judicial minimalism, as is evident in the areas of affirmative action, homosexuality and gender discrimination, and First Amendment issues regarding the Internet and telecommunication changes. We must consider the validity of Sunstein's insights on the Supreme Court and social change and the implications of those insights, if they are valid, for "the canon" we teach.

However, I must join Sotirios A. Barber and James E. Fleming, who provide a needed cautionary note on the ideas of Levinson, Tushnet, and Sunstein. They caution against placing the idea of the Constitution too far outside the Supreme Court and the courts. Their comments, and others, convince me that the responsibilities of an undergraduate constitutional law

17. See generally Edward S. Corwin, *The Passing of Dual Federalism*, 36 Va. L. Rev. 1 (1950) (arguing that power has shifted to the federal government and away from the states); Walter Murphy, *Elements of Judicial Strategy* (U. of Chicago Press, 1964); and C. Herman Pritchett, *The Roosevelt Court: A Study in Judicial Politics and Values, 1937-1947* (MacMillan Co., 1948) (critical review of non-unanimous Supreme Court opinions). For more recent scholarship that bridges the gap between constitutional law/theory and political science, see generally Howard Gillman, *The Constitution Besieged* (Duke U. Press, 1993); Michael McCann, *Rights At Work: Pay Equity Reform and the Politics of Legal Mobilization* (U. of Chicago Press, 1994) (review of "the value of law for empowering . . . citizens"); Rogers M. Smith, *Civic Ideals* (Yale U. Press, 1997); and Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (U. of Chicago Press, 1991). See also the following contributions to this symposium: Sotirios A. Barber and James E. Fleming, *The Canon and the Constitution Outside the Courts*, and Louis Fisher, *The Canons of Constitutional Law: Teaching With a Political-Historical Framework*.

18. See generally Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard U. Press, 1999) (describing "procedural and substantive components" on judicial minimalism).

teacher are different from those of law school professors who have an obligation to teach their students to be lawyers. However, the more I read the thoughts of my colleagues here, some of whom have taught undergraduates as well as law school students, in creative ways, the more I feel that the difference in the roles of undergraduate and graduate teachers of constitutional law may be exaggerated.