

## CHASING THE CANNON: A TAIL'S VIEW OF, AND REQUESTS TO, THE DOG

John E. Nowak\*

My admiration for the late Fred Rodell gives me an excuse, if not a reason, for keeping the number of footnotes in this document as small as possible.<sup>1</sup> Otherwise I would, of course, have footnote references to the other articles in this Symposium, particularly Jerry Barron's article, "Capturing the Canon." Those articles have provided us with both an excellent overview of developments in the casebooks and rationales for the decisions of casebook authors.

There are as many "canons" of constitutional law as there are constitutional courses. Each student studies a canon that consists of the cases and materials used in her course. The student believes that the materials presented by the professor, discussed in class, and "tested" on the examination constitute the principles that every law student and lawyer should know. It's my guess that the vast majority of professors who teach constitutional law do not supplement the casebook materials with additional cases, or anything else. Most professors create a canon for their students by choosing a casebook and selecting the sections of the casebook that will be covered in the course.

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\* David C. Baum Professor of Law, University of Illinois.

1. In other essays, I have attempted to resurrect Professor Rodell's brand of legal realism in analyzing constitutional issues. See generally John E. Nowak, *Professor Rodell, The Burger Court, and Public Opinion*, 1 Const. Comm. 107 (1984); John E. Nowak, *Foreword: Evaluating the Work of the New Libertarian Supreme Court*, 7 Hastings Const. L.Q. 263 (1980). Although one would never guess it by the number of footnotes in this short essay, I really hate footnotes. I made that point in John E. Nowak, *Woe Unto You, Law Reviews!*, 27 Ariz. L. Rev. 317 (1985). I take some solace in the fact that Judge Abner Mikva, a former student of Professor Rodell's, as well as a noted scholar and jurist, has also made some accommodation to the need to use notes to support statements in law reviews today. Because Judge Mikva is a person of more character than myself, he has made less of a departure from Professor Rodell's approach to legal writing than I have. Compare Abner J. Mikva, *Goodbye to Footnotes*, 56 U. Colo. L. Rev. 647 (1985) (arguing against the importance of footnotes in legal writing), with Abner J. Mikva and Jeff Bleich, *When Congress Overrules the Court*, 79 Cal. L. Rev. 729 (1991) (using footnotes only as means of citation).

The authors of casebooks are the “big dogs” who create canons of constitutional law. The writers of reference works for students are the tails who follow the dogs as they wander through years and editions. Nevertheless, taking a look at where the tail has gone tells you something about what the dog has been doing. As the coauthor of a “one volume treatise,” I’ve been in the business of tracking developments in constitutional law casebooks and courses for more than twenty years.<sup>2</sup> [*Here’s an aside*: Before I go further, I should tell you how hard it is for me—at least with a straight face—to call a one volume reference work, which is aimed primarily at a student audience, a “treatise.” Nevertheless, I’ll go along with today’s terminology].

In 1978, the late J. Nelson Young, Ron Rotunda, and I published the first edition of our one volume treatise. The first edition of the book was only 974 pages in length and it had large typeface and wide margins. Yet that modest text covered almost all of the subjects that received significant attention in constitutional law courses. There were not a lot of schools offering separate first amendment or fourteenth amendment courses a quarter century ago. In the “old days” most schools had only one constitutional law course.

Many, though not all, of the changes in our book are direct reflections of changes in constitutional law courses in the last quarter of the twentieth century. The second edition of our book, published in 1983, had grown dramatically. We had received a good response to the first edition from lawyers and judges, as well as from the student audience for which the first edition was aimed. In the second edition we added topics and lengthened our examination of some topics, in the foolish belief that we could write a single reference work that would serve all elements of the profession: students and professors, judges and lawyers.

Jerry Barron played a part in changing the direction of our one volume treatise. In 1983 he was nice enough to include me in the planning committee for the constitutional law conference to which he refers to in his article. Some of the views presented in that conference, as well as discussions with a number of professors around the country, led Ron Rotunda and me to decide that a single book could not serve the needs of both academe

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2. See John E. Nowak, Ronald D. Rotunda and J. Nelson Young, *Constitutional Law* (West, 1978); John E. Nowak and Ronald D. Rotunda, *Constitutional Law* (West, 6th ed. 2000).

and the "real world." In 1986, we published the third edition of our one volume treatise; in that year we also published the first edition of our multi-volume *Treatise on Constitutional Law: Substance and Procedure*.<sup>3</sup>

Our one volume treatise is very different from our multi-volume Treatise. The Treatise is not designed to create, or reflect, a canon of constitutional law, though it should be of more help to constitutional law professors than our one volume work. The third edition of the multi-volume Treatise, which was published last summer, fills five volumes and more than 3800 pages. The Treatise has yearly supplements, and more topics, more cases, and citations to a lot more law review articles than does our single volume work. Surprised that we include citations to most law review articles in the Treatise, but not our single volume text? You shouldn't be. Students, who are the primary users of any single volume treatise, will only consider a law review article important if it was discussed in their course. For that reason, almost all references to law review articles will disappear from the sixth edition of our one volume treatise.

The growing divergence between the contents of our one volume treatise [A/K/A hornbook] and our Treatise reflects the different needs of judges and lawyers, on the one hand, and students, on the other. Judge Edwards, and others, have commented upon the growing divergence between what is taught in law school and the skills required of practicing lawyers.<sup>4</sup> Professors Balkin and Levinson are unquestionably correct when they note that we need not be as concerned about the training of lawyers in our constitutional law courses as professors should be in some other law school courses.<sup>5</sup> Nevertheless, lawyers do run into constitutional questions, and judges must deal with those questions. Those lawyers and judges require information on a range of issues that no professor would include in the canon; they require citations to many, if not all, of the Supreme Court's decisions on each point. In serving the needs of judges and lawyers in our Treatise, Ron and I have been able to avoid making

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3. Ronald D. Rotunda and John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* (West, 3d ed. 1999, with 2000 Supplement).

4. Contrast Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34 (1992), with Sanford Levinson, *Judge Edwards' Indictment of "Impractical" Scholars: The Need for a Bill of Particulars*, 91 Mich. L. Rev. 2010 (1993).

5. J.M. Balkin and Sanford Levinson, *The Canons of Constitutional Law*, 111 Harv. L. Rev. 963, 1004 (1998).

decisions about which topics or cases should be included in a "canon." For example, *Downes v. Bidwell*,<sup>6</sup> discussed in Levinson's article, touches on a variety of subjects that might come up in court cases; we include four references to that case in our multi-volume Treatise. That case only gets one footnote reference in our single volume treatise.

What do students want from one volume treatises? What differentiates one volume treatises from other "study aids"? The student's primary interest, of course, is in getting help in understanding the materials in a way that will allow him or her to get a higher grade for the course. The difference between any of the one volume treatises and other types of study aids, such as commercial outlines, is two-fold. First, a one volume treatise, unlike some "study aids," will give the student information concerning how principles were developed (thus touching on some of the concerns raised by Maxwell Stearns in his article). Second, a one volume treatise needs to be as comprehensive as possible, because it is designed to be used by students in many types of courses. I cannot speak for the writers of other one volume treatises, but Ron and I only drop a topic from our one volume work when we are fairly certain that it is not being taught in constitutional law courses across the country. We cut back dramatically in our coverage of a topic only if we have determined that the topic is no longer getting significant attention in those courses.

Over the years, a number of topics have disappeared from basic constitutional law courses. Based on the content of constitutional law courses in the late 1980s and early 1990s, our fifth edition (published in 1995) almost completely eliminated coverage of some topics, including: Article I powers of Congress other than the commerce and fiscal powers; immigration and naturalization; federal government immunity from state regulation; and state taxation. We also significantly reduced our coverage (essentially by eliminating reference to cases that no longer appear in constitutional law casebooks) of topics such as: congressional enforcement of civil rights; foreign affairs; presidential immunities and powers; and procedural due process.

Ron and I have not made a final decision regarding the topics that will receive significantly reduced coverage in the sixth edition of our one volume treatise, which will be published in the

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6. 182 U.S. 244 (1901).

fall of 2000. Among the top candidates for reduced coverage are: most pre-1960s cases concerning alienage, gender, and illegitimacy classifications; procedural due process; the one person-one vote cases; and most of the ballot access cases. Indeed, we may drop some of the "specialized" religious clause topics (such as judicial inquiry into religious "frauds" and judicial involvement in intra-sect disputes), because, despite the growing number of First Amendment courses, those topics do not appear in many casebooks.

Why has our one volume treatise grown in size, while Ron and I have been reducing coverage of some topics? Topics that have received reduced coverage in our one volume treatise are the topics that have given way, in most casebooks and courses, to more "in-depth" coverage of fundamental rights topics, particularly the right to privacy, and post-1968 equal protection cases.

I assume that casebooks follow the "market force" of professorial preferences. If so, the changes in topics covered in most casebooks must meet with the approval of most law professors. Nevertheless, I believe that there are at least three major omissions from the canon that law students study. There are three areas that I believe casebook authors should add to their texts, so that these topics might become part of the canon presented to most students. The remainder of this paper consists of three requests to the casebook authors. If these topics do not get significant coverage in casebooks and courses, we cannot add them to our one volume reference work. My three suggestions are made in ascending order of their importance (to me, that is).

[*What, another "aside"?* I must give you the same warning that I always give my students at the start of each course. Each semester, I make the statement that: "Every law school should have at least one came-of-age in the 1960s, white guilt, knee jerk liberal. You're looking at one right now." The suggestions to casebook authors, below, are made by a professorial dinosaur who's trying to survive the ice age of law-and-economics, and new-speak constitutional law terminology that might make John Marshall spin in his grave.<sup>7</sup>]

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7. After all, John Marshall thought that he, not Madison, was a Federalist. Prior to the ratification of the Constitution, all those persons who supported ratification (including all of the writers of Federalist Papers) were referred to as Federalists; those persons who opposed ratification were referred to as Anti-Federalists. After ratification of the Constitution, Federalists were persons, such as John Marshall, who were members of the Federalist political party. The Federalists were opposed by a political party known as the Democratic-Republicans (which was also called the Democrats, the Republicans, or

### 1. STATE TAXATION AND INTER-GOVERNMENTAL TAX IMMUNITY CASES

There is no reason to lament the absence of materials on the details of commerce clause and due process clause limitations on specific types of state taxes such as franchise taxes, inheritance taxes, or income taxes. Nevertheless, I believe that casebooks should include the cases that establish basic commerce clause principles that apply to all forms of state taxes. The inclusion of *Complete Auto Transit, Inc. v. Brady*,<sup>8</sup> which established the modern four-part test for judging the compatibility of any state or local tax with dormant commerce clause principles, and *Quill Corp. v. North Dakota*,<sup>9</sup> which recast earlier due process rulings as commerce clause decisions, are important for two reasons. First, reviewing basic state taxation cases will give the students a better perspective on the debate among the Justices concerning the extent to which they should strike state laws under the "dormant" or "negative" commerce clause. Second, these cases show the students that the Court is willing to defer to Congress concerning the limitation, or expansion, of a state's taxing power, a subject of increasing importance in an age of when economic transactions are being done at computer keyboards.

Classroom discussion of Supreme Court cases concerning intergovernmental tax immunity<sup>10</sup> would help prepare the students for a discussion of federal-state relationships, and the competency of the judiciary to structure those relationships. Casebooks should include excerpts from, or a text description of, the cases in which the Court attempted to carve out an area of immunity from federal taxes for state "governmental" activities (as opposed to "proprietary" activities). All the casebooks include an excerpt from Justice Blackmun's majority opinion in

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the Anti-Federalists in various portions of the country). The Anti-Federalists, who had opposed the Constitution, were a dying political group. The Democratic-Republicans espoused a modified version of the Anti-Federalist philosophy; they mirrored the Anti-Federalists in their opposition to the Federalists' political philosophy. Everyone knows about the Federalists. For information about the Anti-Federalists, and their opposition to the constitution, see generally Cecilia M. Kenyon, ed., *The Antifederalists* (Bobbs-Merrill Co., 1966); Herbert J. Storing, ed., *The Complete Anti-Federalist* (U. Chicago Press, 1981).

8. 430 U.S. 274 (1977).

9. 504 U.S. 298 (1992). For an examination of constitutional limits on state taxes, see Rotunda and Nowak, *Treatise on Constitutional Law* Ch. 13 (cited in note 3).

10. For an examination of intergovernmental tax immunity cases, see Rotunda and Nowak, *Treatise on Constitutional Law* § 13.9 at 467-505 (cited in note 3).

*Garcia v. San Antonio Metropolitan Transit Authority*,<sup>11</sup> stating that the Court had found the government-proprietary function distinction to be unworkable, and a description of the ruling in *Massachusetts v. United States*.<sup>12</sup> However, I doubt that students, based on the materials in most casebooks, can fully appreciate the amount of effort that went into the Court's attempt to create an area of state sovereignty that would be protected from federal taxation and the complete failure of that attempt. Inclusion of those cases may lead to a better class discussion of whether the Court should resurrect *National League of Cities v. Usery*.<sup>13</sup>

Most casebooks have omitted the subject of federal government immunity from state taxation and regulation. Reading the cases prohibiting direct taxation of the federal government, and cases endorsing Congress's ability to prohibit even non-discriminatory taxes on persons receiving income from the federal government, would give students another chance to evaluate "sovereignty" issues. The canon presented to the students should provide material for student evaluation of competing viewpoints. Unfortunately, many casebooks make *New York v. United States*<sup>14</sup> and *Printz v. United States*<sup>15</sup> seem like "revealed truth." Inclusion of cases covering state taxation, and federal immunity from state law, would better prepare students to participate in, and evaluate, discussions of federalism issues.

## 2. PROCEDURAL DUE PROCESS

Every constitutional law course (or any course on the Fourteenth Amendment) should include the topic that has come to be called procedural due process. The procedural due process topic divides into two subtopics: (1) the Court's definition of life, liberty and property; and, (2) the type of procedures that will be deemed fair process if the government is going to deprive an individual of a life, liberty or property.

As Jerry Barron has noted, there may be only a slight loss in the student's education by giving little to the second of the two subtopics. The concept of fair process is the focus of both administrative law courses and criminal procedure courses. On the other hand, omission of class discussion regarding the Supreme

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11. 469 U.S. 528 (1985).

12. 435 U.S. 444 (1978).

13. 426 U.S. 833 (1976).

14. 505 U.S. 144 (1992).

15. 521 U.S. 898 (1997).

Court's approach to defining life, liberty, and property leaves students with an insufficient basis for evaluating the Rehnquist Court's treatment of civil liberties generally.

Examining how the Court uses the "entitlement" and "present enjoyment" concepts to define the property interests that it will protect, in a procedural setting, allows the student to see the Court's rulings concerning taking of property, and substantive due process, in perspective. This point can best be made by reference to two cases, one of which made all of the casebooks and one of which was mentioned in very few of the casebook supplements.

Virtually all of the casebooks, or the casebook authors' supplements thereto, have an excerpt from *Eastern Enterprises v. Apfel*,<sup>16</sup> wherein the Court, without majority opinion, invalidated an arguably retroactive assessment on a corporation, which had not owned a coal mine for many years, for payments to a welfare and retirement fund for coal miners. Very few of the casebooks pointed out that the company that seemed to be victimized (if one read only the plurality and concurring opinions) had operated the coal mine through a subsidiary after it formally got out of the coal mining business. The "victimized" parent corporation had made a profit, from the effort of coal miners, that was many times the millions of dollars in benefit payments it would have had to pay into the fund if the application of the Coal Act to this corporation had been upheld by the Court.

Almost none of the casebook supplements that I could find [admittedly, I don't have all of them in my office] included a major excerpt from *American Manufacturers Mutual Insurance Co. v. Sullivan*.<sup>17</sup> In that case the Court ruled: (1) private insurance companies' denial of workers' compensation payments to injured workers did not constitute "state action"; and (2) due process standards would not limit, in any way, the state statutes establishing a dispute resolution system to resolve disagreements between an injured worker (who believed that his request for payment for medical treatment was justified) and an insurance corporation (who refused to make payment because the insurance company thought the medical treatment was not necessary). Most of the casebooks (with the exception of Cohen and Varat<sup>18</sup>) have only a short reference to *American Manufacturer's*

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16. 524 U.S. 498 (1998).

17. 119 S. Ct. 977 (1999).

18. William Cohen and Jonathan D. Varat, 1999 *Supplement, Constitutional Law:*



*Mutual Insurance* in their state action chapter. The most important aspect of the case was the Rehnquist Court's ruling that the state statutory system for resolving disputes between injured workers and the insurance corporations was subject to absolutely no due process standards. Even though the injured workers had qualified for workers' compensation benefits, the Court ruled that an injured worker had no "entitlement" to payment for medical treatment before the company agreed that treatment was reasonable and necessary. Because no property interest was at stake, the majority refused to apply any due process principles to the dispute resolution system. Unless the students have seen the Court's refusal to apply any due process standards to the resolution of an injured worker's claim, are they adequately prepared to discuss the issue of whether *Eastern Enterprises v. Apfel* represents a desire of some Justices to recreate "*Lochner* Era" protection of business interests?

While many of the casebooks have significant excerpts from Supreme Court cases defining property, very few have more than a page or two concerning the Supreme Court's approach to defining "liberty" for procedural due process purposes. This omission is understandable, because many of the key cases in the area are so-called "prisoner's rights cases." However, these cases allow a student to develop a sense of how Justices (as opposed to a "person on the street" or philosophers) define liberty. Comparing cases in which the Court's ruling that a prisoner has no liberty interest at stake when he is transferred to a prison in a state far from his home (so that he will never be visited by his relatives) with the cases in which the Court has found that prisoners had liberty interests at stake when prison authorities were going to transfer the prisoner to a psychiatric care facility for involuntary administration of anti-psychotic drugs, helps students focus on how they would define the term "liberty" if they were judges instead of students.

The failure to consider the Court's definition of liberty in procedural due process cases deprives the students of an adequate basis to evaluate the Court's definition of liberty in substantive due process and equal protection cases. In the 1960s and 1970s the Court seemed to assume that virtually all activity was part of the liberty protected by the due process clauses. In those decades, laws restricting liberty generally would enjoy a

presumption of constitutionality and be subject only to minimal judicial scrutiny. The Court would only closely scrutinize the impairment of an individual's ability to engage in some activity, if the activity was deemed a "fundamental constitutional right."

In the 1980s and 90s, the Court has sometimes talked about whether a right should receive judicial protection in terms of whether the asserted right is a part of "liberty." Plurality and majority opinions (in cases such as *Michael H.*,<sup>19</sup> *Bowers*,<sup>20</sup> and *Cruzan*<sup>21</sup>) talk about the rights whose impairment would trigger independent judicial review as being forms of liberty. These opinions could lead a reader to believe that a restriction of any activity that constituted "liberty" would receive close judicial scrutiny, and that non-liberty activities were left unprotected by the Constitution. If students had talked about the concept of liberty when discussing procedural fairness, they might find some of these Rehnquist Court cases even more confusing than they do in most constitutional law courses. On the bright side, however, the students would understand that confusion about the concept of liberty exists within the Supreme Court.

Confusion concerning the word liberty was at the core of two Supreme Court rulings from last spring. In *City of Chicago v. Morales*,<sup>22</sup> Justice Stevens wrote for a majority in ruling that a Chicago ordinance that gave police officers the right to order certain persons to disperse if they were "loitering" in a public place was so vague that it violated due process. Justice Stevens wrote for only a plurality of judges when he described the activities of persons on street corners as a part of the liberty protected by the due process clause. The dissenters in *Morales* attacked Justice Stevens' position that walking down a street, or standing on a street corner, was part of our "liberty."<sup>23</sup> Justice Stevens, in his plurality opinion, was not advocating close judicial scrutiny of laws that regulated the times when people could walk down the street or the number of people who could stand on a street corner. Rather, the plurality opinion only asserted that walking and standing on a public sidewalk were liberty interests that required the government to provide persons with adequate notice regarding forms of walking and standing that it was making crimi-

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19. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

20. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

21. *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990).

22. 119 S. Ct. 1849 (1999).

23. *Id.* at 1867-79 (Scalia, J., dissenting); *id.* at 1879-87 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., dissenting).

nal. Students who had not discussed the definition of liberty in procedural due process cases would have difficulty understanding Justice Stevens' views, and the worth (or lack thereof) of the dissenting opinions.

Justice Stevens avoided the tricky problem of defining liberty when he wrote an opinion for seven Justices in *Saenz v. Roe*.<sup>24</sup> The Court in *Saenz* for the first time employed the privileges or immunities clause of the Fourteenth Amendment to invalidate a restriction on civil liberties. (The Court once used the privileges or immunities clause to restrict economic classifications, but repudiated that position within a few years.) If a student understood the difficulty the Court had faced in defining liberty in both procedural and substantive due process cases, the student could better understand why seven Justices might have chosen to resurrect the privileges or immunities clause, rather than to attempt to define the types of liberty interests that would trigger close judicial scrutiny.

As we prepare the sixth edition of our one volume treatise, Ron and I are confronting the question of whether we should drastically cut back on our coverage of procedural due process. If we drop most of procedural due process from our one volume work, we will still examine the entire topic in the multi-volume Treatise, but that Treatise is not used by students. I hope that the next round of casebooks will have greater coverage of the procedural due process, so that we can justify examining that important topic in our reference work for students.

### 3. THE SUPREME COURT'S RULINGS ON RACE AND ALIENAGE IN THE JIM CROW ERA

An examination of the casebooks used in most constitutional law courses leads me to believe that we have totally failed to prepare our students to discuss intelligently the role of the judiciary in protecting, or harming, racial minorities. The basic canon presented to every law school class in this country should include cases, and other materials, regarding the mistreatment of racial minorities from the 1860s to the 1950s, in addition to the post World War II cases that appear in all the casebooks.

Most casebooks portray the Court as a passive participant in the tremendous harm that was caused to racial and ethnic minorities during the post Reconstruction and Jim Crow era.

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24. 119 S. Ct. 1518 (1999).

Casebooks will include an excerpt from *Plessy v. Ferguson*<sup>25</sup> and a misleading quote from Justice Harlan's dissent (who mentioned color-blindness only once).<sup>26</sup> Only a few casebooks have excerpts from the Court's rulings creating the separate and unequal principle, such as the case allowing a county to have schools only for white children if the county could not "afford" a separate school for minority race children.<sup>27</sup>

Even more important than any omissions regarding the Court's role in developing its separate and unequal principle, is the omission of the Court's role in destroying the effectiveness of the Reconstruction era statutes protecting racial minorities. The Supreme Court is not solely to blame for the failure to protect the rights of minority race persons. The Congress in the 1890s repealed important provisions of the post-Civil War legislation. But the Court was a leader, not merely a follower, in the destruction of federal protections for racial minorities.

All of the casebooks have an excerpt from the *Civil Rights Cases*,<sup>28</sup> but most of the casebooks highlight only the portion of the decision concerning "state action." Rare is the casebook that notes that portion of the Supreme Court opinion in the *Civil Rights Cases* in which the majority discusses the conflict between the statutes and the view of federalism embodied in the Tenth Amendment.<sup>29</sup>

How can students intelligently evaluate discussions of using "original intention" to interpret the Fourteenth Amendment, unless they have materials in their "canon" that contradict the majority's view in the *Civil Rights Cases*? The Johnson Administration had objected to the Fourteenth Amendment precisely because it was giving wide-ranging power to Congress to protect minority races and to regulate aspects of state law that had been the province of the states prior to the Civil War. Students should know that the Johnson Administration's views were reported, and rejected, by a number of newspapers in the north. As the editors of the *New York Herald* said in 1866: "[The John-

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25. 163 U.S. 537 (1896).

26. *Id.* at 552 (Harlan, J., dissenting). See generally T. Alexander Aleinikoff, *Re-Reading Justice Harlan's Dissent in Plessy v. Ferguson: Freedom, Antiracism, and Citizenship*, 1992 U. Ill. L. Rev. 961; Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 Iowa L. Rev. 151 (1996).

27. See *Cumming v. Board of Education*, 175 U.S. 528 (1899) (majority opinion by Justice Harlan).

28. 109 U.S. 3 (1883).

29. *Id.* at 14-15.

son Administration's fear] is that this amendment in its operation will do away with State sovereignty, legislative and judicial, and will put the legislatures of our court of the several States under Congress and the federal courts . . . we hold that this old Southern theory of our government was demolished at Petersburg and surrendered at Appomattox Court House . . ."<sup>30</sup>

Your students are going to go to meetings in their law schools with professors who will talk about "original intent" and "federalism" as if the Civil War had never happened and the Civil War Amendments were meant to do nothing to a pre-war, Southern view of federal-state relations. The canon you present to the students should let them consider the other side of the argument.

Of the casebooks I examined, only the Stone, Seidman, Sunstein and Tushnet casebook had text examining the setting of the nineteenth century Supreme Court cases invalidating civil rights laws, and the effect of those rulings on racial minorities.<sup>31</sup> All students should have information regarding the slaughter of black persons in Louisiana that led to the prosecutions in *United States v. Cruikshank*.<sup>32</sup> The students should understand the impact of cases such as *United States v. Harris*,<sup>33</sup> which prevented the federal government from punishing conspiracies to obstruct government actors from giving protection to racial minorities.

The Court did uphold some of the Reconstruction legislation, but its rulings, as a whole, helped pave the way for violence against minorities. I would not claim that the Court's rulings caused white mobs in the 1920s to kill hundreds of black persons in Tulsa, or to destroy Rosewood, Florida.<sup>34</sup> The Court's rulings

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30. The N.Y. Herald 6 (Oct. 25, 1866). Similar sentiments can be found in The Cincinnati Commercial 1 (Oct. 26, 1866) and N.Y. Times 4 (Oct. 25, 1866). See John E. Nowak, *The Scope of Congressional Power to Create Cause of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 Colum. L. Rev. 1413, 1457-58, 1462-63 (1975).

31. Geoffrey R. Stone, et al., *Constitutional Law* 508-12 (Little, Brown & Co., 3d ed. 1996).

32. 92 U.S. 542 (1875). For an account of the violence that was the background for this litigation, see Brooks D. Simpson, *This Bloody and Monstrous Crime*, Constitution 38 (Fall 1992).

33. 106 U.S. 629 (1882).

34. Information concerning the Tulsa race riot of 1921 was provided by Professor Al Brophy who has given me a draft of his article, tentatively titled "Reconstructing the Dreamland: Contemplating Civil Rights Actions and Reparations for the Tulsa Race Riot of 1921." The State of Florida has taken action to compensate the remaining survivors and descendants of persons murdered in the 1923 "Rosewood Massacre." See 1994 Florida Sess. Law Serv. Ch. 94-359, available in Westlaw, FL-LEGIS-OLD file. Profes-

were not a “but for” cause of the almost 5000 documented lynchings that occurred between the Jim Crow Era and the 1970s when the federal government stopped tallying the total number of lynchings in this country (perhaps out of national embarrassment).<sup>35</sup> Nevertheless, I believe that students must be presented with information about the Supreme Court cases restricting or overturning civil rights legislation. Without that information, how can they evaluate the Supreme Court’s role in our society?

How can the students really evaluate the Rehnquist Court’s rulings restricting the ability of the federal government to require certain states to engage in race conscious districting, unless they have seen the Court’s nineteenth century invalidation of some federal statutes protecting the right to vote of minority race persons?<sup>36</sup> This fall, the Supreme Court heard oral arguments, for the second time, in *Reno v. Bossier Parish School Board*.<sup>37</sup> Shouldn’t all constitutional law students know that they may be witnessing a “replay” of the nineteenth century Supreme Court rulings? The canon should prepare our students for an informed discussion of whether we should expect any less devastating effects from the Court’s dismantling of civil rights legislation at the end of the twentieth century than the effects of similar rulings by the Court in the nineteenth century.

The articles by Sandy Levinson and Jerry Barron provide support for my request that casebook authors include materials regarding the Court’s dismantling of Reconstruction era civil

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sor Brophy also provided me with the reference to the Florida compensation legislation.

35. There appear to have been, by a conservative estimate, almost 5000 lynchings of racial minorities. *Tuskegee University Lynching Reports* (unpublished). The state-by-state lynching estimates contained in the Tuskegee University study are quoted in Mark Mayfield and Tom Watson, *Guilt, Innocence Blur with Passage of Time*, USA Today 2A (Sept. 25, 1992); see also U.S. Bureau of the Census, *The Statistical History of the United States: From Colonial Times to the Present* 422 (Basic Books, Inc., 1976) (showing the number of persons lynched, by race, from 1882 to 1970).

36. See, e.g., *United States v. Reese*, 92 U.S. 214 (1875).

37. 120 S. Ct. 866 (2000). After the date of our conference, the Supreme Court interpreted the Voting Rights Act so as to prohibit the Department of Justice from denying “preclearance” to changes in voting laws that were adopted with the intent to discriminate against minority race voters if the changes did not, in fact, reduce the voting power of racial minorities. The case was decided by a 5 to 4 vote of the Justices. Not surprisingly, the five Justices in the *Bossier Parish* majority were the same five Justices who had found that white voters could challenge a legislative district drawn to protect minority race voting power even though white voters were over-represented in a legislative delegation after the creation of the district that was designed to protect minority race voters. For an analysis of the racial attitudes of these Justices see John E. Nowak, *The Rise and Fall of Supreme Court Concern for Racial Minorities*, 36 Wm. & Mary L. Rev. 345 (1995); John E. Nowak, *The Gang of Five & the Second Coming of an Anti-Reconstruction Supreme Court*, 75 Notre Dame L. Rev. 1091 (2000).

rights laws. For all the reasons set out by Sandy Levinson, the *Insular Cases*<sup>38</sup> should be included in casebooks and used in constitutional law courses. Inclusion of those cases will help students understand the Supreme Court's attitude toward people who were "different." That attitude was also evident in the Court's rulings concerning civil rights legislation.

Jerry Barron notes, and regrets, the decreasing amount of coverage in casebooks given to United States citizenship classifications. Significant treatment of alienage classifications, including pre-1970 decisions, should appear in the basic canon presented to students for two reasons. First, these cases can help students understand why the phrase "undocumented person," is not a "politically correct" phrase. It is the constitutionally correct phrase. The students should understand the relationship of the first sentence of the Fourteenth Amendment to the alienage decisions. The cases denying any significant protection under the equal protection clause for undocumented persons (all of the Court's decisions other than *Plyler v. Doe*<sup>39</sup> have the effect of disadvantaging a large number of persons in this country who are citizens, but who can't document their citizenship).

Second, examination of the history of how alienage classifications were used by state governments, and the Court's approval of such state activity, sheds light (though not a kind one) on the Court's position regarding racial classifications throughout most of our history. Students may not know about the portion of our history when persons from certain parts of the world who immigrated into our country could never become naturalized citizens. Students can't fully evaluate the Court's position regarding racial classifications if they do not know that alienage classifications were used, particularly on the West Coast, to victimize Asian immigrants and their children (even children who were born in the U.S. and, therefore, were U.S. citizens). Students should know that the Supreme Court created a "special public interest" doctrine that allowed states to exclude non-citizens from owning land, or engaging in certain types of business activities. These cases, in effect, created a "*Plessy* era" for Asian Americans. The Court didn't back away from this approach until 1948; the special public interest concept didn't completely disappear until 1970. It may have reappeared, in a different form, in the late 1970s when the Court allowed New York

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38. See, e.g., *Downes v. Bidwell*, 182 U.S. 244 (1901).

39. 457 U.S. 202 (1982).

to limit public school teaching positions to U.S. citizens. The Court's limitation of at least one aspect of the right to travel to U.S. citizens, in *Saenz v. Roe*, continues a sad tradition.<sup>40</sup>

Most of the casebooks select cases concerning alienage classifications and racial discrimination that give students the impression that the Supreme Court was always "the good guy." All the casebooks include the Court's nineteenth century rulings invalidating the most blatant forms of discrimination against racial and ethnic minorities (cases such as *Yick Wo* and *Strauder*). The Court's rulings that provided assistance to states, and private persons, in harming persons of color don't appear in most casebooks. Perhaps most casebook authors believe that such cases belong in courses on civil rights enforcement, critical race studies, or immigration and naturalization. I believe that all students who have taken a basic constitutional law course should be prepared to discuss the question of whether "judicial review" [which they fall in love with early in law school] has helped or hurt racial minorities. If the canon presented to the students included more of the Court's history, rather than focusing only on post World War II rulings, students would realize that there is no clear answer to that question. The canon(s) of constitutional law should include materials that help students understand the difficulty of answering that question.

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40. *Saenz v. Roe*, 119 S. Ct. 1518 (1999). Justice Stevens' majority opinion makes it clear that the new decision only protects U.S. citizens. *Id.* at 1526, 1530. See generally Chin, 82 Iowa L. Rev. 151 (cited in note 26).