

# CAPTURING THE CANON

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## INTRODUCTION

In this paper I have reflected on the nearly twenty-five years I have been involved in editing a constitutional law casebook. In the process of examining the various editions of the casebook to the present, I realize, more than I otherwise would have, the fundamental way that developments quite apart from the intentions of the editors—in politics, in the Supreme Court, and in the academy—continuously redefine the canon and thereby trespass indelibly on the original goal of a short, concise teaching tool. This survey demonstrates that the essential constitutional law canon is ever flowing but not always in anticipated directions. In the prefaces to the book's five editions, forecasts were sometimes made about a bright new future for dormant constitutional clauses which appeared suddenly to have come to life. Yet by the next edition they were shown to have returned to the slumber from which they emerged. After a quarter of a century of experience, my conclusion is this: The canon can neither be defined, predicted nor confined; it resists capture. The following is an account of how the dominant events and issues of the times in which each new edition appeared continuously changed the canon and reshaped the book both in substance and form.

## I. SIZING THE CANON

The first edition of the constitutional law casebook of which I am one of the editors was published in 1975.<sup>1</sup> When I signed a contract in the early 1970s with Bobbs-Merrill (later Michie and

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1. Jerome A. Barron and C. Thomas Dienes, *Constitutional Law: Principles and Policy, Cases and Materials* (Bobbs-Merrill Co., 1975).

now Lexis-Nexis), it was my intent to write a short casebook on constitutional law. At that time I was teaching constitutional law in the evening to part-time students. The book I used, Lockhart, Kamisar and Choper,<sup>2</sup> was excellent; but for my purposes it was a very big book. The book, as casebooks do, reflected the scholarly interests of its editors. Accordingly, there was a lot of material on state taxation of interstate commerce, on freedom of religion, and on constitutional criminal procedure. Constitutional criminal procedure by this time was becoming a subject of its own; it soon comprised a separate course in criminal procedure as it continues to do today. I no longer covered it. I did cover freedom of religion in those days but state taxation of interstate commerce not at all. So the result was that there were large chunks of the book that I was not using at all. The book was about 1400 pages long. In the four hour course that I taught then, it was not possible to cover the entire casebook or indeed the major part of it.

Why not, I asked myself, edit a shorter casebook which reflected what I *did* cover? I discussed it with the publishers and, on the basis of their travels on the law school circuit, they were quite enthusiastic about my casebook idea. The plan was for a constitutional law casebook that would be a short, concise teaching tool, not a research source book, yet in which the important ideas and controversies in the scholarly literature would be highlighted. The unrealistic objective was to do all this in a casebook of about 700 or 800 pages.

In the middle of all this, I accepted the deanship of the law school at Syracuse University. The deanship put the casebook on hold. When I returned to the law faculty at GW, the enormity of the casebook project hit me and I asked Tom Dienes if he would join me. In 1975 our first edition came out. It was not 750 pages. Instead, it was 1110 pages. The most recent edition of our casebook—the fifth edition published in 1996, which has since acquired two new editors (Martin Redish and Wayne McCormack)—is 1542 pages.<sup>3</sup> In 21 years it has increased by almost half. As evidence that constitutional law casebooks (like their editors) have a tendency to expand, the following page size

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2. William B. Lockhart, Yale Kamisar, and Jesse H. Choper, *The American Constitution, Cases—Comments—Questions* (West, 3d ed. 1970).

3. Jerome A. Barron, et al., *Constitutional Law: Principles and Policy, Cases and Materials* (Michie, 5th ed. 1996).

figures for the successive editions of our casebook are instructive:

First Edition	1975	1110 pages
Second Edition	1982	1139 pages
Third Edition	1987	1388 pages
Fourth Edition	1992	1470 pages
Fifth Edition	1996	1542 pages

The remarkable thing about this inflation in size is that it has happened despite the fact that we tried very hard during these two decades to resist it. We now have four editors and we have the usual differences of opinion over how much of a reported case we should include. But, on the whole, we have tried to be faithful to the statement in the Preface to the first edition that our aim was to develop a concise teaching tool.

If a concise teaching tool was our goal, what happened? There are a number of explanations. For one thing, the constitutional law course for which we prepared the first edition has largely vanished. The constitutional law course I taught at GW in the 1970s was a required one semester four credit course taught in fifty minute segments four days a week in the day program, and two evenings a week in the part-time division for 100 minutes each. That course covered judicial review, separation of powers, federal and state powers, *plus* individual rights and liberties. Embraced under the individual rights and liberties heading were such massive topics as state action, due process, equal protection and freedom of expression. These topics are covered today in most law schools by at least two courses. There is a required three credit course, usually taught in the first year, covering judicial review, separation of powers and problems of federalism relating to state and federal powers. But now there is also another three credit course, Constitutional Law II, an upper class elective taken by most students in the second year. This course, sometimes called Individual Rights and Liberties, typically covers the origins of substantive limits on government, substantive due process in both its economic and fundamental rights incarnations, the rise of the equal protection clause as a source of constitutional rights, and freedom of expression and its various rationales, categories, tests and standards. In addition to these courses, our school, and many others, offer separate three credit courses in First Amendment Law, and the Civil War

Amendments. Today's constitutional law casebook is used, therefore, in at least two courses instead of one. This somewhat explains the growth in size of constitutional law casebooks.

Despite the increased size of today's constitutional law casebooks, they still contain notable omissions. To some extent, these omissions reflect either curricular changes or developments in the larger world which should, and do, affect coverage. I will use our casebook as an example. The first edition of our constitutional law casebook came out right after Watergate. Therefore, it gave a degree of coverage to impeachment and executive power which was much more extensive than had been true of casebooks in the pre-Watergate world. In our first edition in 1975 there was a 78 page chapter on executive power and an eleven page section of that chapter exclusively devoted to impeachment. In our most recent 1996 edition, we no longer have a separate chapter on Executive power but instead we have a chapter of slightly over a hundred pages entitled Executive and Congressional Relations: Separation of Powers. This chapter contains no material on impeachment. In that regard, as recent events illustrate, we were not very good prophets. The next edition, I think, will doubtless contain material on impeachment—certainly on what constitutes an impeachable offense. Casebook editors no less than generals are ready for the last war.

Other changes or omissions from the first edition include the entire area covered by civil due process or, as we grandly called it then, Due Process in the Noncriminal Context: Some New Constitutional Frontiers. This was a chapter of nearly 50 pages. Its contents reflected the then prevailing *Zeitgeist* as is demonstrated by the section headings: Welfare Rights and The "New Property," Constitutionalizing the Consumer Credit Relationship, the Employment Relationship in the Public Sector, and the Due Process Rights of the Student. Although the first edition appeared six years into the Burger Court, these issues, and the Supreme Court cases that considered them, continued the agenda of the Warren Court; they were rights-expansive and ground-breaking: *Goldberg v. Kelly*,<sup>4</sup> *Fuentes v. Shevin*,<sup>5</sup> *Board of Regents v. Roth*,<sup>6</sup> *Perry v. Sindermann*,<sup>7</sup> and *Goss v. Lopez*.<sup>8</sup>

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4. 397 U.S. 254 (1970).  
5. 407 U.S. 67 (1972).  
6. 408 U.S. 564 (1972).  
7. 408 U.S. 593 (1972).  
8. 419 U.S. 565 (1975).

Now, the civil due process chapter is gone. It is gone because the cases that the chapter celebrates are no longer fertile terrain for new developments in constitutional adjudication. The expansive due process methodology those cases employed is no longer ascendant. Instead, the relevant aspects of civil due process are covered variously in courses on Administrative Law, Civil Procedure, Education Law, and so on.

There have been other coverage casualties in nearly twenty-five years. For example, the first edition concluded with a chapter on Congressional Legislation in Aid of Civil Rights. That fifty-five page chapter has now been assigned to the course in Civil Rights. Of course, material on congressional enforcement of civil rights is still present in our casebook. In the federal legislative power chapter, *Katzenbach v. Morgan*<sup>9</sup> and *City of Boerne*<sup>10</sup> are given prominence, as is the *College Savings Bank*<sup>11</sup> case employing federalism to limit Congressional power to legislate under Section 5 of the Fourteenth Amendment. Indeed, this sequence displays a not unfamiliar pattern for topics in constitutional law casebooks, emergence, eclipse and revisionist revival.

At this point, one might appropriately say: the chapters on civil due process and on congressional enforcement of civil rights are gone and yet the book in its present edition is still five hundred pages longer than the original edition. Why? Well, for one thing, some venerable issues have now achieved radical new importance. Supreme Court Justices and scholars alike are absorbed with the claims of state sovereignty and the appropriate limits on the constitutional powers of the federal government. Significantly, there is now for the first time a chapter called the Structure of Federalism, in which *McCulloch*<sup>12</sup> is employed to explain federal power and *U.S. Term Limits, Inc. v. Thornton*<sup>13</sup> is used to explain state power in the federal structure. This chapter directly follows the judicial review chapter. The prominence of the Structure of Federalism chapter in the front of the book is intended to emphasize for the student the critical role issues of federalism have come to play in our constitutionalism.

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9. 384 U.S. 641 (1966).

10. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

11. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199 (1999).

12. *McCulloch v. Maryland*, 17 U.S. 316 (1819).

13. 514 U.S. 779 (1995).

Student reaction and opinion also influence the ever-changing casebook. In the first edition judicial review and its limitations comprised the first chapter of the book. Today judicial review, its landmark cases and the scholarly literature debating its merits still comprise the contents of the first chapter. But limitations on judicial review—congressional control of federal jurisdiction, Eleventh Amendment issues, the case or controversy requirement, problems of standing, mootness, ripeness, etc.—now are put in the last chapter at the end of the book. Why? Different editors may have different answers to this question. My own feeling is that it is a response to students. Students come to constitutional law eager to discuss critical constitutional issues such as the abortion controversy, affirmative action, and hate speech. If the first topics they encounter are Eleventh Amendment issues or tracking the law of standing from *Warth*<sup>14</sup> to *Lujan*,<sup>15</sup> we may lose them for the rest of the course. Perhaps it doesn't matter where you place a topic in the book as long as the instructor can find it. But placement does show the priorities of co-editors and the priorities of the *Zeitgeist*.

## II. CHANGING THE CANON—FROM PREFACE TO PREFACE

The times, of course, influence not only placement but content. The preface to the first edition in 1975 exhibited the substantive signs of the times. We noted that we had adopted a particular focus on civil rights, that we approached the “enigma of due process from the perspective of social science and also in the light of the problems presented by a new technology,”<sup>16</sup> and that Watergate impelled us to give new and heavy coverage to the rise of executive power. Substantively, the preface to the second edition in 1982 charted some new directions for the casebook. *National League of Cities*<sup>17</sup> and its revival of a doctrine of state sovereignty as a limitation on the constitutional powers of Congress was appropriately heralded. We made a couple of bad calls. We bade a premature farewell to impeachment: “[W]ith the passing of the Nixon presidency . . . the mechanics of impeachment[,] have been relegated to the constitutional history

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14. *Warth v. Seldin*, 422 U.S. 490 (1975).

15. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

16. Barron and Dienes, *Constitutional Law* at vii (cited in note 1).

17. *National League of Cities v. Usery*, 426 U.S. 833 (1976).

books.”<sup>18</sup> We noted “[t]he resurrection of the contracts clause and its use as an alternative to economic due process.”<sup>19</sup> The resurrection proved to be short-lived. In the Preface to the second edition in 1982, we said we had tried to provide a “more leisurely presentation of . . . the[se] cases”<sup>20</sup> since our users felt some of the cases had been cut too close to the bone.

By the time of the third edition in 1987, the book’s editors comprised four teachers and writers in constitutional law rather than two. The 1987 preface states that the chapter on judicial review provides “student and teacher with the continuing debate about the merits of having the Supreme Court serve as the ‘ultimate arbiter of the Constitution,’ a matter as controversial in the era of Ronald Reagan as it was in the era of Thomas Jefferson.”<sup>21</sup> *Garcia*<sup>22</sup> and its decision “to scuttle *National League of Cities* and once again to extend very large latitude to federal regulation of the states qua states”<sup>23</sup> were featured. There was a dramatic increase in space and focus on separation of powers issues in this edition. These issues included congressional efforts to control executive power and to control itself, as illustrated by cases involving the legislative veto and the Gramm-Rudman legislation. In regard to the individual rights and liberties area, it is noted that the equal protection chapter devotes considerable attention to affirmative action and gender discrimination and the Court’s rising unhappiness with the tripartite standard of review.

By the advent of the fourth edition in 1992, we were ready to acknowledge in the preface what the instructors and students who used the book had taught us about reporting and editing cases. The following account of what we learned explains the book’s increasing girth: “[A] reported case should not be edited too lean. We have tried to report enough of each case so that the case serves as an effective teaching tool and a guide to the evolution of the Court’s approach to a particular issue. We have, therefore, chosen not to edit the cases too sharply.”<sup>24</sup> The fourth edition began with a new feature—an overview of the

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18. Jerome A. Barron and C. Thomas Dienes, *Constitutional Law: Principles and Policy, Cases and Materials* vii (Michie, 2d ed. 1982).

19. *Id.*

20. *Id.* at viii-ix.

21. Barron, et al., *Constitutional Law: Principles and Policy, Cases and Materials* vii (Michie, 3d ed. 1987).

22. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

23. Barron, et al., *Constitutional Law* at vii (cited in note 21).

24. Jerome A. Barron, et al., *Constitutional Law: Principles and Policy, Cases and Materials* v (Michie, 4th ed. 1992).

“foundations of American constitutionalism”—which included a “survey of constitutional development from the founding, through the Warren Court era, to the conservative counter-reformation in the Supreme Court.”<sup>25</sup> The rivalries of warring ideological movements within the constitutional law academy are evident in the fourth edition. The Preface noted that the judicial review chapter now includes a discussion of the literature on republicanism and communitarianism and the critique by the Critical Legal Studies movement of the “rights” orientation of judicial review.<sup>26</sup> We concluded the preface to the fourth edition by saying that this was an uncertain time for a new edition of a constitutional law casebook: “Two Justices whose views are hardly known on many major current constitutional issues—Justice Souter and Justice Thomas—have replaced Justices Brennan and Marshall, whose views on constitutional issues were extremely well-known and understood. The extent to which the new Court will wish to reconsider the precedents of even the recent past is unclear. Thus, this fourth edition runs a greater risk that it records constitutional history rather than constitutional law than was the case with previous editions.”<sup>27</sup>

The preface to every edition of our book has stated as a mantra that a primary objective for our book has been to prepare a *concise* teaching tool. The fifth edition, published in 1996, was, alas, far weightier than its slender 1975 progenitor. Not surprisingly, we conceded in the 1996 edition that the size problem is “increasingly formidable.”<sup>28</sup> We called attention to some of the reasons behind the ever expanding casebook: “The Supreme Court of today . . . consists of Justices who are not shy about writing highly individual and separate concurrences and separate dissents to make clear where they agree and where they disagree with the opinion of the Court. The consequence of all this is that the process of condensing a case for casebook purposes has never been more difficult or more important. Furthermore, the law review literature in constitutional law is ever more massive.”<sup>29</sup> In a kind of *cri de coeur* we say that the fifth edition at around fifteen hundred pages is still one of the *shorter* constitutional law casebooks. Finally, the 1996 preface reveals

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25. *Id.* at v-vi.

26. *Id.* at vi.

27. *Id.* at vii.

28. Barron, et al., *Constitutional Law* at v (cited in note 3).

29. *Id.*



that it is a true child of its times; it is available in both a print and an electronic format.

### III. TEACHING THE CANON

In 1983, I chaired an AALS Workshop on Constitutional Law which was held in Los Angeles. On that occasion as on this, there was a knowledgeable group of constitutional law casebook editors and teachers. My paper was on a still timely topic: *Order and the Nagging Problem of Coverage*. At that time—more than 16 years ago—I admitted that whatever coverage I achieved was at the expense of omissions of important, perhaps critical, topics. For example, I skipped entirely the chapter in that edition on executive power. In my defense it was nearly a decade after Watergate. Remember also that the typical constitutional law course was only a single four credit course. I also skipped the chapter on civil due process. Why then did we include it in the book? Some of those who adopted the book taught civil due process and had no wish to abandon that topic and leave it to the administrative law teachers.

In retrospect, I am amazed at how much we did cover in a single basic four credit course in constitutional law. We covered judicial review, state and federal powers, and I gave substantial coverage to equal protection. But, of course, I had to skip coverage in class of the illegitimacy classifications, alienage classifications and equal access to the franchise. Today when we have a separate course in individual rights and liberties of which the equal protection clause is a very substantial chapter I *still omit* for class purposes illegitimacy, alienage and protection of the franchise cases.

In 1983, I covered 150 pages of a 200 page chapter on freedom of expression. Last year I covered 95 pages of the 345 page chapter on free expression in the fifth edition. In less than a hundred pages I tried to cover the rationale of the First Amendment, the *Brandenburg*<sup>30</sup> version of the clear and present danger doctrine, the content-based/content neutral distinction, prior restraint, the *O'Brien*<sup>31</sup> test, the public forum doctrine, and various categories of speech, including fighting words, offensive speech, hate speech, commercial speech, obscene speech, indecent speech and the issue of what First Amendment standards to

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30. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

31. *United States v. O'Brien*, 391 U.S. 367 (1968).

apply to female pornography, and to child pornography. Finally, we examine what First Amendment standards to apply to the electronic media. A vast landscape to traverse indeed. Many topics in which I have intense interest, and would like to cover had we time enough, had to be dropped. These include the flag burning cases, speech in special environments, publicly funded speech, the First Amendment impact on the law of defamation and privacy, media access to information, freedom of association and the right of non-association or compelled speech, and freedom of religion.

Of course, I have glossed over the issue of whether given the complexity, breadth and scope of contemporary First Amendment law that topic ought to be covered in the course in Constitutional Law II at all. After all, there is a separate course in First Amendment law. This is not an unimportant issue. At least two arguments support *not* including First Amendment law in a survey course on individual rights and liberties. First, freedom of expression is such a substantial topic that it inevitably will absorb too much time in an already overcrowded course. Second, it is impossible really to cover First Amendment law adequately as part of a survey course; a smattering of First Amendment law might be mistaken by students for the real thing. On the other hand, the argument for including First Amendment law in the survey course on individual rights and liberties is that it provides at least some exposure to a large group of students who might not otherwise receive any exposure to it at all. Secondly, an introduction or acquaintanceship with First Amendment law in the survey course on individual rights and liberties may create a larger constituency for the separate course in First Amendment law.

At the AALS Workshop on Constitutional Law in 1983, I made a general confession of my sins of omission with regard to coverage—executive power, civil due process, freedom of religion and congressional enforcement of civil rights. But I remarked that I did conclude my course with the chapter on state action. At that time, I remarked that it might be more sensible to discuss state action right after judicial review. I didn't do so. Instead, I concluded the course with it. This meant that I had to discuss the state action concept at a number of places in the course prior to the specific discussion of state action at the end of the course. Although the state action chapter at that time was a fifty page chapter, I said then that I regretted I was only able to cover 30 of those pages—and those fairly rapidly. Today, in our

fifth edition, the state action chapter is nearly seventy pages. But now even though we offer two courses in constitutional law, I still don't cover it in either course. Why? Three reasons. First, I discuss state action at various points in the course. Second, the tail end of a constitutional law course can often turn out to be a solipsistic marathon for the professor and a forced march for the students. Third, this area of the law is currently comatose as far as the Supreme Court is concerned. For all these reasons, I now leave the end of the course for review rather than state action.

In 1983 I speculated on the merits of the solution that was then emerging to the hard choices these difficult questions of coverage present. At that time many law faculties were moving away from the required four hour course in constitutional law to a mandated six credit two course requirement in constitutional law. Some schools were even considering an eight credit coverage—again with two courses. More credits, more courses, more coverage. Well, now there are more courses and more credits. Has it led to more coverage? In 1983 I was skeptical that it would. I said then that I did not think the problem of coping with the abundance of material in constitutional law could be resolved by increasing the number of credit hours for the course. I said it would just expand the terrain on which hard choices would be made. I think I have been vindicated in this forecast. Many constitutional law teachers then found it hard to fit freedom of expression into a single basic course in constitutional law. Many constitutional law teachers today find it just as difficult to fit freedom of expression into the new course on individual rights and liberties. The emergence of the separate survey course in individual rights and liberties has not, in my opinion, increased coverage, for example, for freedom of religion, civil due process or state action in those courses.

The situation with many casebooks, even casebooks with three or more editors, is that there are whole chapters which none of the editors teach. Precious space is allocated to some topics just because in an unacknowledged way we believe them to be part of the constitutional law casebook canon. Yet we really have no firm knowledge that those who use our books give those topics any more coverage or attention than do the editors who prepare the materials.

Can any editor, teacher, or group of students manage even the whole of that part of the canon a particular casebook seeks to capture? The answer is probably not. Currently, the constitu-

tional law casebook tries to serve many needs, yet whether those needs are widely shared is not really known. We reach for an entire canon but, inevitably, it slips our grasp. Perhaps, casebooks should address the topics those who prepare them actually use and then provide an intense and vertical look at those issues. All casebooks need not try to provide materials on the whole spectrum of the canon. A variety in focus would provide a needed diversity and a more manageable task. The curriculum is already moving in this direction. Perhaps, the casebook should as well. We should admit, if not proclaim, that we make our own canon.