

## THE CANON AND THE CONSTITUTION OUTSIDE THE COURTS

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What would it mean for “the canon of constitutional law” if we were to take seriously “the Constitution outside the courts”? What would happen to the canon if we were to distinguish (as Cass Sunstein and Larry Sager do) between the partial, judicially enforceable Constitution and the Constitution that imposes higher obligations upon legislatures, executives, and citizens generally to pursue constitutional ends or to secure constitutional rights?<sup>1</sup> How would the canon be affected by “taking the Constitution away from the courts,” as Mark Tushnet proposes,<sup>2</sup> or by adopting what Sandy Levinson has called a “Protestant” rather than a court-centered “Catholic” approach to the question, *who* may authoritatively interpret the Constitution?<sup>3</sup>

We are co-authors, with Walter Murphy, of a casebook, *American Constitutional Interpretation*, which conceives the enterprise of constitutional interpretation on the basis of three basic interrogatives: *What* is the Constitution? *Who* may authoritatively interpret it? and *How* ought it to be interpreted?<sup>4</sup> In our treatment of the questions *What?* and *Who?* and in our selection of cases and materials bearing on those questions, we commit ourselves to a muscular conception of the Constitution outside

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1. See Cass R. Sunstein, *The Partial Constitution* (Harvard U. Press, 1993); Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212, 1213 (1978); Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 Nw. U. L. Rev. 410, 419 (1993).

2. Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton U. Press, 1999).

3. Sanford Levinson, *Constitutional Faith* 9-53 (Princeton U. Press, 1988).

4. Walter F. Murphy, James E. Fleming and Sotirios A. Barber, *American Constitutional Interpretation* (Foundation Press, 2d ed. 1995).

the courts, rather than simply focusing on constitutional interpretation by courts and on constitutional law as the product of Supreme Court decisions. In this essay, we briefly explore the canon and the Constitution outside the courts in general and then in particular with respect to a canonical, though wrongly decided, case, *DeShaney*. We take up the matter of how case-book authors might show that the canon of the Constitution is broader than the canon of the judicially enforceable Constitution. We raise the issue of *DeShaney* here, not to say anything new on the subject, but instead to put it on the table for discussion.

We appreciate the many difficulties associated with the concern for the Constitution outside the courts. Though the nation has not always moved toward a judicial monopoly of constitutional interpretation in all areas of constitutional controversy, American constitutional history does exhibit uneven progress toward a judicial monopoly of most constitutional questions, including most of the weightiest constitutional questions. Even where doctrinal change seems largely epiphenomenal on social and economic developments that occur “outside the law,” the formal Constitution does not catch up until the courts say so, and the precise constitutional rationalizations of these developments, factors in their future, depend also on the courts.

The judiciary’s apparent grip on the Constitution can be connected to a founding strategy to facilitate and foster private economic pursuits from which the common good would emerge as if by some hidden hand. As long as things go well or recovery is just around the corner, a bourgeois citizenry is too busy living to reflect much on its manner of living. Finding it easiest to believe that pleasure defines the good, and encouraged to do so by the regime, the bourgeois citizenry degrades all other answers to “ideology.” This entrenches its answer so deeply that it is no longer seen as one of several (debatable) answers, and the question goes neglected—rationally unanswerable, some come to believe. This neglect and depreciation of the question creates a vacuum into which the courts are sucked by virtue of the way constitutional language forces judges into philosophic reflection and choice. (Justices finding a constitutional right to abortion, for example, had to make and eventually defended assumptions about the nature of liberty.<sup>5</sup> Opponents of the right, like Justice

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5. *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

Scalia in *Casey*, predictably raised (second-order) philosophic objections to the (first-order) attempt to define liberty.<sup>6</sup> Both sides thus addressed formidable philosophic issues, even though one side pretended not to.)

But bourgeois life has its attractions, and some of them (scientific progress, the corrosion of racial and ethnic commitments, and an aspiration to prosperity for all responsible persons) leave social progressives to complain less about regime norms than about the gap between regime norms and public attitudes and policies. Regime criticism is thus largely abandoned to the partisans of particular truths that are at odds with the bourgeois Constitution, like fundamentalist Christianity and Social Darwinism.

A Constitution outside the courts thus risks a stronger voice for reactionary forces in formulating constitutional doctrine, possibly through means like the state-legislative committees of correspondence proposed by Madison's Report of 1799 on the Virginia and Kentucky Resolutions, the Southern Manifesto in opposition to *Brown*, and Ronald Reagan's refusal to acknowledge the precedential authority of federal judicial decisions in certain disability cases under the Social Security Act. (We include, or will include, materials concerning all of these in *American Constitutional Interpretation*.) There is also Madison's warning in *The Federalist* 49 that submissions of constitutional questions to the electorate (an agency outside the courts) will undermine the Constitution's legitimacy by involving it in partisan political clashes. Those who dismiss Madison's assumption that constitutional doctrine can ever be other than partisan might nevertheless share a Hobbesian fear of the worst consequences of allowing more than one authoritative interpreter of our nation's basic law.

These risks are mitigated by further reflection, however. Opt for one interpreter on any ground, Hobbesian or otherwise, and that interpreter is, for familiar cultural and institutional reasons, most likely to be the judiciary. Propose a constitution outside the courts and you propose multiple interpreters, though a practice of multiple interpreters cannot realistically hope for much more than improvement of the judicial product on its own terms and is likely to leave the judiciary on top in all but those few areas the courts call "political." We say this because first-

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6. *Casey*, 505 U.S. at 979-1001 (Scalia, J., concurring in part and dissenting in part, joined by Rehnquist, C.J., White & Thomas, J.J.).

order constitutional discussion in America today is mostly about what the “supreme Law” permits or prohibits. Altogether unlike the ratification debate, and largely dismissive of the Constitution’s preamble, today’s constitutional discussion has little to say about what the Constitution promises by way of substantive goods.

Most constitutional scholars do not even admit substantive benefits of the kind delivered through the powers to tax and spend as a category of constitutional discourse.<sup>7</sup> Left and right, constitutional scholars tend to assign such policy questions and constitutional questions to mutually exclusive categories. They tend to hold that the Constitution guarantees process rights and “negative liberties” only, not substantive benefits. Such a view treats substantive benefits afforded through the powers to tax and spend as constitutionally gratuitous, not fulfillments of constitutional obligations. This view is so firmly established that the Supreme Court was able to affirm it in a decision that might have been seen as its *reductio ad absurdum*. The case was *DeShaney*; it held that a state has no constitutional duty to protect a four-year old child from the predictable physical harm of a violent parent—in effect, that a person has no constitutional right even to a minimal benefit of the night-watchman state.<sup>8</sup>

The *DeShaney* Court might have said, not that it saw no constitutional right, but that it saw no constitutional right that was judicially enforceable. But this might have suggested constitutional duties and rights to benefits that are not judicially enforceable, constitutional end-states that judges can do little to achieve. And this in turn would have implied the need for a constitutionally-minded electorate whose individual members would be willing to pay higher taxes in pursuit of a nation whose qualities of life and government could serve as sources of pride. This would have been a Constitution truly outside the courts, a non-justiciable Constitution, a Constitution whose pursuit leaves the judiciary little beyond the power to exhort. Precedent for such a holding could have been the Court’s dismissal of war-powers questions as political questions (not to mention other instances of judicially underenforced norms analyzed by Larry Sager<sup>9</sup>).

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7. For an exception, see generally Sotirios A. Barber, *Welfare and the Instrumental Constitution*, 42 Am. J. Juris. 159 (1997).

8. *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189 (1989).

9. See Sager, 91 Harv. L. Rev. (cited in note 1); Sager, 88 Nw. U. L. Rev. (cited in note 1).

When the Court recognizes constitutional questions left to the political branches—an appropriate concept when substantive benefits (like national security) are involved, benefits pursued through the powers to tax (or conscript) and spend—it implicitly conceives the Constitution as a charter of benefits and concedes a place for concepts like constitutional policies or ends (like national security) and corresponding constitutional duties, judicially unenforceable though they may be.

*DeShaney's* rejection of this approach in domestic politics, and the academy's acquiescence in *DeShaney*,<sup>10</sup> suggest that much current talk about "the Constitution outside the courts" (with some notable exceptions<sup>11</sup>) will be parasitic upon, reactive to, or in any case in the shadow of the Constitution inside the courts. Put another way, it probably envisions little more than an extension of the practice of friends of the court filing amicus briefs inside the courts. Consequently, outside opinions about constitutional matters that are the subject of litigation will remain within the discourse of litigants and judges, a discourse which asks not what is good, but what courts will do in fact (to evoke Holmes's "bad man" view of the law<sup>12</sup>), or what is required by fidelity to what courts have decided in the past.

Though our reflections here impart ambiguity to the phrase, we do favor a Constitution "outside the courts," despite our appreciation of the risks on the one hand and our modest expectations on the other. One reason is our interest in the survival of constitutionalist possibilities, in which we include fresh acts of constitution making and reform of the public-spirited sort idealized in *The Federalist*. American constitutions are made outside the courts, at least initially, and the Constitution of 1789 was proposed and ratified as a set of means toward a culturally limited range of substantive goods that were explicitly held to be more important than democracy itself; hence Publius's repeated assertions (e.g., in Nos. 9, 10, 40, 45, 63, 71) in behalf of justice and the welfare and happiness of the people as the ends of constitutional government and the tests by which popular government itself would stand or fall.

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10. Here one might also mention the academy's acceptance of the Court's policies regarding standing and advisory opinions, which reject key elements of this outside Constitution, notably citizens' personal interest in public purposes—"citizenship," if you will—and the substantive constitutional goods that could justify exhortation in the Constitution's name.

11. The notable exceptions include the works mentioned in this essay.

12. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457 (1897).

To cultivate a sense of this outside Constitution in *American Constitutional Interpretation*, we include, or will include, numbers of *The Federalist*, court cases and writings of American statesmen and scholars that display different basic conceptions of what the Constitution is and who may interpret it, and opinions of jurists and others that expose the influence on litigation of the outsider's concern for the ends of government. *DeShaney*, for example, is a clear answer to the question of what the Constitution is and an implicit answer to the question of who may authoritatively interpret it. For different answers, readers of our next edition will be directed to *McCulloch*, *Federalist* 45, Lincoln's Message to Congress of July 4, 1861 (along with his First Inaugural Address), Roosevelt's 1944 State of the Union Address advocating a "second Bill of Rights," and Chief Justice Hughes's opinion in *Parrish* ("the bare cost of living must be met"). Each of this last group of statements views the Constitution in terms of substantive benefits that constitutional government is obligated to pursue. Our notes on these readings will cite recent works by writers like Larry Sager, Mark Tushnet, Mark Graber, Cass Sunstein, and Stephen Holmes, and earlier articles by Frank Michelman, Robert Bork, and Susan Bandes.

Our next edition will explore whether, notwithstanding cases such as *Dandridge* and *Rodriguez* (forebears of *DeShaney*), the Constitution outside the courts contemplates rights to minimal subsistence and education.<sup>13</sup> That is, despite the slogans about "negative liberties," the Constitution might impose affirmative obligations upon the legislative and executive branches of government to provide a social minimum of goods and services to meet the basic needs of all citizens. These obligations might entail rights to minimal subsistence and education, even if such obligations and rights are not judicially enforceable in the absence of legislative or executive measures.

We will conclude by sketching some thoughts concerning two recent views of the Constitution outside the courts, Cass Sunstein's judicial minimalism and Mark Tushnet's populist constitutional law (each of which we plan to discuss in the next edition of our casebook). Sunstein's development of judicial minimalism in his new book, *One Case at a Time*,<sup>14</sup> can be inter-

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13. One of us is pursuing such questions in considerably greater detail in other work. See Sotirios A. Barber, *Welfare and the Constitution* (unpublished manuscript on file with author).

14. Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme*

preted, in part, as an answer to his own earlier call (in *The Partial Constitution*<sup>15</sup>) for taking seriously the idea of the Constitution outside the courts.<sup>16</sup> One might think that this call means that not just courts, but also legislatures and executives, should be fora of principle. As such, it is a valuable corrective to overdrawn contrasts between courts as the forum of principle and legislatures as the battleground of power politics. But for Sunstein, who argues that legislatures and executives, rather than courts, are the true fora of principle, the slogan “the Constitution outside the courts” practically has come to mean “get the Constitution outside of the courts”! One also might think that the call for the Constitution outside the courts promises to liberate constitutional theory from its court-centeredness—whether it be the court-centeredness of those who are obsessed with courts as vindicators of rights or of those who are obsessed with the institutional limits of courts—or, in Mark Graber’s term, to “delegalize” constitutional theory.<sup>17</sup> Yet, ironically, Sunstein’s recent work may end up shackling constitutional theory to concern for institutional limits of courts—thus legalizing it with a vengeance.

Finally, Tushnet’s recent book, *Taking the Constitution Away from the Courts*,<sup>18</sup> is the most thoughtful and provocative expression of its genre. He offers powerful refutations of arguments for judicial supremacy and judicial exclusivity in constitutional interpretation. And he puts forward an attractive vision of populist constitutional law outside the courts, one that rightly emphasizes the Declaration of Independence and the Preamble. But Tushnet does not establish that taking the Constitution seriously outside the courts requires, in his terms, “taking the Constitution away from the courts.” By contrast, we contend for a constitutionalism that takes the Constitution to legislatures, executives, and citizens, in order that their deliberations, like those of courts, might be framed and guided by constitutional principles and aspirations.

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*Court* (Harvard U. Press, 1999).

15. Sunstein, *The Partial Constitution* at 9-10 (cited in note 1).

16. One of us has criticized Sunstein’s notion of “judicial minimalism.” James E. Fleming and Linda C. McClain, *In Search of a Substantive Republic*, 76 *Tex. L. Rev.* 509 (1997). Here we draw upon that critique. *Id.* at 546.

17. See Mark A. Graber, *Delegalizing Constitutional Theory*, *The Good Society* 47 (Fall 1996).

18. Tushnet, *Taking the Constitution Away from the Courts* (cited in note 2). One of us has developed a fuller critique of Tushnet’s book. See James E. Fleming, *The Constitution Outside the Courts*, 86 *Cornell L. Rev.* (forthcoming 2000).