

# IS THERE A CANON OF CONSTITUTIONAL HISTORY?

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My contribution to this discussion is purely empirical. I ask whether a canon exists, not among constitutional *law* casebooks, a question addressed elsewhere,<sup>1</sup> but rather in documentary collections in American constitutional *history*.<sup>2</sup>

I begin with this assumption, which I consider reasonable, and almost circular: if such a canon exists, it will be found in existing constitutional history casebooks. They reflect whatever there may be of a canon out there among constitutional historians concerning what materials a student of constitutional history ought to study.

I have therefore conducted a simple survey of six casebooks meant to be used in classes in constitutional history, whether they are taught in law schools or undergraduate environments. They are:

- Urofsky, *Documents of American Constitutional & Legal History* (1989)
- Benedict, *Sources in American Constitutional History* (1996)
- Presser & Zainaldin, *Law and Jurisprudence in American History: Cases and Materials* (3d ed. 1995)
- Hall, Wiecek, Finkelman, *American Legal History: Cases and Materials* (2d ed. 1996)
- Kutler, *The Supreme Court and the Constitution* (1984)<sup>3</sup>

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1. For public-law courses in Political Science, see Jerry Goldman, *Is There a Canon of Constitutional Law?*, Newsletter of Law and Courts Section of Am. Pol. Sci. Ass'n 2-4 (Spring 1993).

2. I made a preliminary, speculative, and (to my mind) unsatisfactory foray into the problem of the canon in William M. Wiecek, *Gladly Wolde He Teche: Students, Canon, and Supreme Court History*, J. Supreme Ct. Hist.: Y.B. of the Supreme Ct. Hist. Soc'y 11-18 (1995).

3. I should note that I was a graduate student and a research assistant for Stanley

- Smith and Murphy, *Liberty and Justice* (rev'd ed. 1965)

The last is, regrettably, out of print. Nevertheless, it was so influential in its day that it merits attention, if for no other reason than that it helped establish the canon. I have not included three older compilations:

- Radin, *Handbook of Anglo-American Legal History* (1936)
- Smith, *Cases and Materials in the Development of Legal Institutions* (1965)
- Kimball, *Historical Introduction to the Legal System* (1966)

Each devoted half (or less) of its space to American material; each reflected a conception of American legal and constitutional history that passed away a generation ago. I have also not included what is, in my opinion, the finest documentary collection in the field, Commager, *Documents of American History* (9th ed. 1973). It was not limited to constitutional history (though extraordinarily rich in that area), was not suitable for classroom use as a “casebook,” and has not been updated since 1988.

I have identified the canon in the following rudimentary way. Andrea Stubbs, Syracuse University College of Law class of 2001, noted the appearance of each case and other documents in each collection in a simple spreadsheet. From that I then compiled the lists below of cases and materials that found their way into all six volumes, into five, and into four.<sup>4</sup>

The following cases<sup>5</sup> appear in all six compilations:

*Charles River Bridge v. Warren Bridge* (1837)

*Dartmouth College v. Woodward* (1819)

*Dred Scott v. Sandford* (1857)

*United States v. E.C. Knight Co.* (1895)

*Brown v. Board of Education I* (1954)

The following cases and other materials appear in five compilations:

Selections from the Federalist papers (1787-1788)

Kutler at the University of Wisconsin-Madison at the time he compiled the first edition of this casebook, and I participated in a small and peripheral way in its publication.

4. I will be happy to make available to anyone who is interested the complete tabulation.

5. The Kutler compilation contains only cases. Thus no non-case document appears in all six compilations.

*Marbury v. Madison* (1803)  
*McCulloch v. Maryland* (1819)  
*Gibbons v. Ogden* (1824)  
*Prigg v. Pennsylvania* (1842)  
*Slaughter-House Cases* (1873)  
*Munn v. Illinois* (1877)  
*In re Debs* (1895)  
*Plessy v. Ferguson* (1896)  
*Lochner v. New York* (1905)  
*Muller v. Oregon* (1908)  
*Schenck v. United States* (1919)  
*Abrams v. United States* (1919)  
*Hammer v. Dagenhart* (1918) and/or *Bailey v. Drexel Furniture Co.* (1922)  
*Whitney v. California* (1927)  
*A.L.A. Schechter Poultry Corp. v. United States* (1935)  
*United States v. Butler* (1936)  
*West Coast Hotel Co. v. Parrish* (1937)  
*NLRB v. Jones & Laughlin Steel Corp.* (1937)  
*West Virginia State Board of Education v. Barnette* (1943)  
*Korematsu v. United States* (1944)  
*Dennis v. United States* (1951)  
*Griswold v. Connecticut* (1965)  
*Miranda v. Arizona* (1966)

The following cases and other materials appeared in four of the compilations:

Mayflower Compact (1620)  
Declaratory Act (1766)  
Declaration of Independence (1776)  
Articles of Confederation (1781)  
Jefferson's Bank opinion (1791)  
Hamilton's Bank opinion (1791)  
Virginia and Kentucky Resolutions (1798-99)  
Jefferson's First Inaugural (1801)  
Jackson's veto of the Bank Bill (1832)

Lincoln's Emancipation Proclamation (1863)  
*Cohens v. Virginia* (1821)  
*Barron v. Baltimore* (1833)  
*Commonwealth v. Hunt* (1842)  
*Cooley v. Board of Wardens* (1852)  
*Texas v. White* (1869)  
*Civil Rights Cases* (1883)  
*Income Tax Cases* (1895)  
*Holden v. Hardy* (1898)  
*Champion v. Ames (Lottery Case)* (1903)  
*Adkins v. Children's Hospital* (1923)  
*Near v. Minnesota* (1931)  
*Carter v. Carter Coal Co.* (1936)  
*Palko v. Connecticut* (1937)  
*United States v. Darby* (1941)  
*Wickard v. Filburn* (1942)  
*Youngstown Sheet & Tube Co. v. Sawyer* (1952)  
*Cooper v. Aaron* (1958)  
*Mapp v. Ohio* (1961)  
*Engel v. Vitale* (1962)  
*New York Times Co. v. Sullivan* (1964)  
*Pentagon Papers Case* (1971)  
*Roe v. Wade* (1973)

Making allowances for inevitable idiosyncrasy and for specialization (Kutler), there are no surprises here. Each of us will question the omission of a favorite—Lincoln's Second Inaugural and *Carolene Products* would get my vote—but the listed fifty cases and eleven non-case documents would probably appear on most constitutional history teachers' "required" lists, whether in a law school or an undergraduate classroom context.

In their valuable essay, *The Canons of Constitutional Law*,<sup>6</sup> Jack Balkin and Sandy Levinson postulate that canons address one of three needs: to constitute a body of materials to be used in teaching; to provide the content of "cultural literacy," the es-

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

sential core of materials in a subject that all educated citizens should know something about; and to furnish fodder for academic theorizing. The first two are relevant here.

Canons may be even more important, according to Balkin and Levinson, for enabling "law talk": the characteristic ways of thinking and talking about law, including constitutional law. Canons define what kinds of legal arguments are legitimate; provide norms and methods for deciding cases correctly; constitute standard narratives about the subject that may attain mythic status; and furnish stock examples of problems in the field. The canon of constitutional history would find use in the last two areas; its value for the normative purpose is often negative, illustrating the destructive potential of Supreme Court decision-making and American statecraft.

Francis Mootz, relying on the work of Hans-Georg Gadamer, proposes that we get beyond canons, with their oppressive, exclusionary connotations, to think in terms of "legal classics": cases identified by an interpretive community that are relevant to current concerns, providing subjects of debate that enable us to discuss and resolve those issues.<sup>7</sup> His suggestion is welcome because it carries the discussion beyond the trite (though valid) observation that hegemonic elites define canons in order to impose their value preferences on all others, silence competitors, and reinforce their dominance in a society. If we think of lists like those compiled above as classics rather than as hegemonic pseudo-sacred texts, we glimpse a new approach to teaching them, one that satisfies the Balkin/Levinson purposes of the pedagogical and cultural-literacy canons. The classics provide a common platform for discourse among the entire American community about our constitutive public law.

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7. See generally Francis J. Mootz, III, *Legal Classics: After Deconstructing the Legal Canon*, 72 N.C. L. Rev. 977 (1994) (arguing that certain classic pieces should be used despite concerns about "neglected voices"). Cf. Christian C. Day, *The Teaching of Legal Classics*, 26 Ind. L. Rev. 263 (1993) (describing a course that he, Mike Hoeflich, and I created at Syracuse University College of Law).