

# A COMPARATIVE CONSTITUTIONAL LAW CANON?

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## I. INTRODUCTION

Some ten years ago we began to put together a coursebook in American constitutional law for senior undergraduates. In the initial proposal we sent to West Publishing, we wrote, "It takes a measure of audacity to produce yet another book in American constitutional law. We have done so, however, in an effort to relate the cases presented here to important developments in American constitutional theory and comparative constitutional law." Recognizing the novelty of our approach, and especially the uniqueness of our effort systematically to incorporate comparative materials, we sought to reassure the publisher that our commitment to innovation would not yield a casebook that would intimidate or frighten our colleagues (which we preferred to the publishers' term—the "market"). Thus, we noted that undergraduate casebooks typically contain 90 to 150 cases. Our survey of six widely used books revealed around 90 cases common to all. Our plan was to include most of this "common core" of cases, organized "in a conventional way," so that our book, innovation notwithstanding, would "appeal to teachers unwilling to depart from the traditional format of the typical constitutional law course. . . ."

Although we did not then employ the terminology, concern about the canon, about what it included and what it left out, was never very far from the surface of our project. Moreover, we began with the sense that what the canon was, and what it should be, must depend heavily upon the audience. One audience was

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the market, or the academic (interpretive?) community. A second consisted of undergraduate students, most of whom we assumed would be enrolled in a traditional liberal arts curriculum. (We think, however, that the book would be equally useful in law schools.) These two audiences, one of which could be said to know the canon by virtue of their standing, the other not yet initiated into the fold, informed our approach to the canon no less than our commitment to the integration of comparative constitutional materials. From the outset, we hoped to replicate the canon and to remake it.

## II. REPLICATING THE CANON: ADVENTURES IN CONSTITUTIONAL CRYPTOZOOGRAPHY

Any effort to replicate the canon—assuming one exists, and we did—begins with a sense of what the cryptoid looks like. At its most accessible and least interesting level of abstraction, a constitutional law canon might be simply “canonical cases.” This is where we began ten years ago. Without the benefit of Goldman’s later study, we simply sent a graduate student out to peruse the table of contents for five or six of the leading casebooks. We concluded that 90 or so cases appeared in most of the casebooks, but we made no effort at greater precision. For our purposes, the canon could be conceived simply in terms of “expectations”—what cases would most professors expect to be included in the ordinary casebook? The results did not much differ from what we would have expected, had we simply sat down and guessed a list of cases.

Goldman’s study systematized this approach to the canon.<sup>1</sup> Drawing from twelve casebooks and a total of 552 cases, Goldman found that only three cases, or less than one percent of the total inventory, were common to all twelve works. Even with certain allowances, Goldman could find only ten shared cases. His conclusion, then, was that “Public law has a canon, but it appears a trifling one.”

There are, of course, profound methodological and epistemological difficulties with Goldman’s approach. Any one of us could find plenty of reason to criticize a concept of a canon that is case-centered, for example. Before entertaining some of those

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1. See generally Jerry Goldman, *Is There a Canon of Constitutional Law?*, Am. Pol. Sci. Ass’n Newsl. (Law and Courts Section of the Am. Political Science Ass’n, Spring 1993).

criticisms, though, it might be useful to start by seeing if Goldman's results still hold. We hired an undergraduate to conduct a similar study.<sup>2</sup> We constructed a database of fourteen casebooks, most of which are directed to undergraduates (Appendix A). These books yielded a total of 697 cases. Only eleven cases appeared in every casebook (Appendix B). If one relaxes the criteria for "canonicity" to replication in 90% of the casebooks, the list of cases expands to twenty-one cases (Appendix C). There are few surprises in the lists.<sup>3</sup>

In what sense can a list of cases be said to be canonical? Is a canonical listing of cases a canonical curriculum? The question points to one of the most obvious and most significant of problems that inheres in a definition of the canon that reduces it to cases. One of us (Finn) teaches constitutional law in a department where the course is taught also by another member of the faculty. For much of the semester our students study the same cases, and in much the same order. Early in the term, therefore, two groups of students learn *Marbury* at pretty much the same time, and then *McCulloch* and then *Roe* and *Casey* and so on. We think it fair to say, however, that these two groups of students would find it difficult to speak to each other in any meaningful way about the cases. One group's approach to the cases tends to be policy oriented and attentive to issues of interest group politics. (The instructor uses David O'Brien's well-known casebook.) Our approach, on the other hand, is driven by concerns for constitutional theory and comparative inquiry, and the casebook we use reflects those interests.<sup>4</sup>

The most concrete manifestation of difference within the canonical list of cases, of course, is in how cases are edited. For example, some casebooks (such as Foster & Leeson), do not include the passages from Justice Powell's concurring opinion in *Chadha* (1983) that address the two ways one branch may violate the doctrine of separation of powers, whereas many others do include the passage. The process of editing cases is tedious but critically important, especially when, as in our work, the cases are meant to illuminate recurring themes or principles. Beyond this, though, is the gelatinous character of the materials them-

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2. We thank Andrew Calica of the Wesleyan University Class of '01 for his assistance.

3. The Kommers-Finn casebook missed just one, *Reynolds v. Sims* (1964), thus suggesting that our casual methodology of "expectations" was remarkably accurate.

4. See generally Donald P. Kommers and John E. Finn, *American Constitutional Law: Essays, Cases, and Comparative Notes* (West/Wadsworth, 1998).

selves. The same case—and the same passages in that case—may be put in forms that give them very different meanings. A canon of cases, or what Bloom has called the teaching canon,<sup>5</sup> does not necessarily yield a canonical curriculum. Different pedagogical approaches may use the same cases for very different purposes.

The location of cases and subjects may also vary considerably. We suspect there is a loosely defined constitutional law canon that governs the organization of materials and cases. As Balkin and Levinson have observed, many of the older casebooks began with issues surrounding constitutional amendment.<sup>6</sup> In many of the earlier editions of Cushman, for example, the first topic was “Amendments to the Constitution,” and the first case covered was *Hawke v. Smith* (1920).<sup>7</sup> In a polity that continually wrestles with questions about identity and the constitution of the body politic, as well as with issues about the limits of judicial power, there are good reasons to include *Hawke* in most casebooks, but it does not appear in any of the casebooks we surveyed.

Our survey of casebooks revealed a fairly standard order of progression. Nearly every book began with a chapter on the rise of judicial power or with a chapter on constitutional interpretation, followed by chapters on the separation of powers (usually divided into chapters on the executive and the legislature), and followed by chapters on the commerce clause and federalism. There was more variation in the organization of chapters on the Bill of Rights, but the topics tended consistently to center around speech, religion, property, substantive due process, and equal protection.

This loose canon of progression, what Bloom has called “a map of the territory,”<sup>8</sup> is much more significant than a canon of cases. Unlike the canon of cases, it is a canon that more clearly reflects shared understandings in the academy about what constitutional law is and how an education in it should proceed. The persistence of opening chapters on the rise and the consequences of the authority of the Supreme Court and the doctrine of judi-

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5. See Lynn Z. Bloom, *The Essay Canon*, 61 *College English*, No. 4 at 401 (1999). Bloom distinguishes between the teaching canon and the “critical” canon.

6. See J.M. Balkin and Sanford Levinson, *The Canons of Constitutional Law*, 111 *Harv. L. Rev.* 963, 1010 (1998).

7. See generally Robert Eugene Cushman, *Leading Constitutional Decisions* (F.S. Crofts & Co., 3d ed. 1933).

8. Bloom, 61 *College English* at 403 (cited in note 5).

cial review, for example, reflects concerns about the tensions between judicial review and democratic theory, concerns that have dominated scholarship in the academy at least since the court crisis of the 1930s. For an earlier generation, giving pride of place to the amendment process may have reflected scholarly concern with issues of institutional design. Equally important, it may have reflected the composition of the academy itself. As Balkin and Levinson note, giving pride of place to the issues concerning constitutional amendment may have reflected "the interests of political scientists, who still dominated the field in the early part of the century."<sup>9</sup>

The concept of a canonical curriculum pushes toward a shared sense of what constitutes knowledge of a discipline, indeed, of what the discipline is. Our casebook sought to replicate this canon too. We suspected, rightly as it turned out, that any significant departure from expectations would unsettle "the market." Concerns about how successful our mimicry of this canon was, and about the wisdom of our departures from it, surfaced throughout the review process. One of our reviewers, for example, complained loudly about our initial plan to cover first amendment issues in the last two chapters instead of earlier in the text (we later acceded to this view). And we agonized over how to organize the two chapters on the commerce clause and federalism.<sup>10</sup> Even now, neither of us teaches those chapters in the order in which they appear in the book, and they are prime candidates for reorganization should a second edition appear.

Finally, the notion of a canon of progression raises issues about what topics must be covered and which ones, if any, may be safely omitted. In our experience, the most important question concerned the inclusion or exclusion of constitutional criminal law cases. Here the tension between "expectations" and pedagogical approach seemed especially pronounced. Neither of us includes the topic when we teach constitutional law, and both of us are convinced that the pedagogical approach we favor does not require its inclusion. Nevertheless, we contemplated a chapter on criminal procedure, in large measure because the publisher believed many users would expect it. (We did include

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9. Balkin and Levinson, 111 Harv. L. Rev. at 1010 (cited in note 6).

10. In our chapter on the judiciary, we deviated slightly from the traditional emphasis on issues of standing and justiciability by including extracts from *Dred Scott*, *Brown v. Board of Education*, and *Planned Parenthood v. Casey*. Each of these cases illustrates the expansion of the Supreme Court's powers in the American political system.

*Hurtado*, *Twining*, *Palko*, *Adamson*, and *Duncan*, but only for the purpose of illustrating the debate both on and off the bench over the relationship between the Bill of Rights and the Fourteenth Amendment. We also included *Gregg v. Georgia*, but it appears after *Casey* in our chapter on “liberty and personhood.”)

In sum, we began with the premise that there is a canon of constitutional law and that it has at least two dimensions, one consisting of cases, and one of organization. Its familiarity to most of us suggests that the canon is a comfortable refuge, and we had no desire to upset it. Instead, we sought to replicate it, noting explicitly in our Preface that “we hope . . . teachers accustomed to the canon will find much that is familiar. . . .” We did so, in part, because we (and the publisher) wanted a book that could appeal to a wide audience of potential users. But we sought to do more than simply replicate the canon—we hoped also to remake it.

### III. MAKING THE CONSTITUTIONAL LAW CANON COMPARATIVE

Much of our concern about the canon was a consequence of a larger, prescriptive purpose: We wanted to change the way American constitutional law is taught and how it is studied in liberal arts institutions. We began with the conviction that the study of constitutional law is an integral part of, and should draw upon, a liberal arts education. We tried to produce a casebook that will encourage students to think critically about the American political order and to engage the great questions of political life that the Constitution and constitutional interpretation address.

Following more or less a canonical format in terms of presentation, we began each chapter with an introductory essay, followed by edited cases and then by notes and queries. We designed all three formats to highlight three basic themes, or perspectives, each of which is meant to facilitate critical thinking and to draw upon skills and knowledge central to the liberal arts. Our first theme, the interpretive perspective, stresses the nature and processes of constitutional interpretation. Our second theme, the normative perspective, invites students to consider how constitutional argument, both at the founding and in our time, has concentrated on a few basic conflicts, such as the tension between constitutionalism and democracy, and between the

values of liberty and community. Our third theme, and the most ambitious in terms of remaking the canon, is the importance of a comparative perspective. It represents our belief that the great variety and richness of comparative materials should inform the study of American constitutional law. We stress that the inclusion of such materials *does* involve reworking the canon; only rarely, if ever, do casebooks on American constitutional law integrate material from foreign jurisdictions.

We believe the time has arrived to incorporate foreign constitutional materials into the standard course in American constitutional law. Comparative constitutional law has developed into a vibrant legal discipline, one impressive sign of which is the recent publication of a major course book in the field.<sup>11</sup> The field's emergence has been made possible by the explosion of constitution-writing around the world but also, and mainly, by the rich and voluminous jurisprudence of postwar constitutional courts, especially those of Germany, Italy, India, Austria, and Japan. Enriching this jurisprudence even further is the work-product of more recently created tribunals, such as the Spanish, Hungarian, and South African constitutional courts, not to mention Canadian judicial opinions under the 1982 Charter of Rights and Freedoms or the spiraling caselaw of the European Court of Human Rights.

What we are witnessing is nothing less than the globalization of constitutionalism. As Sujit Choudhry writes, "Constitutional interpretation across the globe is taking on an increasingly cosmopolitan character, as comparative jurisprudence comes to assume a central place in constitutional adjudication."<sup>12</sup> One sign of this global phenomenon is the increasing frequency with which constitutional courts around the world cite one another. Another is the routine practice of some tribunals, such as Canada's Supreme Court and South Africa's Constitutional Court, to seek guidance in international and comparative law for the resolution of domestic constitutional conflicts.<sup>13</sup>

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11. See generally Vicki C. Jackson and Mark Tushnet, *Comparative Constitutional Law* (Foundation Press, 1999).

12. *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 Ind. L.J. 819, 820 (1999).

13. Still another sign of this global phenomenon is the extent to which constitutional judges from various countries meet with one another to discuss common issues and problems arising under their respective constitutions. Examples of such meetings are the biennial conferences of the presidents of European constitutional courts as well as international seminars and symposia in which scholars and judges exchange views on interpretive and other issues arising out of constitutional adjudication in their respective coun-

Our casebook, then, began with a clear sense about the ways in which the canon of constitutional law should be conceived and hence about how it should be taught. In our view, the canon, however defined, was introverted and insular. We set out to overcome this. In doing so, we were confronted first with elemental questions about how and why canons change. Second, we were forced to consider difficult questions about which kinds of new materials ought to be canonized and why some qualified and others did not.

#### A. THE HOWS AND THE WHYS OF CANONICAL CHANGE

A canon is a communal academic enterprise; where it exists, it does so because there are shared understandings, patent or otherwise, about what comprises the canon and what functions it serves. We do not mean to suggest that these characteristics and presuppositions are monolithic. It might be better to describe them as familial in nature, with lots of variations in different parts of the family tree. This communal character means that canonical change is similarly a shared enterprise. The canon changes, if we may borrow the phrase, in response to the felt necessities of the academic or interpretive community.

We are uncomfortable with the concept of an “interpretive community,” for its use too often has been uncritical. Its proponents have tended to assume, first, that the community is fundamentally egalitarian and democratic, when in fact there are profound disparities of influence, power, and position in it. These disparities are likely to have an effect on the composition of the canon. Second, they have not given enough attention to who comprises the community. The identity of the community, and the interests of its members, are equally likely to have a pronounced impact on the canon the community produces, as we saw when we considered the canon of progression and how it differs from an earlier generation of casebooks.

Our effort to remake the canon should be understood as a claim about who comprises the academic community, which in turn influences which necessities will be felt and which will go

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tries. Some American Supreme Court justices have participated in these meetings. See, e.g., *Justices at Work: A Comparative Constitutional Symposium*, 18 *Cardozo L. Rev.* 1609-1873 (1997). The most recent of these conferences, in which Chief Justice Rehnquist participated, took place at the Georgetown Law Center on September 17, 1999, where judges and scholars from a number of countries met to discuss the meaning and uses of comparative constitutional law.



unheard. In our view, the globalization of constitutional law means an inevitable expansion of the academic community. More than ever, there is an international community of academics, judges and lawyers that wrestles with problems that are fundamentally transnational in constitutional character. Indeed, that community is a visible professional presence in most of the world, notwithstanding its relative invisibility in the American academic community. The internationalization of a community concerned with constitutional questions and issues represents both a challenge to the canon and an opportunity to rework it. We doubt whether Americans can any longer ignore the ideas and practices of other nations with liberal constitutions designed for the governance of modern, secular, and pluralistic societies.

There is a danger in conceptualizing a canon as a shared enterprise, influenced substantially by changes outside the community that have a profound influence on the identity of that community. Put simply, the danger is of reification. Arguably, a canon that is a collaborative enterprise is everyone's responsibility and no one's responsibility. Thus, "[m]uch of what is canonical is not the result of conscious planning but of the serendipitous development of the ever-shifting contours of a culture, a discipline, or an interpretive community."<sup>14</sup> It is worth adding, too, that when a canon has a commercial component—and a casebook that doesn't sell is unlikely to have much of an impact on the canon in the long run—the autonomy of its practitioners is even further circumscribed.

The danger of reification is why concern about what comprises the canon warrants scholarly inquiry. It also, in our view, imposes obligations on authors. To fail to think about what the canon is, and what it should be, is to forfeit (what remains of) our intellectual autonomy and responsibility for how we educate students. A canon is at once a creation, whether serendipitous or deliberate, and a creator. A canon, in other words, creates a particular kind of student and citizen, who knows certain kinds of things and, more importantly, has acquired particular ways of thinking and knowing. A canon is more than a pedagogy—it is a pedagogue.

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14. Balkin and Levinson, 111 *Harv. L. Rev.* at 995 (cited in note 6).

## B. CRITERIA FOR CANONICITY

Which new materials ought to be elevated to the canon? Any answer to this question relies on some sense, implicit or explicit, about what the canon is good for. Or more expansively, it depends on what we think an education into the wonders of constitutional law is good for, if anything. Is the purpose to frighten students away from or to welcome them into the professional education of the law? One function of an undergraduate education in constitutional law might be described as gatekeeping. Students sometimes use such courses to self-select in or out of the law school game. It would not be difficult to create a canon to facilitate this purpose. We might, for example, seek a canon that is largely doctrinal, ahistorical, and best suited to the Gilbert's or Nutshell treatment.

Alternatively, it might be that the gatekeeping function is ours. Perhaps courses on constitutional law are tracking devices: Our best students win grades that are like tickets to the best law schools, our B students go somewhere else, and those that don't cut it get a consolation prize on their way out the door. The ideal canon here, much like the one above, helps us winnow. So we might construct a canon that separates wheat from chaff.

We began with the premise, instead, that an education in constitutional law should be an integral part of a liberal arts education and not simply, or even at all, a part of a preprofessional education. An education in constitutional law, we concluded, should be an education that goes beyond the facts and rulings of particular cases to engage the great questions about constitutional interpretation and the nature of our polity. Seen from this perspective, a constitutional law course can be, and is, no less than an extended commentary on the meaning of America.

This purpose greatly influenced our sense about where and how we should change the canon. We tried to integrate selected comparative materials into our text while maintaining its character as a casebook on American constitutional law. We hoped that these comparative materials would provide a springboard for fresh reflection on the American Constitution. The point, in other words, was to incorporate foreign materials that would illuminate particular aspects of American constitutional experience.<sup>15</sup>

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15. In part through what has been called, unfortunately, the process of "defamiliarization."

Foreign judicial cases often scrutinize practical problems left largely unexamined by the U.S. Supreme Court. They also employ interpretive methods and modes of judicial review that contrast sharply with American approaches to constitutional analysis. These methods and modes often emphasize balance and equilibrium in constitutional interpretation, the harmonization of conflicting rights and values, and a perspective that envisions the constitution as a unified structure of principles and values. By contrast, the American Supreme Court often seems to issue categorical rulings, to award total victory to one side in a conflicting rights dispute, and to interpret particular provisions of the Constitution in a less holistic fashion. On the other hand, comparative materials may reinforce a student's views of the strength, integrity, or superiority of American constitutional policies.

In short, the comparative perspective enriches the study of constitutional law in several ways. First, by looking at foreign modes of constitutional governance, students may begin to discern what is purely historical and contingent in the American experience and what is more universal and permanent. Second, Americans may take some pride in knowing something about the extent to which their constitutional practices and ideals are embedded in the provisions and features of other constitutional democracies. Third, they may also find great value in the distinctive aspects of foreign constitutions and the often sharp contrasts to American law found in foreign constitutional doctrine.

We devoted a good deal of thought to considering precisely how the canon should be modified to suit these changes in canonical purpose. The most obvious change, and the simplest, would be simply to add to the canon by incorporating decisions from other jurisdictions. Even this simplest of approaches raises problems. Which cases should we include and from which jurisdictions? We decided to draw upon the decisional law and constitutions of countries which face social and political problems similar to those of the United States in the past half-century, which share constitutional language and texts similar to the United States Constitution, and whose supreme judicial tribunals play roles analogous to that of the Supreme Court. We drew primarily, but not exclusively, from Germany, Canada, Japan, South Africa, Ireland, and the Council of Europe.

We chose foreign cases that raised serious questions about judicial interpretation in the United States. The reasoning in

South Africa's death penalty case,<sup>16</sup> for example, in which *Gregg v. Georgia* is discussed—and criticized—at great length, gives students an entirely different perspective on the American case. For one thing, the standards used by South Africa's Constitutional Court for determining what is a “cruel and unusual” punishment are very different from those used by the American Supreme Court. In addition, the South African Court advances a different (and more sublime) view of human dignity. We often find that students are quite surprised to see, as they do in the South African case, that there are alternative visions of liberty, equality, and personhood.<sup>17</sup>

A similar issue arose concerning format. As we indicated earlier, the canon is no less about structure and progression than it is about cases. In particular, both substance and format invite the reader to approach the text in a particular kind of way. Insofar as our purpose was to create students who could draw upon and advance the skills of critical learning that are characteristic of an education in the liberal arts, we sought to structure and present the materials in ways that invited students to be active participants instead of passive readers. Asking students simply to read may yield students who can't do much else. Moreover, reading the word may produce students—and citizens—that accept as natural and inevitable a constitutional order in which the production of constitutional meaning is an enterprise entrusted only to judges and not to citizens.<sup>18</sup>

Such concerns informed our approach to questions that might otherwise seem merely mechanical. Should we simply edit and integrate comparative case law into the standard, edited case format? Or should we utilize the materials in some other way?

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16. See *State v. Makwayane & Mchunu*, 6 June 1995.

17. Another example of a non-American case that illuminates important issues of American constitutional law is *Dudgeon v. United Kingdom*, 4 European Rights Reports 149 (1981), decided by the European Court of Human Rights. It is a wonderful contrast to *Bowers v. Hardwick*, and it exemplifies the simple (or simplistic?) innocence of the opinions by Justices White and Blackmun. Arguably, for both White and Blackmun *Bowers* was an easy case; both accept uncritically the formulaic methodology of fundamental rights. For White, no such right existed in *Bowers*, and hence the state won easily. Blackmun's conclusion in favor of Hardwick was no less simple or predictable. The European Court, in contrast, engaged in a sophisticated and sensitive balancing of the important interests of both state and individual, finding that in the case of Northern Ireland, despite its valid interest in regulating sexual morality, there was no “pressing need” to criminalize homosexual conduct. *Dudgeon* thus provides students with a different perspective on the issues raised in *Bowers*, not the least of which is how individual rights are to be reconciled with the community's prevailing conceptions of morality.

18. See also Bloom, 61 *College English* at 419-20 (cited in note 5).

We did not want to introduce long extracts from foreign cases or the secondary literature. We certainly did not want to convey the impression that we were producing a book in *comparative* constitutional law. As already noted, ours was designed as a book in *American* constitutional law. And we wanted to organize the comparative materials in a way that would allow teachers and students to use the book even if they were not interested in covering the comparative materials.

We chose to incorporate the comparative dimension in three ways. First, we reserved the concluding section of each introductory essay for a review of comparable foreign developments. Second, we included boxes featuring extracts from foreign cases or applicable provisions from foreign constitutions, carefully spliced into the text so as to focus on points of special interest. Finally, we raised comparative (along with normative and interpretive) issues in the notes and queries following each case. Our insertion of comparative materials was thus selective and largely for the purpose of illustrating issues and problems of American constitutional law.

#### IV. CONCLUSION

Balkin and Levinson have argued that scholarly concern about the canon is most likely to appear at “times of ferment, growth, change, and innovation” in an academic discipline.<sup>19</sup> To this extent, debate about the canon may be seen as a conflict about what the discipline *is*, indeed, about what constitutes knowledge. Any effort to engage the canon, then, and in our case, to work fundamental changes in it, is also an effort to change the discipline. Consequently, although the ostensible and first audience for the canon is the student, its larger audience is the academic community.

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19. Balkin and Levinson, 111 Harv. L. Rev. at 969 (cited in note 6).

## APPENDIX A

## CASEBOOKS

Brest, Paul and Sanford Levinson. *Processes of Constitutional Decisionmaking: Cases and Materials*. 3d ed. Boston: Little, Brown & Co., 1992.

Levinson, Sanford. 1994 Supplement, Brest and Levinson's *Processes of Constitutional Decisionmaking: Cases and Materials*. 3d ed. Boston: Little, Brown & Co., 1992.

Ducat, Craig R. *Constitutional Interpretation*. 6th ed. St. Paul: West Pub. Co., 1996.

Epstein, Lee and Thomas G. Walker. *Constitutional Law for A Changing America: Institutional Powers and Constraints*. Washington, D.C.: Congressional Quarterly Press, 1992.

Farber, Daniel A., William N. Eskridge, Jr. and Philip P. Frickey. *Cases and Materials on Constitutional Law: Themes for the Constitution's Third Century*. St Paul: West Pub. Co., 1993.

Fisher, Louis. *American Constitutional Law*. 3d ed. Durham: Carolina Academic Press, 1999.

Foster, James C. and Susan M. Leeson. *Constitutional Law: Cases in Context*. Vol. 1 *Federal Governmental Powers and Federalism*. Upper Saddle River: Prentice Hall, 1998.

Foster, James C. and Susan M. Leeson. *Constitutional Law: Cases in Context*. Vol. 2 *Civil Rights and Civil Liberties*. Upper Saddle River: Prentice Hall, 1998.

Goldman, Sheldon. *Constitutional Law: Cases and Essays*. 2d ed. New York: HarperCollins, 1991.

Kommers, Donald P. and John E. Finn. *American Constitutional Law: Essays, Cases and Comparative Notes*. Belmont: West/Wadsworth, 1998.

Lockhart, William B., Yale Kamisar, Jesse H. Choper, and Steven H. Shrifin. *Constitutional Law: Cases-Comments-Questions: 1999 Supplement to 8th edition*. St. Paul: West Pub. Co., 1999.

Mason, Alpheus Thomas and Donald Grier Stephenson, Jr. *American Constitutional Law: Introductory Essays and Selected Cases*. 12th ed. Upper Saddle River: Prentice Hall, 1999.

Murphy, Walter F., James E. Fleming and Sotirios A. Barber. 2d ed. *American Constitutional Interpretation*. Westbury: The Foundation Press, Inc., 1995.

O'Brien, David M. *Constitutional Law and Politics*. 3d ed. Vol. 1 *Struggles for Power and Government Accountability*. New York: W.W. Norton & Co., 1997.

O'Brien, David M. *Constitutional Law and Politics*. 3d ed. Vol. 2 *Civil Rights and Civil Liberties*. New York: W.W. Norton & Co., 1997.

Rossum, Ralph A. and G. Allan Tarr. *American Constitutional Law*. 5th ed. Vol. 1 *The Structure of Government*. New York: Worth, 1999.

Rossum, Ralph A. and G. Alan Tarr. *American Constitutional Law*. 5th ed. Vol. II *The Bill of Rights and Subsequent Amendments*. New York: Worth, 1999.

Steamer, Robert J. and Richard J. Maiman. *American Constitutional Law: Introduction and Case Studies*. New York: McGraw Hill, 1992.

Stone, Geoffrey R., Louis M. Seidman, Cass R. Sunstein and Mark V. Tushnet. *Constitutional Law*. Boston: Little, Brown & Co., 1999.

## APPENDIX B

## CANONICAL CASES I

Cases in all fourteen casebooks:

*Marbury v. Madison* (1803)

*McCulloch v. Maryland* (1819)

*Immigration & Naturalization Service v. Chadha* (1983)

*Youngstown Sheet & Tube Co. v. Sawyer* (1952)

*Garcia v. San Antonio Metro. Transit Authority* (1985)

*Lochner v. New York* (1905)

*Roe v. Wade* (1973)

*Bowers v. Hardwick* (1986)

*Employment Division Dept. of Human Resources v. Smith* (1990)

*Brown v. Board of Education* (1954)

*San Antonio Independent Sch. Dist. v. Rodriguez* (1973)



## APPENDIX C

## CANONICAL CASES II

Cases in 90% (13/14) or more of casebooks:

*Marbury v. Madison* (1803)

*U.S. v. Nixon* (1974)

*Reynolds v. Sims* (1964)

*McCulloch v. Maryland* (1819)

*Gibbons v. Ogden* (1819)

*Immigration & Naturalization Service v. Chadha* (1983)

*Youngstown Sheet & Tube Co. v. Sawyer* (1952)

*Garcia v. San Antonio Metro. Transit Authority* (1985)

*Palko v. Connecticut* (1937)

*Home Building & Loan Ass'n v. Blaisdell* (1934)

*Lochner v. New York* (1905)

*Griswold v. Connecticut* (1965)

*Roe v. Wade* (1973)

*Bowers v. Hardwick* (1986)

*Cruzan v. Director, Missouri Dept. of Health* (1990)

*Brandenburg v. Ohio* (1969)

*New York Times Co. v. Sullivan* (1964)

*Employment Division Dept. of Human Resources v. Smith* (1990)

*Brown v. Board of Education* (1954)

*San Antonio Independent Sch. Dist. v. Rodriguez* (1973)

*Frontiero v. Richardson* (1973)