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CONSTITUTIONAL LAW'S LOOSE CANON: ARE WE RUNNING SOFTWARE WITHOUT AN OPERATING SYSTEM?

*Donald E. Lively**

The canon of constitutional law, like any fundamental principle, is a function of the values that inspire it. If a meaningful learning experience is the overarching concern, the common denominators of constitutional law casebooks should reveal the canon's general shadings. Insofar as casebook authorship until recently was the province of a relative few, the canon's analysis and indexing have been a rather hierarchical enterprise. Recent trends in publishing, however, have expanded the sources of and opportunities for definition. Among other things, these developments have complicated the ability to monitor the canon or track its permutations.

Although the market ultimately has limits to the amount of mass distributed hard copies it can absorb, the forces of electronic interactivity and utility are coalescing toward reducing the significance of these barriers. Expanded access to electronic data bases already has freed instructors, in theory if not always in practice, from the procrustean hold of standardized source materials. With the publishing industry itself aggressively encouraging instructors to generate individualized casebooks,¹ autonomous selection is emerging as a realistically convenient and viable alternative to authoritative selection.

To the extent editing and usage become more coextensive, the canon's definition may be subject to dynamics that are more populist than elitist. Decentralization of the editorial process presumably creates the potential for higher diversification and innovation quotients. Whether an expanded community of

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1. West Publishing Company, for instance, has developed and is actively marketing systems that enable law professors to construct customized casebooks from their own materials.

authors affects the canon in ways that formally register depends upon the capacity of or opportunity for self-generated distributions to travel beyond closed circuits. At a minimum, greater individualized control over course material construction multiplies the possibilities for recalibrating the canon at the user level.

With more fermenting sources in the definitional mix, albeit in a less visible way, the possibility arises that a broader range of inputs may yield a more multifaceted canon or even competing canons. Constitutional law traditionally has been noted for its special capacity to facilitate intellectual growth and development. Depending upon their backgrounds, interests, and aims, instructors may discern the opportunities that core constitutional courses present for professional skills development. An unsettling factor, even at schools where students have strong traditional quality indicators, is a widespread impoverishment of knowledge with respect to history and other contextual undergirdings that are prerequisites for a meaningful constitutional law learning experience.

These deficiencies confront legal educators generally, and constitutional law instructors in particular, with an unwelcome dilemma that may have significant implications for the canon. An idealized curriculum would proceed safely upon the assumption that secondary and tertiary education had prepared students for a reasonably sophisticated inquiry into constitutional principles and theories. Expectations of such readiness are quickly dispelled at many institutions by asking simple questions on the first day of class, such as "what document contains the passage 'life, liberty, and the pursuit of happiness?'"²

Insofar as institutional disparities exist with respect to student qualifications, the canon for practical purposes may have variable meaning. The extent of its fluidity, however, hinges upon the willingness of instructors to assume enrichment or remedial responsibilities. Fidelity to a fixed canon, in a context of diverse competencies, competes against the reality that law schools not only educate but certify the professional fitness of their graduates. Assuming that a law school's certification attests to more than a vocational and technical proficiency in the law, it is difficult to escape a sense of obligation to enhance the basis for a congruent learning opportunity and experience.

2. Contrary to the belief of many first-year law students, the answer is not the United States Constitution.

Against this backdrop, it may be perversely symmetrical that a foundational learning need intersects one of the canon's weaker links. To the extent values inspire the law, and the Constitution is the overarching statement of popular will, historical context is crucial for purposes of understanding the document's framing and development. If history is accepted as a cornerstone of the canon, moreover, race must be regarded as an essential pillar. The canon in its current incarnation typically compartmentalizes race as a classification implicating discrete constitutional provisions. A legal system of racial management, however, is the hinge upon which the Constitution's and union's viability originally turned. As James Madison noted, the primary source of division among the states during the framing process was not:

size, but . . . other circumstances; the most material of which resulted partly from climate, but principally from (the effects of) their having or not having slaves. These two causes concurred in forming the great division of interests in the U[nited] States. It did not lie between the large [and] small states: it lay, between the Northern [and] Southern.³

The union's founding, through the accommodation of slavery, is a bedrock reality from which more than two centuries of constitutional doctrine and principle have evolved. Despite the persistence of race as an agent for defining, reinventing, and growing the union, many casebooks have prioritized or focused upon racial and constitutional intersections of the past half century. Limited or underdeveloped historical context in part may respond to external forces that challenge content manageability. Even as classroom time opportunity remains fixed, the body of case law, lengthy opinions, and fragmented decisions continue to multiply. The result is a heavily stressed editorial process that must make difficult choices and painful cuts. Given the scarce resources of time and space, and annual increases in raw material tonnage, it is tempting to regard editorial selection as a zero sum process. Compression of an expanding universe, however, does not necessarily preordain that context and perspective should be casualties.

Escape routes from the bind include a strategic separation of basic principles from their traditional associations, so that

3. M. Farrand, ed., 1 *The Records of the Federal Convention of 1787* at 486 (Yale U. Press, 1937).

they may be viewed through a wider angle lens. The viability of this strategy, as a means of connecting fundamental constitutional principle to illuminating historical reality, is testable against even the most basic elements of the canon. Whatever debate may exist with respect to the canon's margins, it is doubtful that many would dispute that the cases of *Marbury v. Madison*,⁴ *Lochner v. New York*,⁵ and *Brown v. Board of Education*⁶ are within its core. Perhaps consistent with the notion that it is a "derelict[] of constitutional law"⁷ or its status as "the most frequently overturned decision in history,"⁸ the Court's decision in *Dred Scott v. Sandford*⁹ generally travels in an orbit that is distant from the canon. These deprecations alone would seem to establish the basis for canonical striping, if only to provide a reference point for what constitutes normative principle and to stimulate inquiry into the rhymes behind such repetition. As a source of exposure to the power of judicial review, substantive due process, and regimens of racial management, the *Dred Scott* ruling rivals the established points of entry into those areas. At minimum, it provides the basis for an amplified understanding of the principles set forth in *Marbury*, *Lochner*, and *Brown*, and a more layered and nuanced sense of connectivity with foundational premises.

The *Marbury* decision is the classic starting point for a basic course in constitutional law and, more specifically, insight into the concepts of separation of powers and judicial review.¹⁰ The intrinsic value of the Court's pronouncement in *Marbury* is undeniable. Given Chief Justice Marshall's sensitivity to President Jefferson's likely response to a Court ordered remedy, the opinion illuminates some critical interbranch realities. Despite the decision's utilities, instructors must draw upon other cases to point up and develop the debate over the judiciary's reach. The discourse between Justices Iredell and Chase five years before

4. 5 U.S. 137 (1803).

5. 198 U.S. 45 (1905).

6. 347 U.S. 483 (1954).

7. Edwin Meese III, *The Law of the Constitution*, 61 Tulane L. Rev. 979, 989 (1987), quoting Philip Kurland, *Politics, the Constitution and the Warren Court* 186 (U. Chicago Press, 1970).

8. Derrick A. Bell, Jr., *Race Racism and American Law* 21 (Little, Brown and Co., 1973).

9. 60 U.S. 393 (1856)

10. An exception to this norm is exemplified by Daniel A. Farber, William N. Eskridge, Jr. and Philip P. Frickey, *Constitutional Law: Themes for the Constitution's Third Century* (West, 1998).

Marbury, in *Calder v. Bull*,¹¹ is a common departure point for this accounting.

It does not diminish the seminal value of *Marbury* to consider and perhaps conclude that the *Dred Scott* decision is an equally if not more efficient opportunity for exploring the power of judicial review and its potential radiations. The case has the virtue of more multidimensional constitutional linkages, including racially significant founding concerns. By declaring the Missouri Compromise unconstitutional, the Court in *Dred Scott* for the first time since *Marbury* overturned a federal law.¹² More dramatically than *Marbury*, the *Dred Scott* decision reveals the potential for institutional marginalization as a function of reaction to the Court's output. Contrary to President Jefferson's battle-ready position, President Buchanan pronounced the slavery issue "a judicial question, which legitimately belongs to the Supreme Court of the United States, before whom it is now pending, and will, it is understood, be speedily and finally settled."¹³

Misplaced hope that the Court would resolve conclusively an issue that had paralyzed the political process, eventually devolved into a reaction that actualized Chief Justice Marshall's worst nightmare. The decision effectively was nullified by the Lincoln Administration's calculated neglect of it.¹⁴ Having been defined as "the citadel of slaveocracy,"¹⁵ the Court was punished by the downsizing of its membership and influence. Such interstitial consequences, which concerned Chief Justice Marshall, sealed Chief Justice Taney's reputation. The *Dred Scott* decision may not have been the proximate cause of the union's rupture. To the extent its dismantling was achieved in significant part by force of arms and constitutional amendment, however, the ruling's aftermath affords a rare illumination of the people's ultimate power to repudiate, undo, and recast their system of governance.

11. 3 U.S. 386 (1798).

12. *Dred Scott*, 60 U.S. at 452.

13. Donald E. Lively, *Foreshadows of the Law: Supreme Court Dissents and Constitutional Development* 16-17 (Praeger, 1992).

14. President Lincoln maintained that the judgment controlled the outcome for the parties but did not become general law until it became "fully settled." Don Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics*, 442 (Oxford U. Press, 1978).

15. Alpheus Thomas Mason, *The Supreme Court From Taft to Warren* 16 (Louisiana State U. Press, 1968).

Although Chief Justice Marshall announced the Court's power "to say what the law is,"¹⁶ the *Marbury* narrative does not etch the contours of this authority or establish the possible reference points for its utilization. Theories of judicial review, particularly those concerning judicial identification and development of textually unenumerated rights and liberties, typically are explored within the purview of substantive due process analysis. Primary immersion into the subject typically occurs in connection with the Court's generation of and accounting for economic rights during the late nineteenth and early twentieth centuries. One year after minimizing the Fourteenth Amendment's racial significance,¹⁷ the Court in *Allgeyer v. Louisiana*¹⁸ referenced the same provision in vitalizing contractual liberty as a check on state power. This development is a common preview of the *Lochner* era of economic rights enshrinement through interpretation of the due process clause in substantive terms.

The possibilities of substantive due process review were factored and foretold when Chief Justice Taney found that a "right of property in a slave is distinctly and expressly affirmed in the Constitution."¹⁹ As Taney saw it, a federal law depriving slave owners of their property rights "could hardly be dignified with the name of due process of law."²⁰ As predicates for his finding that a "right of property in a slave is distinctly and expressly affirmed in the Constitution,"²¹ he referenced founding clauses accounting for the slave trade²² and fugitive slaves.²³ Although he did not coin the phrase that eventually emerged in *Griswold v. Connecticut*,²⁴ Chief Justice Taney thus introduced the concept of "penumbras."

The *Dred Scott* decision may not approach the intensity or richness of Justice Peckham's, Harlan's, and Holmes' competition in *Lochner* over the validity or applicability of substantive due process review. Its multidimensional qualities and capacity to illuminate original and future realities, however, make it a creditable amplifying agent. These traits, to the extent choices

16. *Marbury v. Madison*, 5 U.S. 37, 177 (1803).

17. In 1896, the Court upheld official segregation and formally constitutionalized the separate but equal era. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

18. 165 U.S. 578, 587-88 (1897).

19. *Dred Scott v. Sandford*, 60 U.S. 383, 451 (1956).

20. *Id.* at 450.

21. *Id.* at 451.

22. *Id.* at 411, 451.

23. *Id.* at 411, 451-52.

24. 381 U.S. 479, 483 (1965).

must be made in setting up the topic of substantive due process, at least make *Dred Scott* a worthy alternative to cases more commonly used as preliminary agents.

The Court's determination that formal segregation was "inherently unequal,"²⁵ in *Brown v. Board of Education*, is a primary focal point for examining the convergence of racial and constitutional reality. Attention to *Brown* is apt for purposes of delineating and explaining the passage from several decades of constitutionally endorsed official segregation. With the real constitutional time invested in doctrine that accommodated or facilitated slavery, blunted the Reconstruction Amendments, and secured the separate but equal doctrine, not to mention the constraints upon desegregation imposed within two decades of the mandate's pronouncement, a universe centered upon *Brown* has a false gravity.

Understanding of the *Brown* decision often is swept away by rhetorical currents that, for instance, script it as the catalyst for "the Second American Revolution."²⁶ Given its backdrop and impact, the decision aptly might be characterized as another incremental repudiation of *Dred Scott*.²⁷ Utilization of *Brown* without sufficient context or enrichment fosters an intellectually misplaced and professionally dangerous sense that the judiciary has a naturally friendly demeanor toward minority claims. It also facilitates a caliber of discourse that, consistent with general propensities when race becomes the topic of conversation in culturally diverse settings, tends to be delicate and underdeveloped. A higher educational experience should transcend this societal norm.

For most of its existence, the canon has been defined in a relatively controlled environment. Potential influences upon the canon's future evolution may be identifiable, but the nature and extent of their impact are less certain. At some level, the canon is bound to be affected by market redefinition, technology, new learning modalities, globalization, multiculturalism, deficiencies or disparities in the intellectual development of students, and assessments of legal education's value and utility.

Several years ago, the American Bar Association Section of Legal Education and Admissions to the Bar published a critical

25. 347 U.S. 483, 495 (1954).

26. Anthony Lewis, *Portrait of a Decade: The Second American Revolution* (N.Y. Times, 1964).

27. See note 12 and accompanying text.

perspective upon the skills and values training provided by law schools in the United States.²⁸ The report responded to concerns that American legal education had become too distanced from the profession and indifferent toward student needs for training in skills and values essential for professional functionality. Noting the practicing bar's lament that law school graduates "can't draft a contract [and] can't write," the report referenced "the traditional response[]" by legal educators that they do not offer a vocational education but teach students "how to think."²⁹ Given the dual functions of law schools, a parallel inquiry into their academic focus and utility may be an equally useful and timely undertaking. Insofar as the canon courses into a future that includes the rigors of searching review, close connectivity with its historical predicates will offer significant evidence of intellectual vitality.

28. *Legal Education and Professional Development—An Education Continuum*, Report of the Task Force on Law Schools and the Profession: Closing the Gap (ABA, 1992).

29. *Id.* at 4.