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Symposium: The Canon(s) of Constitutional Law

THE CANON(S) OF CONSTITUTIONAL LAW: AN INTRODUCTION

*Mark Tushnet**

Any discipline has a canon, a set of themes that organize the way in which people think about the discipline. Or, perhaps, any discipline has a number of competing canons. Is there a canon of constitutional law?[1] A group of casebook authors met in December 1999 to discuss the choices they had made—what they had decided to include, what to exclude, what they regretted excluding (or including), what principles they used in developing their casebooks.[2] Most of the authors were affiliated with law schools, but some had developed coursebooks for use in undergraduate political science and constitutional history courses. Each participant was asked to write a short paper describing the canon of constitutional law, either as reflected in his or her choices, or in the range of materials available in the field.[3]

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* Carmack Waterhouse Professor of Constitutional Law, Georgetown University Law Center. I would like to thank the participants in the Georgetown Discussion Group on Constitutional Law, some of whose written contributions are included here, and all of whose contributions to the discussion are reflected in my introduction. I would also like to thank Dean Judith Areen for the support she has given the Discussion Group over the past decade.

1. For a theoretical discussion, see J.M. Balkin and Sanford Levinson, *The Canons of Constitutional Law*, 111 Harv. L. Rev. 963 (1998).

2. I invited the authors of every casebook on my shelf and authors of as many other coursebooks as I became aware of. I also invited a number of political scientists and law professors who had not written coursebooks but were coursebook users.

3. The papers were to be ten to fifteen pages long. As you will see, some authors took the page limitation more seriously than others. Some of the participants used papers that had been published elsewhere, which was not a violation of the rules of participation, but was a reason for excluding the papers from this collection. See, e.g., Derrick Bell, *Constitutional Conflicts: The Perils and Rewards of Pioneering in the Law School Classroom*, 21 Seattle U. L. Rev. 1039 (1998).

What do coursebook authors' reflections on their choices show about the canon(s) of constitutional law? In my view, three themes pervaded our discussions, and many of the papers that follow. A crude classification is that one theme involves the *focus* of the constitutional law canon, another involves the canon's *substance*, and the third involves the *audience* for constitutional law studies.[4]

Participants expressed substantial interest in teaching something about *the Constitution in non-judicial settings*. This interest takes several forms. In what seems initially to be the narrowest form, the interest lies in ensuring that students know what happens next. That is, what happens *after* the Supreme Court decides a constitutional question? Students ought to know, many participants thought, that Congress enacted a statute requiring the armed forces to allow service members to wear "item[s] of religious apparel" if doing so would not "interfere with the performance of the member's military duties," after the Court held that the Constitution did not require such an accommodation.[5] Perhaps more interesting are legislative reactions to decisions finding a statute *un*constitutional. After *United States v. Lopez*,[6] for example, Congress re-enacted the Gun Free School Zones Act, this time including findings and a jurisdictional element making it an offense to possess (near a school) a gun that had moved in interstate commerce.[7] Instructors could use this statute to probe the meaning of *Lopez*: How important is *Lopez* as a case about fundamental principles of federalism if its strictures can be overcome by a statute containing findings and a jurisdictional element?

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4. A recent thread in the Conlaw discussion list moderated by Eugene Volokh suggests that concern about the audience affects the way in which law professors construct syllabi for their courses and the preferences they have for teaching constitutional law in the first or second years of law school. Obviously, those who teach constitutional law or history to undergraduates have other concerns, but, as I suggest below, the fact that their audience is undergraduates brings their approach close to one supported to some extent by those who teach constitutional law in law schools.

5. See Geoffrey R. Stone, et al., *Constitutional Law* 1515-17 (Little, Brown & Co., 2d ed. 1991). The reference to the statute is omitted from the third edition. See Geoffrey R. Stone, et al., *Constitutional Law* 1596-97 (Little, Brown & Co., 3d ed. 1996). I mention this to note the pervasive concern among casebook authors for creating a book of manageable length (and the judgment, shared by its co-authors, that the third edition of the cited work presses the limits of manageability).

6. 514 U.S. 549 (1995).

7. See 18 U.S.C. § 922(q)(1)(1994) (findings); id. § 922(q)(2)(defining the offense with a jurisdictional element).

How different are legislative or executive discussions of constitutionality from judicial ones, for example? Constitutional scholars generally believe that judges draw on a repertoire of interpretive approaches in justifying their constitutional conclusions,[13] and (perhaps) that these approaches are organized in a rough hierarchy, with precedent and original understanding having presumptive priority over other approaches. Do legislators and executive officials use the same interpretive repertoire, and if so, do they act as if they accepted the same hierarchy that courts do?

I am confident that sustained inquiry would reveal that legislative and executive officials are more conscious of, and invoke somewhat more systematically, obviously political considerations—that is, concerns about how taking one or another constitutional position would affect their political prospects.[14] If I am right, the examination would also allow us to discuss the purported differences between judges and other officials more subtly than usually occurs. For, after all, what is perjoratively political from one point of view is sensibly prudential from another. And prudentialism is part of the judicial repertoire of interpretive approaches.[15] But if legislators are (politically) pragmatic and judges are (judicially) pragmatic, the case for a judicial power to displace legislative decisions is weakened.[16]

Participants also recurrently identified important matters of constitutional governance that are not the subject of decided cases, some of which, they thought, should be brought into the constitutional law course. The political question doctrine bars the courts from considering some of these topics, such as impeachment. As recent events showed, interpretive questions of some significance can arise in connection with these topics. Perhaps more interesting, though, are constitutional questions that are, as Vicki C. Jackson put it, "invisible" because they are

13. See, e.g., Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 Harv. L. Rev. 1189 (1987); Philip Bobbitt, *Constitutional Fate* (Oxford U. Press, 1982).

14. Their political prospects are, I believe, themselves affected (though not determined) by whether the position the politicians take expresses good public policy.

15. See, e.g., John H. Garvey and T. Alexander Aleinikoff, *Modern Constitutional Theory: A Reader* 193-212 (West, 4th ed. 1999) (presenting sections on pragmatism and minimalism).

16. Particularly if one can also establish that legislators give prudential judgments a higher place in the hierarchy of interpretation than judges do, and that the legislators' interpretive hierarchy is more defensible than the judges'.

taken-for-granted aspects of our system.[17] It is an important aspect of U.S. constitutionalism that we have had elections held at the regularly scheduled times throughout our history, even in the midst of civil war and large-scale international conflicts.[18] Perhaps relatedly, U.S. civilian officials have been able to maintain control over the military, a phenomenon that is not universal among constitutional states.

These are clearly important elements in U.S. constitutionalism. How can they be brought into a course on constitutional law? One possibility is to use them (or one or two of them) to raise questions about the meaning of *law* in our courses. Should a convention against military intervention in politics be treated in the same way that the Incompatibility Clause is?[19] This is a point at which some reference to comparative constitutional law might be useful as well. Constitutional conventions are a much more prominent feature of constitutional thinking outside the United States than they are here. The constitution of the United Kingdom consists solely of conventions.[20] The Canadian Supreme Court has issued substantial opinions dealing with the content of constitutional conventions governing the relation between Canada's provinces and the nation.[21] Many teachers of

17. Professor Jackson's paper is not included in this collection because she plans to develop its arguments at even more substantial length elsewhere.

18. Although the existence of a war, and the prospect of direct U.S. involvement, did induce Franklin D. Roosevelt to run for a third term in 1940, contrary to what seemed to be a convention against third terms.

19. The Incompatibility Clause, U.S. Const., Art. I, § 6, cl. 2, provides, "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." It is, I believe, the constitutional text most closely related to the question of civilian control of the military. Article II of course makes the president the commander in chief of the armed forces but does not preclude the possibility that the president would himself or herself be a military officer. See generally U.S. Const., Art. II, § 2, cl. 2.

20. As a matter of stated law, the British parliament could displace any existing constitutional convention, including conventions about holding parliamentary elections. The political limits on doing so are quite substantial. Notably, as a matter of stated law, any existing provision in the U.S. Constitution can be displaced by a constitutional amendment. See generally U.S. Const., Art. V. The formal barriers to such amendments may be no more substantial than the political barriers to changes in fundamental conventions in the British constitution. (The provision barring amendments to the equal representation of states in the Senate arguably could be changed by successive amendments—one amending that portion of Article V, and the next one altering the states' representation in the Senate. My own view is that this could be accomplished in a single step, although most of those who commented on this suggestion on the Conlaw discussion list appear to believe that such an amendment would have to be adopted unanimously rather than by the lesser supermajorities required by Article V.)

21. See, e.g., Reference re Secession of Quebec, [1998] 2 Can. S.C.R. 217; Reference re Resolution to Amend the Constitution, [1981] 1 Can. S.C.R. 753 (Patriation

tively: Cosmopolitan intellectuals located on the east and west coasts of the United States have more in common with their peers in Europe and Japan than they do with many residents of Montana and Idaho. Why should a Constitution structured to some extent around natural rights make the simple fact of co-residence in the United States more important than interests shared in common across national boundaries?[25]

Cosmopolitanism raises another set of membership questions. Here the concern is with U.S. membership in the community of nations. Some participants argued that the canon of constitutional law should expand to include more materials about international law, understood broadly. Existing casebooks do deal with some aspects of the U.S. constitutional law of foreign relations, particularly with the relations between nation and state, and between president and Congress, in making foreign policy. The suggestion is, however, that students should be exposed to materials dealing with the implications (if any) of international law for U.S. constitutional law.

One can offer a fairly narrow pragmatic justification for attention to international law: Ignoring it may muck up U.S. non-constitutional policy. The best current examples are the complications introduced into the administration of capital punishment by the complex questions of how U.S. commitments to international law affect state administration of the death penalty. Many nations will refuse to extradite fugitives who face the death penalty (or who face long stays on death row before they are executed), on the ground that U.S. practices are inconsistent with international human rights law.[26]

Of course, there are larger questions. I have already mentioned that cosmopolitanism raises important issues in political theory. And, I believe, constitutional law in the next decade is likely to grapple with the implications of globalization for the domestic political regime, a regime that I have argued has constitutional status.[27] I might be wrong, but at least for the next couple of years there is reason to take up the implications of inter-

25. I have raised similar questions (ignored in the constitutional literature and perhaps correctly so) about John Hart Ely's representation-reinforcement account of constitutional interpretation. See Mark Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* 87 n.35 (Harvard U. Press, 1988).

26. See generally *Knight v. Florida*, 120 S. Ct. 459, 462-64 (1999) (Breyer, J., dissenting from denial of certiorari). Cf. *Breard v. Greene*, 523 U.S. 371 (1998).

27. Mark Tushnet, *The Supreme Court: 1998 Term—Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 Harv. L. Rev. 26 (1999).

national developments, and, therefore, the implications of international law, for U.S. constitutional law.

Finally, participants were concerned about the audience for constitutional law courses. Some participants believed that they were primarily to be concerned about educating lawyers who must know the fundamentals of constitutional law if they are to be minimally competent professionals. Others believed that they were primarily to be concerned about educating people who, because of their professional credentials, were likely to be influential citizens in their communities. The disagreement, in short, is between educating *professionals* and educating *responsible citizens.*

The choice one makes affects a large number of pedagogical decisions, including decisions about the selection of materials. At this point it seems worth returning to a point I noted earlier: The canon is constructed in part by processes of inclusion and exclusion, and the latter incorporate questions about what the market will tolerate.[28] So far I have discussed things that participants believe ought to *included* in any decent constitutional law course. But for every inclusion comes (almost) another exclusion.

The current canon of constitutional law excludes materials that were prominent in earlier canons. Most constitutional law coursebooks aimed at law students contain very little about constitutional criminal procedure, a topic that was extruded a generation ago into specialized courses.[29] There is today almost no discussion of intergovernmental tax immunities in any casebook, and precious little about limitations on the ability of states to tax interstate commerce. It is not clear, however, what large topic now included in standard constitutional law coursebooks could readily be omitted.[30]

28. On the crudest, but not insignificant, level, the question is how heavy a book we can reasonably expect our students to lug around.

29. Participants who teach undergraduates pointed out, however, that coursebooks aimed at those students must include some materials on constitutional criminal procedure—an indication of one difference between the disciplines of law-school constitutional law and arts-and-sciences constitutional law.

30. My personal preference would be to eliminate detailed discussion of standing doctrine, which has become increasingly complex and is usually dealt with in courses on federal jurisdiction and administrative law. I would use the somewhat simpler political question doctrine as the vehicle to raise questions about the constitutional limits on judicial power to interpret the Constitution. I do not expect this particular exclusion to happen soon, however.

Strikingly, the dormant commerce clause was the primary candidate for exclusion, though it was hardly a unanimous choice. People agreed that, in the abstract, dormant commerce clause materials added something to the course.[31] It was not clear that those materials' marginal contribution was large enough, relative to what else might be inserted into the course. And yet the dormant commerce clause may be the most important subject dealt with in the constitutional law course for practicing lawyers. To put it bluntly: A practicing lawyer has almost no need to know the difference between the two- or three-tier approach to equal protection law and the sliding-scale approach, but has a pressing need to know the difference between ERISA preemption and ordinary preemption. Lawyers practicing in large law firms will rarely confront a serious free expression or substantive due process question, but they will routinely confront substantial preemption arguments, and dormant commerce clause doctrine is almost essential to an understanding of preemption doctrine. These lawyers, and lawyers practicing in other settings, may occasionally come across a serious takings problem, often in the context of a zoning dispute for a large commercial client. Even there, however, the constitutional claim is more likely to be a threat used to intimidate the other side in negotiations over the conditions under which a building permit will be granted, than a claim that might actually be vindicated in litigation. Constitutional law as represented in the canon plays a trivial role in the real world of legal practice.[32]

In short, the question of whether, or how much, to teach about the dormant commerce clause raises important issues

31. The dormant commerce clause cases illustrate a form of non-textual or penumbral reasoning and so provide a contrast with the commerce clause cases (and a preview of modern substantive due process cases). They provide a means of introducing some basic economics into the constitutional law course and sometimes some basic public choice ideas. And there are enough recent cases with varying facts to make the area a productive one to teach general analytic skills.

32. Of course constitutional law creates the structure of government, with which lawyers must deal every day. But constitutional law courses rarely examine anything important that flows from that structure *and* affects daily legal practice. I suspect that most senior partners would snicker (or politely move on) if a recent law school graduate suggested that some legislation they were dealing with for a client raised an interesting and possibly substantial *Lopez* question (even if, in some sense, it did). Of course the senior partner would ask the junior associate to look into the problem in more detail, but my guess is that the senior partner (or the client) would be unhappy if the research used up more than a handful of billable hours. The importance of *Lopez* will vary with the practice setting, and it certainly is more important to lawyers working for members of Congress and for clients seeking to influence the drafting or enactment of federal statutes. But that is a relatively small segment of the legal community.

about the law school's role in educating professionals and responsible citizens. It is the locus where a real trade-off might actually take place. A survey of constitutional law teachers to see what they do with the dormant commerce clause would, I think, be quite revealing about our understanding of our function.[33]

To conclude this introduction to the papers that follow: I have identified a number of themes that run through a large number of the papers. Perhaps, though, the most interesting ones will be the idiosyncratic ones—those that stray so far from the current canon of constitutional law that we would have a dramatically different canon if their suggestions were adopted, not merely one that shifted around the margins. I hope that the collection will provoke readers to think seriously about the syllabi they construct. I know that it had that effect on me.

33. Again, the situation of teachers in law schools is different from that in undergraduate programs. I think it quite difficult to make a substantial case for including material on the dormant commerce clause in an undergraduate course, where, I would think, the primary concern must be for educating responsible citizens. But I do not teach undergraduates and may be mistaken.