

2002

The Canon Has a History

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Recommended Citation

Primus, Richard A. "The Canon Has a History." Review of Legal Canons, by J. M. Balkin and S. Levinson, editors. Yale J. L. & Human. 14, no. 1 (2002): 221-4.

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The Canon Has a History

Legal Canons, J. M. Balkin & Sanford Levinson, eds. New York: New York University Press, 2000. Pp. xi, 443. \$50.00.

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Legal Canons, edited by J. M. Balkin and Sanford Levinson, is a collection of fourteen essays on subjects related to canonicity in law and legal education.¹ Balkin and Levinson have two principal aims. One is to expand the category of things that can be canonical: not just texts, they say, but also arguments, problems, narrative frameworks, and examples invoked in conversation or teaching. In their view, what makes something canonical is its ability to reproduce itself in the minds of successive generations.² If generation after generation of legal academics argues about the countermajoritarian difficulty, then the countermajoritarian difficulty is a canonical problem, and the argumentative moves that are made from generation to generation—assuming they are common from one to the next—are canonical arguments. Balkin and Levinson’s second aim is to argue for a more practical kind of expansion, specifically the expansion of the canon that defines what is taught to introductory students of constitutional law. According to the editors, the present pedagogic canon³ is too focused on a few clauses of the Constitution and on

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1. *LEGAL CANONS* (J.M. Balkin & Sanford Levinson eds., 2000).

2. There are points of contact between this view of canonicity and Balkin’s other work on “memes,” *i.e.*, units of cultural knowledge or practice that are transmitted from one generation to the next. See J.M. BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* 42-90 (1998).

3. I use the term “pedagogic canon” to refer to the canon that structures what students must be taught in constitutional law courses. As Balkin and Levinson point out, this is only one of several types of legal canons. There is a “legal authority” canon composed of those texts and doctrines that bind courts and with which practicing lawyers must therefore be conversant, but there is also a “cultural literacy” canon composed of things that anyone who wishes to participate in serious discussions about the relevant field must know, as well as an “academic theory” canon that defines the world in which law professors conduct contemporary scholarship. *LEGAL CANONS*, *supra* note 1, at 5. These canons overlap: a case like *United States v. Lopez*, 514 U.S. 549 (1995), probably belongs in all three. But the canons also diverge. No lawyer

opinions of the United States Supreme Court. They urge more attention to the development of American constitutionalism outside the courtroom. Balkin and Levinson's view of constitutional development is historically oriented and radically democratic: they wish the canon to include materials that will show how all Americans, not just judges or even officeholders, have affected the meaning of the Constitution.

Two of the book's essays are jointly written by Balkin and Levinson themselves, and the remaining twelve essays are by other scholars. The success of the twelve other essays is uneven. A handful, however, do throw light upon what is most provocative in Balkin and Levinson's ideas. For example, Carol Rose's essay on the canons of "property talk" provides excellent illustrations of how patterns of argument can be canonical, shaping a field of law just as pervasively as any court decision or other written text.⁴ Daniel Farber contributes a thoughtful piece arguing that professors who believe law and economics to be unhelpful nonsense must nonetheless acquaint their students with the field, because law and economics structures the thinking of many legal professionals and learning what other legal professionals take seriously is essential to becoming an educated lawyer.⁵ (Education is in part the study and critique of canonical nonsense.) Katherine Franke's essay "Homosexuals, Torts, and Dangerous Things" provides an interesting sketch of how the recent emergence of gay and lesbian law as a distinct field with its own canonical structure in some ways recapitulated and in some ways diverged from the pattern by which older legal fields like torts came to assume familiar and eventually canonical shapes.⁶ And Randall Kennedy offers a crisp, affirmative program for the integration of race relations topics into the pedagogic canon, engaging and critiquing the way in which Balkin and Levinson propose to incorporate certain kinds of historical materials.⁷

One important way to understand Balkin and Levinson's project is to read their book as a companion to the constitutional law casebook that they edit.⁸ Certainly Balkin and Levinson conceive of the two

would cite *Lochner v. New York*, 198 U.S. 45 (1905) in a brief, but nobody who does not know *Lochner* is an educated constitutional lawyer.

4. Carol M. Rose, *Canons of Property Talk, or Blackstone's Anxiety*, in LEGAL CANONS, *supra* note 1, at 66.

5. Daniel A. Farber, *Of Coase and the Canon: Reflections on Law and Economics*, in LEGAL CANONS, *supra* note 1, at 184.

6. Katherine M. Franke, *Homosexuals, Torts, and Dangerous Things*, in LEGAL CANONS, *supra* note 1, at 303.

7. Randall Kennedy, *Race Relations Law in the Canon of Legal Academia*, in LEGAL CANONS, *supra* note 1, at 211.

8. PROCESSES OF CONSTITUTIONAL DECISIONMAKING (Paul Brest, Sanford Levinson,

books as part of the same project. Casebooks are canon-creators, and the preface to this casebook is a six-page methodological essay—unique among casebooks⁹—laying out the editors' views about their attempt to construct a canon for constitutional law. Quite self-consciously, they want to emphasize different parts of the Constitution and different parts of American history from those that have generally been taught in constitutional law classes. The historical orientation of the casebook is a central feature, and much of the book is organized by historical period rather than doctrinal topic. Moreover, the history they propose to examine is not all sweetness and light. As they make clear in *Legal Canons*, Balkin and Levinson believe more attention should be paid to the role of slavery in shaping American constitutional development, and their casebook follows through with sections on the constitutional treatment of the interstate slave trade, the problem of fugitive slaves, the role of slavery in the secession crisis, and the role of slavery in nineteenth-century attitudes toward judicial supremacy. In the same vein, Balkin and Levinson's central example of a historical text that is not generally taught but should be is Frederick Douglass's 1860 Glasgow speech on the Constitution as an anti-slavery document.¹⁰

The commitment to teaching constitutional law as a historically-embedded phenomenon is welcome, as is the desire to expand the history to which law students are exposed. At the same time, the ways in which Balkin and Levinson (and their casebook co-editors, Paul Brest and Akhil Amar) choose to reconstruct the pedagogic canon raise questions about what kind of fidelity the pedagogic enterprise owes to the history of its subject and indeed to the history of constitutional pedagogy itself. Constitutional meaning has been shaped in part by the kinds of non-judicial material that Balkin and Levinson wish to add to the canon, but it has also been shaped by the way that constitutional law has been taught to American lawyers from decade to decade. Part of the reason why Balkin and Levinson want to reform the canon is that they want the next generation to use different intellectual tools when constructing constitutional meaning. By the same token, the intellectual tools available to previous generations have helped determine what the Constitution has meant in the past. Accordingly, a historically oriented curriculum must ad-

J.M Balkin, & Akhil Reed Amar, eds., 4th ed. 2000) [hereinafter Brest, Levinson].

9. I have sampled the most recent editions of the nine other constitutional law casebooks on my office shelf and found that they have nineteen pages of preface combined. None of the prefaces is even a third as long as that in the most recent edition of Brest, Levinson.

10. Frederick Douglas, *The Constitution of the United States: Is it Pro-Slavery or Anti-Slavery?* (1860), reprinted in Brest, Levinson, *supra* note 8, at 207; Balkin & Levinson, *Constitutional Canons and Constitutional Thought*, in *LEGAL CANONS*, *supra* note 1, at 400-02.

dress not only important historical subjects like slavery but also the history of the canon itself.

Consider again the example of Douglass's Glasgow speech. In their casebook, Balkin, Levinson, and company reproduce the speech as a counterpart to the Supreme Court's decision in *Dred Scott*,¹¹ one document interpreting the Constitution as supporting slavery and the other interpreting the Constitution as hostile to slavery. Teaching Douglass's speech alongside *Dred Scott* is a terrific idea in the service of several pedagogic aims, such as asking students (a) how one chooses among conflicting interpretations of the Constitution, and perhaps (b) when, if ever, one should intentionally misread the Constitution. But historically minded teachers must be cautious about how Douglass is presented. Between 1876 and 1995, Douglass's speech was not widely known among lawyers or law teachers. That piece of history implies that the speech had relatively little impact on how people thought about the Constitution during those years. Offering a canon that presents Chief Justice Taney and Douglass as a yoked pair of opposing constitutional interpreters may suggest, somewhat misleadingly, that both interpretive traditions have been present in American law down through the ages. Precisely because Balkin and Levinson are correct that Douglass's speech has not been widely taught, the teacher who now offers Douglass as an alternative to Taney must take care to convey that this material was not taught to prior generations of law students. Otherwise, students who try to understand the struggles over race and the Constitution in 1896 or 1964 may misapprehend the conceptual landscape that presented itself to the people who shaped constitutional meanings at those times. The history of the canon is itself a key part of constitutional development, and historically oriented scholars must integrate that history into whatever new pedagogic canon they promote.

11. *Scott v. Sanford*, 60 U.S. 393 (1856).