

## CONSTITUTIONAL COWBOYS: NEW RIDERS ON THE PURPLE RANGE

*Gregg W. Bonelli*<sup>†</sup>



The watering hole for intellectual exchange on constitutional issues has moved and those who thirst should take note.<sup>1</sup> Again this year, the annual roundup of the toughest and the best hands in their particular specialties of the

---

<sup>†</sup> John Marshall Law School, Chicago, JD with distinction, 1989; Judicial Clerk for the United States District Court for the southern district of Illinois, Alton, Hon. Wm. L. Beatty, 1989-91; Dobbins, Fraker, Tennant, Joy & Pearlstein, Champaign, Illinois, medical malpractice litigation associate 1991-1992; Assistant Public Defender for Coles County Illinois and private practice 1992 - 2002. Southern Illinois University School of Law, adjunct professor of Trial Advocacy, 2007 - 2009; Professor of Criminal Justice, Illinois Eastern Community Colleges, Robinson, Illinois 2002 - present.

Grateful thanks to Professor Arnold Loewy and his wife Judy, my friends and our gracious hosts. Kinder more caring people you will never find. Thanks to my colleagues at I.E.C.C for their continued understanding and support. Finally, a big "Howdy" and tip of this cowboy's hat to the Texas Tech Law Review wranglers, Miss Katie Maxwell, trail boss, who turned my ramblings into comprehensible prose. *Vaya con Dios.*

1. Buck up, buckaroos, this piece is full of good-natured pokery; this particular poke is word play on Zane Grey's famous title, *New Riders of the Purple Sage*, and titles not being subject to copyright protection its fair game. A "poke" by the way, is a term of art in Texas, as well as being a suffix and aptly modified to be an adverb or adjective. We poke the fire to keep it going. We poke cows to keep them moving, and the

law and its constitutional fencing will follow the trail to Texas Tech Law School to be a part of Professor Arnold Loewy's Spring Symposium. It only seems like an unlikely venue to the uninitiated. "*Is this your first rodeo, pardner?*"<sup>2</sup> an old hand might ask a tentative tenderfoot, and whether it is or not, the welcome could not be warmer.

Everywhere ingrained in the psyche of the prairie people that inhabit this particular part of the West is the tradition of the working cowboy and their management of unruly but spirited livestock that allows them to survive and prosper. They are not isolated or remote in any way that matters, and they are, in fact, as likely to have seen the elephant<sup>3</sup> as any cosmopolitan legal scholar and are a heap more likely to have killed their man, in the legal practice sense. A key element in the process that created this sort of climate was the rodeo<sup>4</sup> gathering where riders showed off skills hard won in lonesome hours of due diligence. So too many an intellectual scholar has holed up many an hour and seen the dawning of a new notion come to them only to find themselves alone and on their own with their campfires cold and their peers nowhere to be found. Now they can come and share their insights with others on a range that uniquely gets it.<sup>5</sup> In the West, what is true will work.<sup>6</sup> Boots are pointed not so

---

Supreme Court is pokey about decision-making if you have an interest. Pokey is a good thing sometimes, as in the Hokey Pokey which is, of course, "what it's all about." Speaking of which, two Texas Aggies were out hunting in the piney woods and came across a co-ed who asked them what they were poking around the bushes for. "We're Lookin' for game ma'am," they answered. "Well, I'm game," she cooed. So they shot her. For the more astute, "purple" or "of the purple", signifies royalty and in our system, the Supreme Court is as close to royalty as we get, being practically immune from removal and appointed for life. Sure, the analogy is a stretch, but if you want to keep up, you have to try harder or be left behind riding drag, which is now the slang term for something being not fun. But the original Texan referred to the rider designated to bring up the rear of the cattle drive to keep the strays in line with the herd and moving forward.

2. This is said with an accent that cannot be duplicated. At once accusatory and protective of the institutions of the speaker, it is also cautionary and welcoming if said to someone appreciative of the tradition. Texas, like the truth, is not for everyone. Lubbock is special in Texas as well, being the home of Buddy Holly, who heard Elvis Presley sing here when the former was in high school and the latter was doing the sage brush tour to make a name for himself. Encouraged and inspired, Buddy went on to play the local roller rink. Ever mindful of the practical nature of things in Texas, the skating continued as he and the Crickets learned to play well enough to make people stop and listen.

3. To have "seen the elephant" means to have witnessed all there is to see that matters, even things not immediately available. The first professional baseball team west of St. Louis, the Kansas City Athletics, displayed an elephant on their caps as the team mascot to signify that if you had seen them, you had seen all there was to see worth seeing. To have "killed your man" did not necessarily mean killing someone else, it was the western colloquial expression meaning that you had faced down your own fears and killed the coward that was you when afraid.

4. "Rodeo" here is not used in the modern or particularly historically correct sense but rather from the memory of the author who grew up in New Mexico and Texas and was raised by a grandfather who had worked the roundups on the King Ranch as a teen. His use of language would now be termed abusive by social service and child protection agencies given my tender years, but at the time was thought to be only "colorful," and I suffered no apparent ill effects and do not complain or explain.

5. I met Professor Loewy at Oxford, twice, searching for the right place to be with others of like mind in a venue that would permit me to work for a better world. The first time I used the free day in the middle of the conference to ride the trains over to Stratford upon Avon to see Shakespeare's house. When I found out he and his wife were coming again the next year, I invited them along. The idea grew and so I chartered a bus and took everyone that wanted to go. Not a big thing if you'd ever been in Texas where the word "big" is

much as a fashion statement but because it's easier to hit a stirrup on the fly and blue jeans are work clothes that don't snag in the mesquite while rounding up a stray. Yes, they wear them in Boston and New York and Chicago, but not for the same reasons.<sup>7</sup>

Of course the jet planes that bring in the tenderfoot to Texas may seem anachronistic, that is unless they flew Southwest, the most successful airline in America, which embodies the spirit of the region and is doin' just fine, thank you. First up it's off to the bunk house to settle in,<sup>8</sup> then it's up to the big house for dinner with the owner of the spread<sup>9</sup> and the ramrod,<sup>10</sup> all of which is great but only anticipatory in nature as the event begins in earnest the next day. It may take the tenderfoot a bit to see it, but the real fun begins once they settle in at the Lanier auditorium on campus at Texas Tech Law School. For the Easterners, and that would be anyone from the wrong side of the Pecos,<sup>11</sup> a little history might be enlightening. Texas was an open range, which meant that cattle could go anywhere they could find grass as it was unlikely that you could make it rain where you wanted it to out here. Cattle could smell rain and grass

---

rightly reserved for the truly large. At Oxford, it is about history and your place in it, which is small and about which you are made to feel rightly humble. In Texas, things are different. Here the sky is big and you are small, but it's okay, because even if you were not born in Texas, you are here now, where great things get done. Texans will not hold it against you if you started out from somewhere else so long as you recognize a better place when you've come to it—like Texas.

6. I am not much for labels, but if I had to wear one, I suppose I would be a pragmatic structural functionalist—if it works, but gives out a bad result now and then, keep the system and live with the occasional mistake. Slavery was a mistake the Supreme Court inherited with its creation. The Court had the chance to fix it and did not because it was systemically prohibited from doing so. While legally correct, the Dred Scott decision, was a historical mistake for the country. What should we have done? Eliminate the Supreme Court or allow it to rewrite the constitution based upon revisionists' interpretations? Hardly, we did what we had to do and corrected the constitution with the Thirteenth Amendment. A lot of blood and treasure was required to get to that point but, importantly, the system survived the trauma. Civil rights took even longer and there is still work to do, but the system is a keeper and we must be grateful we have it. Cattle used to have really long horns too until we bred that out of them.

7. Lawyers are fun to look at when it comes to clothes. Back East they would not be caught dead in a proper cowboy hat, but they do not hesitate to put on the trappings of English schoolboys and wear the Old School tie or something like it, and the conformity of navy blue blazers and casual khaki slacks would be comical if it were not so uniformly sad.

8. The designated hotel was the Hawthorne Inn and Suites, which was close by the Law School and very nice indeed.

9. Professor Loewy's home is on Oxford Avenue, a coincidence I did not miss and thought deliberate. In the larger sense, the University owns the spread and the Deans past and present were present and were gracious in a manner and to an extent unknown elsewhere. Civilized in the extreme, the dinner was catered, formal, and with a string quartet playing Mozart. All in all it was a lovely precursor to a rowdier undertaking to come.

10. Ramrods were not all laconic, hard and mean, they were the best man to get the best work out of a particular set of cowboys. Here it is Professor Arnold Loewy, but if you have been here or know him, you knew that already. If you were not, or do not, you have a treat in store for you.

11. The West goes on past Texas, of course, and I have gone with it. When I got to California, however, I could not shake the feeling that maybe I had gone too far, and perhaps the best of the trail was somewhere behind me. I attended U.C. Berkley in 1969 but know my self-incrimination rights too well now to speak of it in detail.

and could find it to eat better than cowboys could, so cattle were branded<sup>12</sup> to show ownership and allowed to roam so everyone owned the range generally, although those that made the effort could still have a bit of their own for their ranch.<sup>13</sup>

There they would bunkhouse the hands and tend the horses, which were the backbone of every working ranch. Obviously, in so large a place with so much of the resources scattered about, it was critical to be mobile to manage them, which made working from horseback mandatory. If you doubt the value of horseflesh here, recall that taking someone else's horse was a hanging offense, while other capital offenses back east were not so harshly punished locally. Much talk and more work was done to breed, break, and care for a proper horse, and it was not uncommon for conversation among cowboys to find its way to a particular horse who had done a particular thing a certain way. "*Ole' paint wheeled to the left the instant he heard the rattler, long before I had a chance to reign him in and it saved my life,*" a cowboy might say, and others who heard him would wonder what their own mount might have done in that situation and whether they too would live to tell the tale. "*The big roan was scared of lightening and nothin' I could do would make him behave once a storm started comin' in*"—might also be said and considered. *Should have covered his head* some might think on hearing this, *and talked to 'em*. Horse sense has a meaning in Texas, lost in a country with a smaller sky.<sup>14</sup> In a similar manner, rulings from a Court interpreting the Constitutional Law of the land are taken for what they are out here—a reaction on the trail to a particular situation. The trail goes on, hopefully, and as fun as it may be to sit around afterward and mutually recollect such things back behind the travelers now beyond them, it is more important to know what to watch for ahead, which is the Western focus on such things. Examinations of all things constitutional, therefore, are done with an eye to the practical use of the understandings gained from such endeavors. Cowboy up?

---

12. I was an Art major undergrad and "branded" my products with the "GB" combined brand that I still use today. I was spending the summer in Midland, Texas with my grandparents at age 6 when I came up with it, and now it's a copyrighted mark.

13. I drove out to the conference, giving myself a sentimental journey home on snippets of Route 66 that I first traveled sixty years ago. I took my time and savored the scenery. South of Vera, Texas, I saw a sign giving notice of land for sale hung on a fence between the highway and green spring grass as far as the eye could see—7,000 acres, the sign said, and gave a phone number. I wondered how much of Manhattan that would be? We own 14 acres of woods next to our suburban home in Illinois and it's thought to be a forest preserve by envious local developers.

14. If you've never been in this part of the West, you have no idea how big the sky can be. They pushed back the horizon at great expense to allow more of it to show. I think it was one of Pecos Bill's miracles but would have to review my childhood records to be sure. The high point of my fourth birthday was a visit by the Sons of the Pioneers to the party to sing happy birthday to me as a surprise from my well connected uncle who worked for Halliburton. They were in town for the oil show and a little green persuaded them to make my day unforgettable. As for the Texas sky, its boundaries are unimaginable to those hemmed in by hills and trees and buildings. It may be disconcerting to the uninitiated, but quickly becomes reassuring with the recognition that if trouble is coming, you have plenty of time to see it and get ready.

At a rodeo, many things happen at once even though the main action takes place one rider at a time. Tales are told and taken with as many grains of salt as needed to get the lesson they impart.<sup>15</sup> Some are humorous, some are serious, but all are well intended among people who accept the presence of one another graciously just because they are there. At Texas Tech they do that.<sup>16</sup> Equipment is looked over too, and guys with new spurs and tack may have to explain themselves and their choices to old hands who have gotten along just fine without the new fangled gear but who will take up a new idea as quick as that if it does the job better. Little laptops and Kindle readers are passed around and book salesmen and librarians worry about their futures and what these little things are going to do to knowledge and learning generally just like old ranchers skeptically eyed barbed wire a hundred years ago.<sup>17</sup> If you thirst for knowledge and a library is a waterhole, now you can carry a canteen bigger than all of them put together. It may be harder to imagine than use, but it's been done and all that's left is our adjustment to it.<sup>18</sup> Legally speaking, it means more people can know more things sooner. Practically speaking, it will only make a difference when cowboys are broke to using it.

Livestock newly bred or caught having strayed of the range is also brought to bridle and saddle by being "broke." Terminology may seem problematic here, that's because a horse that's broke is a good thing, not bad, but the trick is to break them to riding and use but not in spirit. A good cuttin' horse is a valuable tool for separating a frightened calf from its protective mother and a necessity if you want to get the branding done efficiently. That comes from breeding, training, and handling, all long respected traditions in the West. The heart of any rodeo is the symbiotic relationship between cowboys and unruly

---

15. My grandfather worked the annual roundup with the King Ranch as a youngster and being the cook was the worst job and was always the newcomer's chore. He was stuck with it until someone complained about his cooking when it was then given to the complainer. To get out of the wagon finally, he salted the apple pie for dinner one night and heard from an old hand, "*My God, that's the saltiest pie I ever tasted.*" Then, looking around the campfire at the others eating it too and making faces silently, he realized what he had done and continued, "*But it's just the way I like it!*"

16. My apologies to the dinner guests at my table last year for my inability to resist the temptation to tell "tall tales" in the Texas tradition—especially the one about my uncle, the biggest lamb dyer in Texas; and to the Cub fan and former Jenner & Block associate, I poked with the lie that Wrigley field and the Cubs had been sold and moved to Texas, which I corrected the next day to enjoy his gullibility all over again.

17. On the road home we passed the "C&E Ranch and Cattle Company" as denominated by the marquee over the gate, which also noted that it had been there since 1888. Looking the place over it was hard to believe that they had not accomplished more with it in all that time. "*If it ain't broke, don't fix it,*" as they say, but repeating rifles found a home here unknown elsewhere and for good reason, so practical progress is always appreciated.

18. When I went to law school, I had never seen a computer. I landed a position as a research assistant for my contracts professor when I was the only one in a class of 300 who volunteered to learn how to use Westlaw. By the time I clerked for a federal judge after graduation, it was expected that all citations to the court would be electronically Shepardized, a process that now only keeps the name from where it began. Keystrokes replaced footsteps, in a library full of hopefully the right books, and courtrooms everywhere now accommodate the improvement that is legal research by electronic database.

livestock, each needing the other to survive, but both knowing they may have to put up a fight.<sup>19</sup>

This year in Lubbock there was an ample measure of each of the above and the timing was as perfect as the weather with Supreme Court Justice Stephens announcing his retirement the very day the rodeo started. It is unusual for Constitutional Scholars to get much notice during their lifetime other than among themselves, let alone have it be the lead story in the nation the day they meet. Next year, no doubt, some discussion will be had of the new make-up to be seen on the Court's increasingly feminine face.

With all of this in mind, let me lay it out for those who have never been to a constitutional rodeo Texas style and explain just why this one is exceptional. Cowboys take turns riding unbroken stock for a set period of time to see if they can stay on or get thrown off. It's no disgrace to be bucked off a horse that has never been completely broken, although you may get a good natured hoot from the other riders on the fence now and then. As anybody out here can tell you, "*There never was a horse that couldn't be rode, and there never was a rider that couldn't be throw'd.*" Cowgirls ride 'em too, and always have, necessity being a mother herself and western women having always brought their can do spirit with them from where ever they came.<sup>20</sup> In legal parlance, it could be observed that there were three panels discussing specific areas of concern all having to do with the Fourth Amendment, twenty minutes a person, with questions from the audience and each other following, but that is describing the same event in another language that completely fails to capture the true flavor of the gathering. Jalapeños; más por favor.

So, basically, there is a wild horse,<sup>21</sup> a rider,<sup>22</sup> and spectators of two classes. The corral where all this takes place varies with the ranch but

---

19. As far as I know, Texas led the nation into the electronic filing of documents by court clerks. Harris County—which was filing 50,000 pages of documents a week when I contacted them as part of my research on a law review article about electronic media and legal pleadings and their solution of using digital document storage—was the first I found, and was possibly the precursor of the common practice of doing so in federal court. When I first looked at the problem, the Texas solution was WORM drives, "write once, read mostly," which have now been replaced by Acrobat reader files. Progress, in case you were not aware, happens as well and as often here as anywhere.

20. My mother, Bill Wright, was born on the reservation in Seminole, Oklahoma, and had a stirrup slung from under the dash of her Cadillac convertible to give that foot something to do while the other one was busy driving. At age fifteen, she was sent down to the Hughes Tool Company's Houston warehouse to pick up another drilling bit by her wildcatting father on location outside Ardmore, Oklahoma who didn't have time to leave the rented rig. Alone in a '36 Ford and carrying \$500 in cash and a Colt .45, she drove non-stop for two days to get it done. Although she was successful, the well was a dry hole.

21. This is one of a thousand apt analogies for the institution that is the Supreme Court. How grand that so many ways are needed to help us get a handle on something so useful and necessary. At the conference, in the Q & A, I called it a "Nathan" institutionally speaking, referring to the role of the prophet in bringing the ruler's conduct into line with the law and his public correction of David. Rulers need to be kept in check by something, and God himself used to do it when there were fewer of us and no cable TV. It is somewhat more remote now, but the indisputable finality of society's agreed deference must not be lost. If you don't think there is a God, by the way, come to Texas and sleep out under the stars for a night—that will change your mind.

essentially it's a fenced area large enough to let the beast run and buck a little, but not so big that a rider in trouble is far from help if he needs it. Since the idea originally was to break the horse, cowboys took turns until the job was done. If you have never seen it done you may not fully appreciate the grace of it, but something about the horse changes when they finally are worn down and accept that the cowboys ain't stayin' off their back and they will simply have to adjust to that and do things differently. They may still reach back and bite now and again to remind a rider who's the animal and what the limits are, but once broken they are more useful and can be better directed and put to work.

Cowboys who have participated in this also know that it may not be the cowboy who does it so much as the time for it to happen has come. Since the order is either by seniority or drawn for, depending on the house rules, it may be that the first rider can't reach the level of submission required so another takes his place and so on until it's finished. Some horses may not be broke during a particular session, but instead earn grudging respect from the cowboys themselves about their spirit and strength. In such cases they are studied closely by those who may have to take a turn later for any tendencies and weaknesses that can be used to bring them around. All of this is observed by the first order of spectators—those who will take a turn at riding themselves before the event is over. The second order of spectators are a mixed group who are there because they appreciate the process and just like to watch or have some vested interest in the outcome and hope the cowboys can get it done in a way that will be to their own advantage.<sup>23</sup>

Breeding is important, and a horse who's sire and stud are known, may have the best qualities of both or neither, but it is not just unlikely, but against nature that they will be entirely distinct from their forbearers.<sup>24</sup> Respectful deference to tradition is shown, although modern equipment may be brought to bear to improve the process. The modern mustang that provided the

---

22. I'm sure you get the point here and understand that no one person really can make the Fourth Amendment do anything it doesn't want to. We "ride" it in hopes of having an issue ruled on our way in court and the Supreme Court rides it too, and tries to hobble it, and pasture it, and so forth, none of which will ever tame it. Like any right once taken on by a people as a birthright, it will endure, or the government that attempts to kill it will fall.

23. If you are struggling with the comparison from a lack of Western familiarity, think about building a large shelter and having to pick between architects or carpenters to get it done. Constitutional scholars are architects; they have appreciation for and understanding of forces that are unseen and unknown to carpenters. Carpenters have hammers and saws, however, and know how to use them. So too, trial lawyers watching scholars discuss fine points of historical origins appreciate, but maybe don't care so much, as they are waiting for some useful insights to use to pound a point home in court later. The feminine counterpart would be that Dorothy went to a lot of trouble just to learn the magic words, "*There's no place like home*," and as working lawyers live by billable hours, they don't see the need for all the rest, just the words to say please. Thank God the Texas bar has seen fit to require continuing legal education hours, otherwise there's no telling how long they would keep doing it the way they learned it first.

24. Credentials anyone? "*I see from the cut of your clothes that ya'll ain't from here*," replacing "*Harvard means trumps*" on C.V.S. Yale and Harvard being the only representative schools on the Supreme Court now, one riles a bit if educated elsewhere and think that brains west of the Pecos may be overlooked for being where they are rather than how well they work.

entertainment and excitement in the Lanier Auditorium was the Fourth Amendment of the United States Constitution as lately ridden. Cowboys took their twenty minute turns at explaining their understanding of it and what that meant or should mean to the crowd. “She’s an old mare, some said, and she’s being misdirected and has strayed off the path she was meant to follow.” Other’s attempted to prove breeding and heritage by giving us the breeder’s notes and intentions. Any breeder will tell you that they can write all they want about their hopes for an outcome but it’s a horse, not a wish list made flesh, that they get in the end. Some were a little too worried about themselves and whether they would get hurt, and when their time was up, it was hard to see they had worn down the topic any for the next go ‘round so much as gained a little credit for having not fallen completely off. By and large the comments and concerns were real, valuable, and appreciated and showed everyone something useful about whether to, and how to, take on this particular animal if they had to.

I was interested and had been a cowboy myself on occasion although this time I was happy to sit the fence.<sup>25</sup> I was there by invitation as the ramrod’s guest, and this comment about what I saw is my way of saying thanks to the many who made my attendance memorable and extremely pleasant. The highpoint for me was the lunch break when an old hand was brought in to tell us what he had observed about the current state of things and his worries for the future of the rodeo itself. He spoke with heart and understanding in a way that made most of us feel about it the way he felt about it and I left a changed person as a result. There were no losers here. A few bumps and bruises are always expected and were received, but it was done with good cheer and in the end we all knew we had worked together to make a bridle for an unbroken horse we all admire.<sup>26</sup> For me the real lesson was that I understood, for the first time, the place in history that Constitutional Cowboys hold riding the range across our country.

America’s greatest gift to civilization will always be the perfect balance we achieved when we thought to counter-balance the popular will of the people with an elevated but limited President as a ruler and a Supreme Court to keep them both in compliance with the written law of the land. Much was said at the conference about history and many hours of painstaking research had gone into finding out facts for us that none of us had known about before. Knowing

---

25. Two Oxford Round Table presentations—one on HIV/Aids and the misuse of the rule of law to takes its measure; one on the difficulty of making useful models for substance abuse policy, both with Arnold present to give me a well-timed poke when I needed it. His hand was always first in the air when I finished and there was a call for questions, but then, I did the same for him. My position was always easily established—I disagreed with whatever he said.

26. Speaking of working together, the cowboys around Roswell, New Mexico, used to gather each year at the bottomless lake that was adjacent to the largest artesian well in the southwest and tie their lassos together to see if they could fathom its depth. They could not, hence the name. It was not a failure so much as a mutual appreciation of the thing itself that resulted. Like here, in Lubbock, and our new found respect for the magnificence of the system that is constitutional jurisprudence.



those facts, I did not change my mind about what the Constitution means so much as I saw the reason for what has happened to it since. It is alive, truly, and still a bit unruly. Importantly, it is not divine nor pretends to be. It is of good breeding, true, and some breeders thought themselves divinely inspired as do some of us today. The truth is, however, she's a horse than can work and will save her rider in ways not foreseen or appreciated until the crucial moment comes. When a court issues a ruling that I do not agree with, I may be unhappy about it and look for ways to argue or bring it evidence to change its mind at the next opportunity. When the Supreme Court does it, it is another matter. It is the final arbiter of what the law is and as hard as it is to swallow and get myself up and dust myself off, I must respect it for what it is. Actually, I think the framers had no more idea what they were going to get than the breeders who made Secretariat or Man 'O War. She's a giant of a working horse with more gaits than you've ever seen, and she will not be hobbled nor pastured nor fenced, no sir.<sup>27</sup>

---

27. Yes, Pardner, you may quote me. Be warned, however, that no actual research took place in the creation of this poke and no credence in its contents should be attached other than the parts about how great it was to be in Texas at the Symposium and how good it is to know where to go when good company and skilled cowboys gather to tackle hard issues.