

## At the Lectern

# Between Two Palm Trees: Reading the Constitution in Paradise

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For as long as we have had a Constitution, we have been debating how to interpret it. With the conclusion of the Supreme Court's recent 2013 term and its handful of closely divided, hotly contested cases,<sup>1</sup> we can rest safe in the assumption that, despite the notable uptick in unanimous decisions issued by the Court,<sup>2</sup> the figurative "end of history"<sup>3</sup> in constitutional interpretation, in which the major partisans in our annual Constitutional skirmishes lay down their arms and settle upon one particular interpretive lens through which to read the Constitution, is nowhere in sight. If Alexander Hamilton and James Madison, two of the Constitution's principal architects and leading spokesmen who co-authored *The Federalist*, could not later agree on the meaning of the words on the page to which they had signed their names, should we expect to do any better?

But despite their deep disagreements over how to read the Constitution, Americans from across the spectrum still seem to revere the old musty document. In an era of increasing polarization<sup>4</sup> and growing skepticism

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1. The major constitutional law related 5-4 decisions of the Supreme Court's October Term 2013 (hereinafter "OT") included *McCutcheon v. Federal Election Commission*, 134 S. Ct. 1434 (2014), *Navarette v. California*, 134 S. Ct. 1683 (2014), *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), *Hall v. Florida*, 134 S. Ct. 1986 (2014), and *Harris v. Quinn*, 134 S. Ct. 2618 (2014).
2. Robert Barnes, *For These Supreme Court Justices, Unanimous Doesn't Mean Unity*, WASH. POST, July 1, 2014, available at [http://www.washingtonpost.com/politics/courts\\_law/for-these-supreme-court-justices-unanimous-doesnt-mean-unity/2014/07/01/94003590-0132-11e4-b8ff-89afd3fad6bd\\_story.html](http://www.washingtonpost.com/politics/courts_law/for-these-supreme-court-justices-unanimous-doesnt-mean-unity/2014/07/01/94003590-0132-11e4-b8ff-89afd3fad6bd_story.html) (suggesting that "stark divisions... exist on the court beneath a frequent veneer of 9-0 comity.").
3. The phrase comes from FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).
4. *Political Polarization in the American Public*, PEW RESEARCH CTR. (June 12, 2014), <http://www.people-press.org/files/2014/06/6-12-2014-Political-Polarization-Release.pdf> (detailing various ways in which "Republicans and Democrats are more divided along ideological lines—and partisan antipathy is deeper and more extensive—than at any point in the last two decades.").

about many things official<sup>5</sup>—Congress, the president, the Republican and Democratic parties, business corporations, even the Supreme Court, etc.—the Constitution remains, as it has throughout much of American history, a document that continues to pull powerfully on the heartstrings of citizens.<sup>6</sup> Americans may hate politics, as the pundit E. J. Dionne<sup>7</sup> has observed, and distrust their government, but they continue to love the governing document that structures our politics and organizes our government.

And yet while Americans seem to revere the Constitution, they do not necessarily read it that often.<sup>8</sup> Not unlike that beautiful, color-coded collection of the Great Works in the Western World that sits impressively in one's home library, quietly collecting dust along its immaculately gold-encrusted pages, the thing is practically too good to read. Surely there is something better, and easier, and more enjoyable available on Netflix? And who, frankly, makes a point of reading the Constitution anyway, except for the occasional crank or eccentric old senator? Why not leave that task to the professionally trained lawyers among us whose job it is to pay attention to these sorts of things?

But one of the more remarkable facts about legal education today—and indeed for some time now—is that aspiring lawyers themselves rarely get the chance to study the Constitution as a whole. Instead, they encounter the Constitution mostly sifted through the mediating prism of constitutional law, the doctrines and precedents of the Supreme Court in which the Justices have attempted to say what the Constitution, as law, is. And they usually do so in ways that break up the overall text into more manageable and discrete bits, often taken out of their original context and natural sequence. A traditional constitutional law course, for instance, might begin with Article III, Section 2 (*Marbury v. Madison*), leap back to Article I, Section 8, Clause 3 (Commerce Clause), hop forward to Article I, Section 8, Clause 18 (Necessary and Proper Clause), jump back again to Article I, Section 8, Clause 1 (Spending Clause), zoom forward to the Tenth and Eleventh Amendments, retreat into the President's various sundry powers under Article II, Section 2, and then after a further brief spell in Article I or III, depending upon tastes, conclude with the privileges and immunities clause of Article IV, Section 2. The Bill of Rights

5. See Jeffrey M. Jones, *Confidence in U.S. Public Schools at New Low*, GALLUP (June 20, 2012), <http://www.gallup.com/poll/155258/Confidence-Public-Schools-New-Low.aspx>; see also *Millennials in Adulthood: Detached from Institutions, Networked with Friends*, PEW RESEARCH CTR. (March 7, 2014), [http://www.pewsocialtrends.org/files/2014/03/2014-03-07\\_generations-report-version-for-web.pdf](http://www.pewsocialtrends.org/files/2014/03/2014-03-07_generations-report-version-for-web.pdf).
6. *The AP-National Constitution Center Poll*, ASSOCIATED PRESS (August 2012), [http://surveys.ap.org/data%5CGfK%5CAP-NCC%20Poll%20August%20GfK%202012%20Topline%20FINAL\\_1st%20release.pdf](http://surveys.ap.org/data%5CGfK%5CAP-NCC%20Poll%20August%20GfK%202012%20Topline%20FINAL_1st%20release.pdf) (reporting that 69% of Americans agree that the “The United States Constitution is an enduring document that remains relevant today.”).
7. See generally, E. J. DIONNE, *WHY AMERICANS HATE POLITICS* (1991).
8. See Zinie Chen Sampson, *Most in U.S. Haven't Read Constitution, VA-based Survey Says*, PILOTONLINE.COM (Sept. 16, 2010), <http://hamptonroads.com/2010/09/most-us-havent-read-constitution-vabased-survey-says>.

tends to suffer a similar, discombobulating fate.<sup>9</sup> The First Amendment is often studied on its own, with the religion clauses hermetically sealed from the speech, press, and assembly clauses. The Fourth and parts of the Fifth, Sixth, and Eighth Amendments are studied in a separate class on criminal procedure. The Seventh is tackled in civil procedure. And Constitutional Law II takes up the rest, with large helpings from the First (usually just speech and religion), Second, Fifth (takings clause), Ninth, and Fourteenth Amendments. In other words, after three years of law school, you may have read it all at some point, but probably not, and probably never in one sitting.

The piecemeal and often incomplete study of the Constitution in law school is itself a function of studying the Constitution often exclusively through the lens of Supreme Court decisions, which of necessity are focused on just those relatively few parts of the text that are particularly susceptible to litigation in courtrooms. Over the course of its first nine years, for example, more than seventy-five percent of the constitutional law-themed cases that came before the Roberts Court from 2005 to 2014 revolved exclusively around six Amendments—the First (seventeen percent), Fourth (thirteen percent), Fifth (eight percent), Sixth (twenty-one percent), Eighth (five percent), and Fourteenth (thirteen percent).<sup>10</sup> Now these Amendments unquestionably represent seismic, critical, and hard-fought protections of the rights of individuals and groups against government. But as a matter of sheer textual heft, they make up less than ten percent of the entire text of the Constitution. The vast majority of those laboring in the vineyards of Supreme Court litigation and academic constitutional law, in other words, are focused on a precious small bit of overworked terrain, while large swaths of rich acreage go regularly unexplored and uncultivated.

This past academic year, I had the privilege to guide a few hardy souls through those other parts, in a seminar here at Stanford Law School called “Reading the Constitution.” Joining the ranks of other adventurous-sounding, gerundively titled courses, like “Wildlife Trafficking” and “Accounting for Lawyers,” the seminar was organized around the text of the Constitution itself, beginning at the beginning, with the summoning of “We the People” in the Preamble, and concluding with that 1990s throwback, the Twenty-Seventh Amendment, itself a throwback to an amendment that initially failed to secure enough votes for ratification in the 1790s. In between, we encountered the peaks and valleys, low-lying plains, mountainous cliffs, and seemingly hidden, long-since-forgotten parts of what the constitutional theorist Sanford Levinson has called both the “Constitution of Conversation,” that familiar ten percent

9. For an extended analysis of the problems associated with studying the Bill of Rights in disaggregated bits and pieces, see Burt Neuborne, *“The House was Quiet and the World was Calm the Reader Became the Book”—Reading the Bill of Rights as a Poem: An Essay in Honor of the Fiftieth Anniversary of Brown v. Board of Education*, 57 *VAND. L. REV.* 2007 (2004).
10. These numbers are based upon a review of the approximately 275 constitutional law-related cases decided by the Supreme Court from 2005 through to the conclusion of its OT 2013 in June 2014.

of the text whose meaning remains largely contestable and which has thus become a regular feature of Supreme Court litigation and public debate, and the “Constitution of Settlement,” the rest of the document whose meaning is mostly settled and uncontroversial, but which significantly and almost subterraneously structures and defines much of our public life today.”

Reading all the Constitution in this way, and not just the juicy parts, seems to make some space for thinking about the Constitution in ways that are genuinely independent of politics and policy preferences. When one focuses exclusively on the “Constitution of Conversation,” it is not uncommon for the predictable polarities and pathologies of our broader political conversation to replicate themselves in constitutional debates. This, in turn, tends to lead sophisticated observers of these conversations to conclude, not without some reason, that constitutional law, *contra* Justice Kagan,<sup>12</sup> is really politics all the way down, an infinitely malleable, thin veneer for policy preferences.<sup>13</sup> Tell me what a person’s policy views are on abortion, prayer in school, gun control, and affirmative action, the argument goes, and one can predict with near certainty what his views will invariably be on seemingly technical legal doctrines like substantive due process, the endorsement test, the relationship between the prefatory and operative clauses of the Second Amendment, and the level of scrutiny appropriate for racial classifications. Reading and reasoning through the entire Constitution, by contrast, tends to disarm those armies that otherwise clash by night over constitutional meaning, and opens up a little room for listening to and learning from the text itself on its own terms, and in its entirety.

Reading the entire text itself, by itself, on its own terms, however, does not always answer all the questions one might have about constitutional meaning. As Madison put it in 1796, looking back on his own handiwork from the vantage point of nearly ten years, the text itself would have been just words on a page, “nothing but a dead letter, until life and validity were breathed into it, by the voice of the people, speaking through the several state conventions. If we were to look, therefore, for the meaning of the instrument, beyond the face of the instrument, we must look for it not in the general convention, which proposed, but in the state conventions, which accepted and ratified the

11. See SANFORD LEVINSON, *FRAMED: AMERICA’S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* 19 (2012).
12. During her confirmation hearings before the Senate Judiciary Committee, Justice Kagan, responding to a question about whether law can only take the judge the “first twenty-five miles of the marathon,” memorably said that it was actually “law all the way down.” *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing before the S. Comm. on the Judiciary*, 111th Cong. 103 (2010).
13. Adam Liptak, *The Polarized Court*, N.Y. TIMES (May 10, 2014) <http://www.nytimes.com/2014/05/11/upshot/the-polarized-court.html?abt=0002&abg=1> (quoting visiting Stanford Law professor Justin Driver’s concern that it is “becoming increasingly difficult to contend with a straight face that constitutional law is not simply politics by other means, and that justices are not merely politicians clad in fine robes.”).

constitution.”<sup>14</sup> Perhaps following Madison’s lead on this, Supreme Court advocates today frequently craft their litigation efforts with at least one eye on the historical meaning of the text’s words and phrases. Since just 2000, for example, lawyers have submitted more briefs to the Supreme Court that have cited and engaged explicitly with the “original meaning” of various provisions of the Constitution than had been done in all of the country’s previous history. And last term, OT 2013, lawyers submitted briefs that engaged with founding-era history or the original meaning of a phrase in the Constitution in 23 distinct cases decided by the Court. Attentive to this fact, and lest the seminar wrap up after just two hours of reading the Constitution with a long coffee break, we also looked carefully at the text’s historical context, the often colorful wellsprings of life, contestation, and compromise that breathed life into the law.

When lawyers do history, the results are not always pretty. Just as constitutional litigators are often charged with bending the text of the Constitution to fit their preferred outcome for a particular case, lawyers’ legal history (as opposed to historians’ legal history<sup>15</sup>) is often suspected to be little more than “law office history,” the selective and opportunistic lining up of quotations from presumptively authoritative sources ripped from any meaningful context that happen to most favor one’s position. Give me fifteen minutes and I’ll get you the perfect quote from Thomas Jefferson to support that motion for/against summary judgment. Additionally, when lawyers do use founding-era history in particular, there is a suspicion that what really motivates this is nothing more than an unreasoning “ancestor worship”<sup>16</sup> in which a presumptively monolithic set of “Founders” (with a capital F) sits in disdainful judgment of whatever contemporary political, legal, or cultural practice the speaker himself just so happens also to oppose. The Founders would be appalled! And there is, of course, the alternative approach, which returns the favor of disdain back upon the founders, judging their lot to be a mostly monolithic cabal of wealthy, white, male, slavocratic aristocrats whose achievements represent mostly obstacles to progress and the spread of democracy.<sup>17</sup>

No single seminar could possibly grapple adequately with all of this. But by spending some time with the original debates and conversations that produced the Constitution, on their own terms, some progress can be made. We saw that on at least some points of first principle and matters of specific constitutional meaning, a viable and meaningful consensus seemed to exist at the time of the

14. JAMES MADISON, *Jay’s Treaty*, in 16 THE PAPERS OF JAMES MADISON 290, 296 (J.C.A. Stagg et al. eds., 1989).

15. For the distinction between “lawyers’ legal history” and “historians’ legal history,” see LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 168-71 (1996) (internal citations omitted).

16. See Jamal Greene, *On the Origins of Originalism*, 88 TEXAS L. REV. 1, 63-66 (2009).

17. For perhaps the earliest and most canonical statement of this position, see CHARLES BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION* (1913).

text's ratification. We also saw, however, as may be expected from a period of great transition and creativity like the American founding, that much was disputed as well, and that proponents and critics of the Constitution could be lined up with different understandings and different evaluations of nearly every little clause in it. We encountered intriguing figures from across the spectrum now mostly lost to history whose impression of the new constitutional system strikingly track many contemporary evaluations. Patrick Henry worried that Article V would put future constitutional amendments at the mercy of an astronomically small minority of opponents, making the Constitution simply too difficult to amend through ordinary legal channels.<sup>18</sup> Melancton Smith, a moderate Anti-Federalist from New York, worried that the proposed federal system would tend to ably represent the interests of the extremely wealthy and well-placed, but remain mostly blind to those of the poor and middle classes, while sadly and seemingly permanently baking the protection of slavery into its very institutional architecture.<sup>19</sup> And James Wilson, an influential Federalist from Pennsylvania, expressed profound concern that the equal representation of different-size states in the Senate and the Electoral College could not be squared with basic principles of democracy.<sup>20</sup>

And finally, and perhaps somewhat counter-intuitively surprising, we found that the study of the historical context of the text of the Constitution is not just a riveting 120-episode-long show of James Madison, Alexander Hamilton, George Washington and the gang from 1787, but equally and just as important, the story of the life that was breathed into it during the Reconstruction Era after the Civil War, and the Progressive and Modern Era Amendments after that, which in various ways great and small, filled in, corrected, and completed the original Constitution.<sup>21</sup> For all the fresh and first-rate historical research that has been done on the American founding over the past two generations, given the importance of these subsequent amendments to the overall structure of the Constitution, particularly via the Reconstruction Amendments, we stumbled through key pieces of constitutional history whose story and import have yet to be fully told. One small indication of this lopsided historical

18. *Debate in Virginia Ratifying Convention*, in *THE FOUNDERS' CONSTITUTION* (Philip B. Kurland & Ralph Lerner eds., 2000), available at <http://press-pubs.uchicago.edu/founders/documents/a5s9.html>.

19. *Melancton Smith, New York Ratifying Convention*, in *THE FOUNDERS' CONSTITUTION* (Philip B. Kurland & Ralph Lerner eds., 2000), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch13s37.html>.

20. *Records of the Federal Convention*, in *THE FOUNDERS' CONSTITUTION* (Philip B. Kurland & Ralph Lerner eds., 2000), available at [http://press-pubs.uchicago.edu/founders/documents/a1\\_3\\_1-2s3.html](http://press-pubs.uchicago.edu/founders/documents/a1_3_1-2s3.html).

21. For the ways in which some of the post-founding amendments to the Constitution may have "completed" the original, see Michael P. Zuckert, *Completing the Constitution: The Thirteenth Amendment*, 4 *CONST. COMMENT.* 259 (1987), and Michael P. Zuckert, *Completing the Constitution: The Fourteenth Amendment and Constitutional Rights*, 22 *PUBLIUS* 69 (1992). See also AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* (2005), which served as a key text for the seminar.

emphasis is that while there exists an impressive and easily accessible five-volume, 3,200-page collection of primary documents keyed to everything in the Constitution's text from the Preamble to the Twelfth Amendment known as "The Founders Constitution,"<sup>22</sup> no comparable collection has yet to be produced for the Reconstruction, Progressive, or Modern-Era Amendments. Thus, just as constitutional law often focuses on a small percentage of the overall text of the Constitution, neglecting much that is fascinating and relevant, so too does constitutional history occasionally reflect an imbalance in its coverage of the unquestionably key first moment, at the expense of reflecting upon the significance of other moments in which life and validity were breathed into it over and over again.

A seminar like this is surely no substitute for more traditional constitutional law classes that focus primarily upon Supreme Court doctrine. It is more like a supplement, or perhaps in some ways a prequel, to these standard classes, an exploration of the vast and fascinating terrain of text and historical context often overlooked in doctrinal classes, but which in many ways sets the stage for those doctrinal developments, and may even give one a better perspective from which to understand and evaluate those developments. A few law students in every graduating class will go on to practice in the field of constitutional law litigation, in which the balancing formulae, three-part tests, and various levels of scrutiny engineered by the courts will be their daily tools. Far more, however, will go on to simply become citizens who follow the news, vote, write in to local or national newspapers, engage in, or at least try to gracefully endure, extended political commentary on social media, navigate the competing claims about the Constitution from the anchors and interviewees at MSNBC and Fox News, support candidates for office, and possibly run for elected office themselves. To take just one fairly obvious metric for this last point, fifty-seven percent of current U.S. senators and thirty-eight percent of members of the House of Representatives are themselves graduates of law schools.<sup>23</sup>

But in the push and pull of the political world, too, no less than in the venerable and orderly halls of courtrooms, the Constitution is often a matter of daily conversation and disputation, with conservatives and liberals, Republicans and Democrats, the Tea Party and the Occupy Movement, and the modern-day heirs of Edmund Burke and Thomas Paine laying claim to the Constitution and regularly putting forward their agendas as a restoration or fulfillment of its core meaning. Happily, however, and on its own terms, the Constitution is not the platform for any political party, but rather that singular document in our increasingly polarized political life that transcends these divisions and structures the terms in which those contending forces do daily battle. To (opportunistically) quote Thomas Jefferson (out of context),

22. THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 2000), available at <http://press-pubs.uchicago.edu/founders/>.

23. JENNIFER E. MANNING, CONG. RESEARCH SERV., R42964, MEMBERSHIP OF THE 113TH CONGRESS: A PROFILE 5 (2014).

when it comes to the Constitution, in other words, “we are all Federalists, we are all Republicans.”<sup>24</sup> Therefore, whether we are discussing the tiny portion of the Constitution annually litigated inside the Court, or the vast majority of the Constitution that structures much of our public life on a daily basis outside the Court, it will pay off for both categories of lawyers, from all points along the political spectrum, to have spent some time carefully reading the Constitution in its entirety. And if they can do so in paradise, so much the better.

24. Jefferson said “we are all republicans; we are all federalists” at his first inaugural address, but later newspaper commentary of the time capitalized the nouns and reversed their order. See *First Inaugural Address*, THE PAPERS OF THOMAS JEFFERSON, VOL. 33: 17 FEBRUARY TO 30 APRIL 1801 (Princeton Univ. Press 2006), available at <https://jeffersonpapers.princeton.edu/selected-documents/first-inaugural-address>.