

***Not Another Constitutional Law Course:
Rather A Proposal to Teach a Course on the
Constitution***^{*}

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I want to talk about teaching an elective course that adds some intellectual history to the constitutional curriculum and also has some possible applications in the traditional first year course. My title—if a fifteen-minute talk deserves a “title” — is “*Not Another Constitutional Law Course: Rather A Proposal to Teach a Course on the Constitution.*”

This elective course has its origins back during the celebration of the Bicentennial of the Constitution. I was teaching at Texas Tech University. A colleague, Jim Viator, and I were awarded a grant to develop a course on the Constitution of 1787.

^{*} Association of American Law Schools 2002 Annual Meeting, Program of the Section on Constitutional Law; Friday, January 4, 2002, 10:30 a.m.-12:15 p.m., Napoleon Ballroom, Third Floor Hilton New Orleans Riverside Hotel, New Orleans, LA; *Putting the Constitution in Context: Adding History to Teaching Constitutional Law* with Michael Curtis, Professor of Law, Wake Forest University; Paul Finkelman, Chapman Distinguished Professor of Law, Tulsa University; Linda K. Kerber, May Brodbeck Professor in the Liberal Arts and Professor of History, University of Iowa. This presentation is adapted, without further attribution, from Thomas E. Baker & James E. Viator, *Not Another Constitutional Law Course: A Proposal to Teach a Course on the Constitution*, 76 IOWA L. REV. 739 (1991).

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I should explain how a course on the *Constitution* is different from a course on *constitutional law*. We called our course, “The Framers Constitution” — after an unfortunate typo in the registration materials the students promptly nicknamed it “The Farmers’ Constitution.” Our course emphasized the political theory of the original Constitution.¹ We studied how it was drafted and ratified. We explored the major issues and alternatives that were debated. We examined how the Framers themselves expected the Constitution to function as a practical form of self-government. Our focus was on the intellectual history of the

¹ The Constitution is one of the great achievements of political philosophy; and it may be the only political achievement of philosophy in our society. The Framers of the Constitution and the leading participants in the debates on RATIFICATION shared a culture more thoroughly than did any later American political elite. They shared a knowledge . . . of ancient philosophy and history, of English COMMON LAW, of recent English political theory, and of the European Enlightenment. They were the American branch of the Enlightenment, and salient among their membership credentials was their belief that reasoned thought about politics could guide them to ideal political institutions for a free people. They argued passionately about the nature of SOVEREIGNTY, of political REPRESENTATION, of republicanism, of CONSTITUTIONALISM; and major decisions in the ferment of institution-building that culminated in 1787 were influenced, if never wholly determined, by such arguments. The final form of the new federal Constitution embodied radically new views. . . .

Donald Regan, *Philosophy and the Constitution*, in 4 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1904 (Leonard W. Levy & Kenneth L. Karst eds. 2000) (emphasis in original).

framing of the Constitution. In short, we set out to recapture the constitutional “canon”² of James Madison and his generation.

The leading casebooks tend to give short shrift to the intellectual history of the framers and the written document. Instead, they put on display modern tracts of the tenure track. And almost every casebook begins in 1803, with *Marbury v. Madison*.³ From there, casebooks tour constitutional doctrine using the Supreme Court opinion as a vehicle.⁴ The decided emphasis in this “opinionology” is on *modern* constitutional law.⁵ Do not misunderstand me, I think this is fine — I use the Rotunda casebook and it serves my purposes and my students’ purposes extremely well.⁶ But I think we con law teachers practice an awful lot of what Harry Potter might call “hornbookery” — whether we

² See J. M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998); Symposium, *The Canon(s) of Constitutional Law*, 17 CONST. COMMENTARY 187 (2000). See generally J. M. BALKIN & SANFORD LEVINSON, eds., LEGAL CANONS (2000).

³ 5 U.S. (1 Cranch) 137 (1803). *But see* WALTER F. MURPHY, JAMES E. FLEMING & SOTIRIOS A. BARBER, AMERICAN CONSTITUTIONAL INTERPRETATION (2d ed. 1995) (reserving the introduction of judicial review for chapter seven).

⁴ *See generally* Haimbaugh, *supra* note 15, at 47-52. *See also generally* Auerbach, *supra* note 14, at 20-22.

⁵ *E.g.*, RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW xvi (6th ed. 2000) (“The emphasis is on *modern* constitutional law.”) (emphasis in original).

⁶ Thomas E. Baker, *Mastering Constitutional Law*, 21 SEATTLE U. L. REV. 927 (1998).

want to admit it or not.⁷ (This also is the place to admit that today there are some notable exceptions to the general observation that casebooks lack historical context: for example, the Brest, Levinson, Balkin & Amar casebook and the Kmiec and Presser casebook.⁸)

As Akhil Amar says, today everyone is a doctrinalist to some degree – and we are too – but in the Framers Constitution we are first and foremost documentarians.⁹ The “Framers Constitution” course reflects our personal affinity for textualism and originalism.¹⁰

⁷ John P. Frank, *Constitutional Law: Changes on the Horizon*, 3 J. LEGAL EDUC. 110, 112 (1950).

⁸ PAUL BREST & SANFORD LEVINSON, J. M. BALKIN & AKHIL REED AMAR, PROCESSES OF CONSTITUTIONAL DECISIONMAKING – CASES AND MATERIALS (4th ed. 2000); DOUGLAS W. KMEIC & STEPHEN B. PRESSER, THE AMERICAN CONSTITUTIONAL ORDER—HISTORY, CASES AND PHILOSOPHY (1998). See also DONALD E. LIVELY, PHEBE A. HADDON, DOROTHY E. ROBERTS, RUSSELL L. WEAVER & WILLIAM D. ARAIZA, CONSTITUTIONAL LAW—CASES, HISTORY AND DIALOGUES (2d ed. 2000). Still, the prevailing emphasis continues to be on doctrine in the contemporary era presented through the case method, an emphasis aptly illustrated in the way the Harvard Law School catalogue described the introductory course back when we were putting our course together: “A study of basic principles of constitutional law as created, confused, compromised and changed by the Supreme Court.” Harvard Law School Catalog, 1986-87, at 64, quoted in Reynolds, *supra* note 14, at 1029. Of course, the Harvard understanding of “doctrine” is rather sophisticated. Charles Fried, *Constitutional Doctrine*, 107 HARV. L. REV. 1140 (1994).

⁹ Akhil Reed Amar, *The Document and the Doctrine*, 114 HARV. L. REV. 26, 26 (2000); see also Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

¹⁰ See Frank E. Easterbrook, *An Immutable Vision*, WASH. POST MAG., 52-56 (June 28, 1987). Even if one believes in a metaphorically “living Constitution,” studying doctrine by reading opinions alone cannot be enough. For example, many unwittingly take Chief Justice Marshall’s understanding of congressional power under the necessary and proper clause as some generalization on judicial power vis-a-vis the whole document seen as “a constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.” *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819). And even if constitutional law (whether decisional or textual) is merely policy, shaped by the felt

It is simply not enough that a student of the Constitution understand constitutional doctrine. The curriculum of history provides some needed perspective. History creates a context for a fuller understanding of our constitutional principles. Indeed, I think that our students need a course on the *Constitution* to cope with the chaos of modern constitutional *law* in U.S. REPORTS.

Forrest McDonald, who has spent four decades studying these materials and who admits to doubts about his conclusions, challenges us that: “The American founders left an enormous quantity and variety of written materials, informing us from many points of view what they did, what they read, what they believed, and what they thought.”¹¹ The difficulties of incomplete, inaccurate, and even fabricated sources must be overcome.¹² In addition, there is the challenge to avoid a present-minded study of

necessities of the times, then doctrine alone conveys an inadequate and superficial sense of the historical imperatives which formed the document and which shape its jurisprudential evolution. See J. D. Hyman, *Constitutional Jurisprudence and the Teaching of Constitutional Law*, 28 STAN. L. REV. 1271, 1323-24 (1976).

¹¹ FORREST MCDONALD, *NOVUS ORDO SECLORUM* xii (1985). See generally Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L. J. 1085 (1989).

¹² For the definitive cautionary assessment, see James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1 (1986).

the past. We tried to suspend our own awareness of history to assess the minds of the Framers on their own terms and in their own “constitutional moment.”

The course we fashioned was a three hour elective. We developed 14 Lessons or weekly themes. We began with a lesson on the Colonial experience, then considered the ideas and issues behind the movement for Independence. Next we studied the Articles of Confederation. We had a lesson on the influence of the Classics on the Framers and another lesson on constitutionalism, ancient and modern. The Lesson on Republicanism emphasized Gordon Wood’s work and the ideals of civic republicanism. There followed four related Lessons, one on the theory of mixed and balanced governments and one each on the three branches of the federal government with relevant subthemes of popular sovereignty, foreign affairs, and judicial review. We did a lesson on Federalism. For the lesson on individual rights, we examined the Declaration of Independence, the Bill of Rights and Natural

Law theory. The Lesson on slavery explored the Constitution against the background of the Declaration. Finally, we ended with a lesson on contemporary perspectives that included Beardians, Anti-Beardians, Neo-Beardians, Progressives, Straussians, civic republicanism, and various persuasions of critical legal studies.¹³

Most every constitutional law casebook includes an excerpt from Federalist Paper No. 78 in the section on judicial review – I sometimes wonder if our students merely conclude that John Marshall used Alexander Hamilton’s article the same way they “use” law review articles in their own papers. If you wanted to experiment with a history curriculum but you wanted to be selective, you could select a couple of themes and supplement your casebook with the appropriate historical documents in just a couple of lessons or units.

For example, why not provide your students with excerpts from Montesquieu’s “The Spirit of the Laws” and John Adams’

¹³ See generally MICHAEL J. GERHARDT, THOMAS D. ROWE, JR., REBECCA L. BROWN & GIRARDEAU A.

“Thoughts on Government” when you get ready to cover Justice Scalia’s dissent on separation of powers in *Morrison v. Olson*?¹⁴

Jim and I assembled a 400+ page set of multi-lithed materials. These documents exposed our students to the Framers thoughts directly, not through some scholar’s filter. We still have an unrequited hope to publish it as an anthology some day. If you are reluctant to assemble materials, you can always try some of the paperback supplements that are available like the “Political Dynamics” book¹⁵ by Fisher and Devins or the “History of the American Constitution” book¹⁶ by Farber and Sherry.

Back when we were putting together our course, Jim and I were stuck with the technology of the Gutenberg press of the 15th century.¹⁷ Fastforward to the 21st century – the so-called Information Age and the Internet. Were I to do this all over again today I would make good use of the prevailing technologies. Like

SPANN, CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES (2d ed. 2000).

¹⁴ *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

¹⁵ LOUIS FISHER & NEAL DEVINS, POLITICAL DYNAMICS OF CONSTITUTIONAL LAW (3d ed. 2001).

¹⁶ DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION (1990).

many of you, I have come to rely more and more on “TWEN” – The West Education Network – to organize my courses and to distribute my handouts for my classes. Some of you may be more familiar with the Lexis-Nexis Web Courses Blackboard. Whichever one you use, I think these on-line formats would be an easy and efficient way to develop and distribute course materials on the founding.

There are many Internet sites that could be linked together into a web-based course. For example, Philip Kurland’s and Ralph Lerner’s splendid five-volume anthology – THE FOUNDERS CONSTITUTION – which has aptly been hailed as the OXFORD ENGLISH DICTIONARY of the American Founding – is now available on-line.¹⁸ It covers the early 17th century to the 1830s and includes everything from tracts of philosophy to political pamphlets, from public debates to private correspondence.

¹⁷ We two have always been and will remain very much persons of the book, however. See Daniel J. Boorstin, *A Nation of Readers* in THE REPUBLIC OF LETTERS 56-76 (1989).

¹⁸ PHILIP B. KURLAND & RALPH LERNER, THE FOUNDERS’ CONSTITUTION (1986) available at <http://press-pubs.uchicago.edu/founders/>; see also *University of Texas Tarlton Law Library Guide to Legal History Resources on the Web* available at <http://www.law.utexas.edu/rare/legalhis.htm>

Another comprehensive set of historical documents is the Avalon Project at Yale Law School which contains a rich on line library of documents related to the founding and the intellectual history of the Constitution, interlinked to supporting and related documents.¹⁹ Your students could just point-and-click to read the Article of Confederation alongside Benjamin Franklin’s Draft and then read what Thomas Jefferson said about the Articles in his autobiography.²⁰ Or they could read “Alexander Hamilton’s Opinion as to the Constitutionality of the Bank of the United States”²¹ alongside *M’Culloch v. Maryland*.²² When these dusty historical documents are digitized and displayed on a computer monitor they might even seem more “real” to the current generation of students.²³

¹⁹ *The Avalon Project at the Yale Law School* at <http://www.yale.edu/lawweb/avalon/avalon.htm>.

²⁰ Id. at <http://www.yale.edu/lawweb/avalon/artconf.htm>

²¹ Id. at <http://www.yale.edu/lawweb/avalon/amerdoc/bank-ah.htm>

²² *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

²³ There are some really good one volume “print resources” of primary documents out there, as well. NEIL H. COGAN, *CONTEXTS OF THE CONSTITUTION* (1999); JOHN J. PATRICK, *FOUNDING THE REPUBLIC – A DOCUMENTARY HISTORY* (1995).

In addition to our multi-lithed materials, we assigned five paperback texts.²⁴ As you might expect, we required students to read *The Federalist Papers*²⁵ and *The Anti-Federalist Papers*.²⁶ We required two other books to help guide our students through the original materials: Gordon Wood's classic intellectual history, *THE CREATION OF THE AMERICAN REPUBLIC*²⁷ and the more accessible and more broad-ranging survey by Forrest McDonald, titled *NOVUS ORDO SECLORUM*.²⁸ We also included Jules Lobel's provocative book of readings from the radical and progressive viewpoint, *A LESS THAN PERFECT UNION*.²⁹

²⁴ The most difficult part of choosing the books was to select just a few from among the dozens available. The Bicentennial seems to have loosed a horde of scholars to write on the Constitution. The intellectual history of the Constitution has become something of a growth industry. See, e.g., Daniel P. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO S. L.J. 1085 (1989); Suzanna Sherry, *The Intellectual Origins of the Constitution: A Lawyers' Guide to Contemporary Historical Scholarship*, 5 CONST. COMMENTARY 323 (1988). Some of it, though not all of it, is quite good. There are even writings on the writings, which themselves are helpful in selecting texts. Jack P. Greene, *A BICENTENNIAL BOOKSHELF: HISTORIANS ANALYZE THE CONSTITUTIONAL ERA* (1986); Richard B. Bernstein, *Charting the Bicentennial*, 87 COLUM. L. REV. 1565 (1987); Peter S. Onuf, *Reflections on the Founding: Constitutional Historiography in Bicentennial Perspective*, 46 WM. & MARY Q. 31 (1989); Book Notes, 101 HARV. L. REV. 849 (1988); see also Gordon S. Wood, *The Fundamentalists and the Constitution*, N.Y. REV. OF BOOKS 33-40 (Feb. 18, 1988).

²⁵ THE FEDERALIST PAPERS (C. Rossiter ed. 1961).

²⁶ THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES (R. Ketcham ed. 1986).

²⁷ GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969).

²⁸ MCDONALD, *supra* note 25.

²⁹ *A LESS THAN PERFECT UNION: ALTERNATIVE PERSPECTIVES ON THE U.S. CONSTITUTION* 3 (J. Lobel ed. 1988) ("The underlying theme of this volume is how radicals and progressives have addressed the mythology and symbolism that surround the Constitution.").

For each of the fourteen topical Lessons, we traced the intellectual history of the ideas of the Framers through our weekly reading assignments, which were quite heavy. Recommended secondary readings came from the usual suspects: Edward Corwin, Bernard Bailyn, Gordon Wood, Martin Diamond, Forrest McDonald, Louis Fisher, Clinton Rossiter, Merrill Jensen, Pauline Maier, Jack Greene, and G. Edward White. Our students read what the Framers wrote: The Federalist Papers, The Antifederalist Papers, plus original writings by Paine, Washington, Marshall, Jefferson, Adams and others. But the feature that made our course unique was that our students also read what the Framers themselves actually read: excerpts from Aristotle, Polybius, Cicero, Harrington, Hooker, “Cook” (Coke), Locke, Bolingbroke, Algernon Sidney and Montesquieu for example. We wanted them to see where these ideas came from and how the Framers translated these principles into the American regime.

As something of a postscript, it may be interesting that each of us has experimented in different directions since each of us has gone on to teach at another law school – Jim at Loyola-New Orleans and me at Drake University.

Jim did graduate work in history with Leonard Levy at the Claremont Graduate School. He is a trained historian. His research has emphasized the Framing and the early national era. Jim has continued to emphasize the original documents in the multi-lithed materials since going to Loyola New Orleans. And he will be part of our small group discussion this morning. He has updated some of the secondary readings to include more recent publications like Mortimer Sellers' book on Republicanism,³⁰ Louis Fisher's books on presidential powers,³¹ Forrest McDonald's book on federalism,³² and Saul Cornell's book on the

³⁰ MORTIMER SELLERS, *THE SACRED FIRE OF LIBERTY: REPUBLICANISM, LIBERALISM, AND THE LAW* (1998).

³¹ LOUIS FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* (4th ed. 1997); LOUIS FISHER, *PRESIDENTIAL WAR POWER* (1995).

³² Forrest McDonald, *States Rights' and the Union: Imperium in Imperio, 1776-1876* (2000).

Antifederalists.³³ We will have copies available of Jim's new-and-improved syllabus.

For my part, I have gravitated towards more pre-digested historical materials designed for undergraduates.³⁴ This makes sense to me because most law students are the equivalent of undergraduates when it comes to the study of history. I have used the two volume paperback set edited by Kermit Hall.³⁵ What I like about Hall's book is that he gives the students an introductory essay followed by excerpts from original documents and finishes each section with a pair of essays by professional historians, often arranged to disagree with each other. I also assign John Garatty's nifty paperback on *Quarrels that Have Shaped the Constitution*, which includes essays on the great cases in constitutional law, written by leading historians and political scientists.³⁶ Those

³³ SAUL CORNELL, *THE OTHER FOUNDERS: ANTIFEDERALISM & THE DISSENTING TRADITION IN AMERICA 1788-1822* (1999).

³⁴ See generally William M. Wiecek, *Is There a Canon of Constitutional History?*, 17 CONST. COMMENTARY 411 (2000) (survey of casebooks on constitutional history).

³⁵ KERMIT L. HALL, *MAJOR PROBLEMS IN AMERICAN CONSTITUTIONAL HISTORY, VOLUME I: THE COLONIAL ERA THROUGH RECONSTRUCTION & VOLUME II: FROM 1870 TO THE PRESENT* (1992)

³⁶ JOHN A. GARRATY, ED., *QUARRELS THAT HAVE SHAPED THE CONSTITUTION* (Rev. ed. 1987). See Louis P. Masur, *What It Will Take to Turn Historians into Writers*, CHRONICLE OF HIGHER EDUCATION, July 6, 2001.

essays tell “the rest of the story” behind the cases to help students to better appreciate the historical context of the decisions – in a way that we cannot hope to do during a forced march through 200 years of commerce clause holdings. (By the way, the Garatty book would be another excellent supplement to a traditional casebook.)

The next time I teach the seminar I probably will use the new two volume paperback set of readings that Paul Finkleman and Melvin Urofsky have authored for the Oxford Press.³⁷ (Paul, you are welcome for that “plug.”) I would supplement those books by posting copies of some relevant historical documents on a TWEN page for the course. Then, for example, my students can read scholarly commentary about the Articles of Confederation but also have the actual document itself in front of them.

³⁷ MELVIN I. UROFSKY & PAUL FINKELMAN, A MARCH OF LIBERTY—A CONSTITUTIONAL HISTORY OF THE UNITED STATES, VOLUME I: FROM THE FOUNDING TO 1890 & VOLUME II FROM 1877 TO THE PRESENT (2d ed. 2001).

A great deal of criticism has been leveled at so-called “law office history.”³⁸ I suppose what Jim and I tried to do could be called “law school history.” For my sake I would encourage law professors like me who do not have a formal graduate education in history to collaborate with a colleague who does, perhaps someone in your university’s history department. I know that my own seminars have been missing something since I went out on my own and Jim is no long in the room to save me from ignorance.³⁹

Sometimes I feel like I am the Everyman-character in those television commercials – up in front of the room teaching history only because I stayed at a Holiday Inn Express last night. But this is not brain surgery or rocket science. The intelligent novice can pull it off to the benefit of your students and yourself as a teacher of our subject. Maybe that is a good note for me to end on: if *I* can

³⁸ Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 553-54 (1995); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119; Buckner F. Melton, Jr., *Clio at the Bar: A Guide to Historical Method for Legists and Jurists*, 83 MINN. L. REV. 377 (1998); Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court’s Uses of History*, 13 J. L. & POL. 809 (1997); Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, 71 CHI.-KENT L. REV. 909 (1996); Morgan Cloud, *Searching Through History: Searching for History*, 63 U. CHI. L. REV. 1707 (1996); William M. Wiecek, *Clio as Hostage: The United States Supreme Court and the Uses of History*, 24 CAL. W. L. REV. 227 (1988).

teach a course in constitutional history *you* can too . . . and you
should.

—THE END.

³⁹ See generally Elaine Showalter, *Teaching in Public: A Modest Proposal*, 1 PEDAGOGY 449 (2001) available at <http://muse.jhu.edu/journals/pedagogy/v001/1.3showalter.pdf>.