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Not Another Constitutional Law Course: A Proposal to Teach a Course on the Constitution

Thomas E. Baker* and James E. Viator**

Justice Douglas once railed against law review writing in which "the views presented are those of special pleaders who fail to disclose that they are not scholars but rather people with axes to grind."¹ Not so here. Authors of course materials, even casebook authors, package their biases in subtle but effective ways, through their selection, organization, and emphasis of materials. By this essay, which is based on the preface to our multilithed course materials, we mean to disclose our own biases to our students and readers.

This is the basic question we consider at the outset: How is a course on the Constitution different from a course on constitutional law? Our course, "The Framers' Constitution," is about the history and theory of the
Constitution. The course and the materials we have assembled are about the framers' learning, their ideas, and their vision. Our goal is to understand the intellectual background of the Constitution by studying how it was written and ratified, identifying the major issues and alternatives that were posed, and appreciating how the framers themselves expected the Constitution to function as a practical form of self-government.

In U.S. law schools, as political science Professor Gary McDowell has noted, "the study of the Constitution as the source of our political being has fallen on hard times." He rightly explains that the lawyer's role is inherently "more rhetorical than philosophic." Furthermore, legal reasoning itself is built on the paradigm of the common law, not on a text. Finally, the case method—perhaps the single original innovation in all of legal education—focuses the attention of teacher and student on judicial opinions, in particular on the opinions of the Supreme Court of the United States. The law school regimen thus has inverted the framers' priority—the primacy of a written Constitution. "The result," as Professor McDowell laments, "has been to abandon the study of the Constitution in favor of studying constitutional law."

This emphasis on the Court's opinions and Justices and away from the document is nowhere better demonstrated than in one of the leading casebooks in the field. The first 1601 pages deal with Supreme Court opinions and commentary. The Constitution of the United States is then relegated to Appendix B—just after a listing of the Justices. Our concern is that "the regimen of casebooks may make the reading of original texts into an illicit experience." We do not mean to say that law students should not study the Supreme Court and its opinions. Our more modest argument is that while reading cases is necessary, it is not enough. All too often the study of constitutional law by students is too much like "future horticultur-

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2. 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.


3. McDowell, Legal Education and the Constitution, 1 Benchmark 14, 14 (Jan.-Feb. '84).

4. Id.

5. Id. at 15.


A COURSE ON THE CONSTITUTION

The teaching of constitutional law in the law schools has become too predictable. The "typical course" is a first-year, second-semester offering required for graduation. If the leading casebooks have anything in common, it is that they give short shrift to the political and intellectual history of the framers and their document, instead giving emphasis to modern tracts of the tenure track. Furthermore, almost every casebook begins in 1803, with the ascension of the judicial branch to judicial review in *Marbury v. Madison.* This has become something of a Musgrave ritual for first-year law students: generation after generation mouthing the Chief Justice's three questions and dully penetrating his logic and meaning. From there, the casebooks guide the student on a journey through constitutional doctrine using the Supreme Court opinion as vehicle. The decided emphasis in this "opinionology" is on modern constitutional law. The prevailing emphasis on contemporary era doctrine presented through the case method is illustrated nicely in the Harvard Law School catalogue description of the introductory course: "A study of basic principles of constitutional law as created, confused, compromised and changed by the Supreme Court." This leads to a certain "hornbookery" with which

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13. See generally Haimbaugh, supra note 10, at 47-52 (survey of casebook authors' points of emphasis and deemphasis). See also generally Auerbach, supra note 9, at 20-22 (discussing legitimacy of constitutional policymaking by judiciary).


15. Harvard Law School Catalog, 1986-87, at 64, quoted in Reynolds, supra note 9, at 1029.
anyone who teaches the basic course is all too familiar.\textsuperscript{16}

Even so-called "advanced" courses in constitutional law are structured doctrinally. Such courses typically deal with recent or current issues before the Supreme Court. One is more likely to find a course on "Individual Rights" or courses on particular types of discrimination (gender, race, poverty, age, or sexual preference) than a course on the intellectual history of the Constitution. This sort of curriculum is upside-down, pedagogically as well as chronologically. It would "make more sense to have a required first-year course in constitutional history, followed by upper-class electives on contemporary doctrine."\textsuperscript{17}

We believe Chief Justice Marshall's 1803 landmark and its judicial aftermath are, in an important sense, postscripts. The "Framers' Constitution" course reflects our skepticism toward the approach of modern constitutional law teaching that prefers contemporary moral and political ideals, such as the pursuit of "human dignity," over the original theory of the document.\textsuperscript{18} We would resist the current tendency to transfigure courts from "the bulwarks of a limited Constitution" into the vanguards of an unlimited one; and the judges from arbiters of concrete legal and constitutional disputes into seers and soothsayers pondering the darkest mysteries of Nature and her laws.\textsuperscript{19} To surrender to this tendency and begin in 1803 is to ignore the most important lesson learned by that first student of constitutional law, when he exhorted that "we must never forget that it is \textit{a constitution} we are expounding."\textsuperscript{20}

Although this is obviously not the place to rehearse the whole debate over the interpretive technique of "original understanding," a topical digression illustrates the obvious: a true constitutional history course will

\textsuperscript{16} Frank, Constitutional Law: Changes on the Horizon, 3 J. Legal Educ. 110, 112 (1950).
\textsuperscript{18} \textit{See} Easterbrook, An Immutable Vision, Wash. Post Mag., 52-56 (June 28, 1987).
\textsuperscript{19} McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413 (1819). And even if constitutional law (whether decisional or textual) is merely policy, shaped by the felt 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. \textit{See} Hyman, Constitutional Jurisprudence and the Teaching of Constitutional Law, 28 Stan. L. Rev. 1271, 1323-24 (1976).
\textsuperscript{20} McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis in original). Compare, e.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) with The Federalist No. 78 (A. Hamilton) (C. Rossiter ed. 1961) (Marshall and Hamilton both deriving constitutional judicial review from the nature of a limited constitution containing the highest expression of the fundamental, binding will of "We the People"); \textit{See also} Rehnquist, A Comment on the Instruction of Constitutional Law, 14 Pepperdine L. Rev. 563, 563 (1987) ("I think there may be a place in a law school curriculum for such a course which tries to cover the border land between history and law.").
not slant the material in order to serve what some have called a "Meesean agenda." In his address to the 1985 ABA annual meeting, which largely stimulated the current debate over a jurisprudence of original intent, then Attorney General Edwin Meese himself gave the flat lie to his own claim of an impartial dedication to original understanding. Attorney General Meese endorsed the notion that because "the nation is in the throes of a drug epidemic," the Court must take "a more progressive stance on the fourth amendment." 21 Exactly what Attorney General Meese meant by "a more progressive" approach to the fourth amendment is not made entirely clear in his address, but from our vantage it resembles a "law and order" version of non-interpretivism. For example, Attorney General Meese rejected "the 'conventional interpretation,' widely accepted among judges and scholars," that except in a few limited circumstances, the fourth amendment requires a warrant to issue based upon probable cause before a search or seizure can be conducted. 22 In place of this conventional wisdom—which many have taken to express the "original understanding" of the matter—Attorney General Meese praised the "progressive" cases that dispensed with the warrant requirement for the search of automobiles, even in those instances when the automobile has been impounded and the executive branch enjoys ample time in which to secure a judicial warrant before conducting its search. 23

The modern "conventional interpretation" of the warrant clause may not have matured into a regnant orthodoxy by the time the fourth amendment was ratified in 1791, probably due in part to the early American fixation with general warrants and writs of assistance as the bête noire of a proper search-and-seizure law. There is no doubt, however, that as colonists suffered through interludes of arbitrary search-and-seizure practice in the century between 1690 and 1790, "[w]arrants [became] increasingly requisite for search and arrest." 24 Thus, contrary to the announced "Meesean agenda" for the warrant clause, an impartial originalist should be prepared to live with the results mandated by the original understanding of the fourth amendment, whether those results are "liberal" or "conservative" in terms of modern political philosophy.

Indeed, "result-neutrality" is the leading benefit of taking a written constitution seriously: it binds the ideological impulses of those who must apply the sovereign command of the people. To borrow an Augustan-period phrase, a "true and honest study" of the framers' Constitution

23. See Meese, supra note 21, at 460 (citing United States v. Johns, 469 U.S. 478 (1985)).
should please neither liberal Democrats nor conservative Republicans all of
the time. It may be a measure of the success of our course that the various
lessons discomfited everyone in the class at least part of the time. This
“discomfort index” might serve as the best measure of the objectivity and
honesty of a constitutional history course, for although we are the intellec-
tual heirs of the founding generation, in many respects our generation is
radically different and inhabits a different social and intellectual universe.
Today, a pat originalism likely is an ideological originalism. A true and
honest engagement with the historical sources should teach new lessons to
anyone (including the instructor) who is open to edification.

It is simply not enough that a student of the Constitution understand
its contemporary interpretation. Only history can provide the necessary
perspective, the bas-relief for the text. An intellectual history creates the
appropriate context for tracing the genesis and development of our
constitutional ideals. The compelling reasons for studying contemporary
constitutional principles, which we all urge on our students, are even more
compelling towards a study of the framers' dilemmas and their resolutions.
We fully admit the problematic nature of this enterprise. Professor Forrest
McDonald, a scholar who has spent three decades of his life studying these
and similar materials and who admits to his own doubts about his
conclusions, holds out a challenge to those who would follow him: “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.”25 The difficulties of
incomplete, inaccurate, and even fabricated sources must be overcome.26 In
addition, the even more overwhelming challenge of historians is to avoid a
present-minded study of the past. Cognizant of the last two centuries, we
must nevertheless assess the minds of the framers as innocent of any
awareness of later events and developments as were their contemporaries.
An arduous task, however, is only the more worthwhile, especially when
something so important is at stake.

Law school should be more than training for a trade. Law school is,
after all, graduate education and rightly should partake of the life of the
mind.27 A deeper understanding of first principles and their historical
context provides a fuller, more complete appreciation for constitutional
law.28 This develops the necessary background for law-school study of

25. F. McDonald, Novus Ordo Seclorum xii (1985).
26. For the definitive cautionary assessment, see Hutson, The Creation of the Constitution:
27. “To the extent that you are talking about jurisprudence as a course in intellectual
history—a sort of great books course if you will—there can be no doubt that it can be taught
effectively and well and that such a journey ought to be made somehow by every educated
lawyer.” White, Teaching Philosophy of Law in Law Schools: Some Cautionary Remarks, 26
28. See Liu, Studying United States Constitutional Law: A Personal Experience of a
Chinese Student, 37 J. Legal Educ. 346, 348 (1987) (observing that it is difficult to understand
or appreciate American constitutional law if one lacks knowledge of “the political, economic,
and social background of the cases”).
related courses, such as administrative law, civil procedure, criminal law and procedure, and federal jurisdiction. On the other hand, law school is also professional training, and constitutional law, thus broadly considered, provides vital preparation for practice in other related areas such as antitrust law, family law, and labor law.

Beyond its curricular ripple effect, a broadly conceived study of the Constitution informs what Tocqueville called the "habits of the heart"—the components of an American character, fashioned during our nation's beginning when philosophies, values, and customs began to assume the shape of moral and intellectual traditions. Our commitments to limited government, separated powers, federalism, and individual rights constitute the essential terms of the fundamental social compact that defines our country and our people. Thus, one need not be an originalist to care about the framers' Constitution. Their ideas, as refracted over the intervening 200 years, have shaped and continue to shape our destiny. Even a non-originalist understanding of our current selves benefits by an understanding of our former selves, though we may never wholly succeed at either understanding. That we care, really and deeply care, about the answers we reach provides us with an added worry over selective perception—that we will understand only what we want to understand and only how we want to understand it—but this merely obliges a more careful and sensitive study.

Lawyers and the legal profession have a special responsibility for maintaining the integrity and continued vitality of our constitutional order.

A constitution establishing free government is not a machine that runs forever once set in motion; by nature, its success depends on the citizenry. However firm its foundation, however cunning its structure, however self-evident its truths, a constitution cannot guarantee that liberty will be passed on effortlessly from generation to generation. As [the framers] understood, freedom is renewed and sustained only by vigorous education. 30

Law schools are to the modern United States what Oxford and Cambridge were to Victorian England: the grammar schools for those who will govern the nation from public and private positions of leadership. We lawyers, beyond all cavil, have a first responsibility to learn about the rule of law. 31 As law teachers, the authors are convinced that the framers are our best teachers.

31. That this is a timeless challenge may be gleaned from Aristotle's entreaty:

But of all the things which I have mentioned that which most contributes to the permanence of constitutions is the adaptation of education to the form of government, and yet in our own day this principle is universally neglected. The best laws, though sanctioned by every citizen of the state, will be of no avail unless the young are trained by habit and education in the spirit of the constitution . . . .

The course we have fashioned is a three-hour elective. Each lesson in the following syllabus corresponds to a class week. Class assignment A is for the first weekly session, a two-hour session of lecture and discussion. Class assignment B is for the second weekly session, a one-hour discussion usually focused on Supreme Court decisions.

We set out to read and ponder what the founding generations in the United States read and wrote during the late seventeenth through the late eighteenth centuries. In our class discussions, we make every effort to create a seminar atmosphere, an atmosphere of reflection and contemplation, of critical inquiry and synthesis. The structuring of the materials conveys our pedagogical emphasis on originalism and interpretivism, although the materials support regular and extended consideration of alternative theories of constitutional interpretation. Our purpose needs to be made explicit: we developed a course on the intellectual history of the framers, not a course on contemporary historiography about the framing.

We assembled a 426-page set of course materials which was distributed to the students. These materials expose our students to the framers' thoughts directly, not through some scholar's filter. In some evolved form, we hope to publish it as an anthology. In addition, we ask students to purchase five paperback texts. The Federalist Papers and The Anti-Federalist Papers are necessary primary sources, of course. Two additional texts are necessary secondary materials to help guide our students through the original materials: Gordon Wood's classic intellectual history and the more recent and more broad-ranging survey by Forrest McDonald. Finally, as a foil for our own views and with the expectation that it would challenge the basic assumptions of most of our students, we include Jules Lobel's provocative book of readings from the radical and progressive

32. See, e.g., Lesson 3 of Syllabus, infra. Others may prefer to begin such a course with a discussion of originalism and the competing theories of constitutional interpretation and rely on this discussion as a leitmotif for the remainder of the course. See supra note 2.
34. 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., Farber, The Originalism Debate: A Guide for the Perplexed, 49 Ohio St. L.J. 1085 (1989) (stating that the originalism debate "has extended beyond academics to include judges and other government officials"); Sherry, The Intellectual Origins of the Constitution: A Lawyer's Guide to Contemporary Historical Scholarship, 5 Const. Commentary 323 (1988) (an attempt to synthesize the massive historiography of the intellectual origins of the Constitution). Some, though not all, of it is quite good. There are even writings on the writings, which themselves are helpful in selecting texts. J. Greene, A Bicentennial Bookshelf: Historians Analyze the Constitutional Era (1986); Bernstein, Charting the Bicentennial, 87 Colum. L. Rev. 1565 (1987); Onuf, Reflections on the Founding: Constitutional Historiography in Bicentennial Perspective, 46 Wm. & Mary Q. 341 (1989); Book Notes, 101 Harv. L. Rev. 849 (1988); see also Wood, The Fundamentalists and the Constitution, N.Y. Rev. of Books '33-40 (Feb. 18, 1988).
38. F. McDonald, supra note 25.
viewpoint.  
What follows is our set of lesson plans with major themes identified in italics.

LESSON 1

America In The 18th Century: The Political and Social Context of Colonial America

Class Assignment:


B. G. Wood, supra, pp. 91-255.


Supplemental Reading (asterisks denote especially noteworthy readings):


LESSON 2

The Political and Constitutional Theory of the American Revolution: The Ideas and Issues Behind the Movement for Independence and Revolution

Class Assignment:


B. G. Wood, supra Lesson 1, pp. 344-467.

Supplemental Reading:


* Tate, The Social Contract in America, 1774-1787, 22 William and Mary

39. 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.")
Quarterly 375 (1965).


LESSON 3

The Road to the Philadelphia Convention: The Political and Social History of the Confederation Years

Class Assignment:

A. G. Wood, supra Lesson 1, pp. 471-564, 593-615.


Supplemental Reading:


G. Anastaplo, The United States Constitution of 1787. Baltimore:
LESSON 4

The Classical Heritage and the Constitution: The Lessons Gleaned from Classical History and Philosophy—A Brief Sampling from the Framers' Didactic Reading

Class Assignment:


Supplemental Reading:


* M.C. Cicero, *De Republica*. Columbus, Ohio: Ohio State University Press (1929).


LESSON 5

Constitutionalism and a Written Constitution: A Survey of Classical and Modern Ideas About the Rule of Law and Constitutionalism

Class Assignment:

A. Laslett, John Locke: Two Treatises of Government, in DOCUMENTS AND MATERIALS, supra Lesson 1, pp. 100-12.

U.S. Congress, A Declaration by the Representatives of the United States of America (The Declaration of Independence), in DOCUMENTS AND MATERIALS, supra, pp. 113-15.

THE FEDERALIST PAPERS, Nos. 2, 22. New York: New American Library (Clinton Rossiter ed. 1961) [hereinafter FEDERALIST PAPERS (cited by number only)].


F. McDonald, supra Lesson 3, pp. 1-55.


FEDERALIST PAPERS, No. 78, supra Lesson 5.


Supplemental Reading:


Lutz, From Covenant to Constitution in American Political Thought, 10 Publius 101-33 (1980).

Thompson, The History of Fundamental Law in Political Thought from the French Wars of Religion to the American Revolution, 91 American Historical Review 1103 (1986).

J. Burgh, Political Disquisitions (1775) (reprinted New York: DaCapo Press (1971)).

R. Hooker, Of The Laws Of Ecclesiastical Polity (1594).

Sir Edward Coke, Bonham's Case, 8 Coke 113b (1610).


LESSON 6

Republicanism and a Republican Form of Government: Detailed Discussion of Gordon Wood’s Work and the Discovery of Civic Humanism in the American Founding

Class Assignment:


Federalist Papers, Nos. 11, 29, 63, supra Lesson 5.

Anti-Federalist Papers, supra Lesson 5, pp. 189-216.

F. McDonald, supra Lesson 3, pp. 57-96.

A Less Than Perfect Union, supra Lesson 5, pp. 396-420.

B. Luther v. Borden, 48 U.S. 1 (1841).

Supplemental Reading:


**Lesson 7**

The Separated and Balanced Constitution—The Theory of Separation of Powers: The Origins and Heritage of the Mixed and Balanced Polity and Its Transformation into Modern Separation Theory

Class Assignment:


Federalist Papers, Nos. 47, 48, 51, 66, supra Lesson 5.

The Complete Anti-Federalist, in Documents and Materials, supra Lesson 1, pp. 179-84.

F. McDonald, supra Lesson 3, pp. 225-60.

Morrison v. Olson (J. Scalia, dissenting), in Documents and Materials, supra Lesson 1, pp. 185-220.

A Less Than Perfect Union, supra Lesson 5.

Supplemental Reading:


LESSON 8

The Separated and Balanced Constitution—The Legislative Branch and Popular Sovereignty: The Traditions of Popular Participation in Government and Legislative Supremacy

Class Assignment:

A. Federalist Papers, Nos. 10, 30-36, 42, supra Lesson 5.
ANTI-FEDERALIST PAPERS, supra Lesson 5, pp. 37-39, 357-64 (Arts. of Confederation); 39-41, 49-53 (Representation in the National Legislature); 92-109 (Senate); 317-21 (President).

F. McDonald, supra Lesson 3, pp. 261-93.


Supplemental Reading:


LESSON 9

The Separated and Balanced Constitution—The National Executive and Foreign Affairs: The Foreign-Policy Powers of the President and the Theory of Executive Prerogative

Class Assignment:

A. Laslett, John Locke: Two Treatises of Government, in Documents and Materials, supra Lesson 1, pp. 221-23.

Federalist Papers, No. 8, supra Lesson 5, pp. 23-26.


A Less Than Perfect Union, supra Lesson 5, pp. 221-48.


Supplemental Reading:


C. Thach, The Creation of the Presidency 1775-1789. Baltimore:
Johns Hopkins Press (1922).


LESSON 10


Class Assignment:

A. FEDERALIST PAPERS, Nos. 78-81, supra Lesson 5.

ANTI-FEDERALIST PAPERS, supra Lesson 5, pp. 120-27, 293-308, review pp. 244-47.


Supplemental Reading:


* C. Wolfe, THE RISE OF MODERN JUDICIAL REVIEW. New York: Basic
Books (1986), pp. 3-89.


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**LESSON 11**

**Federalism: A Study of Sovereignty, Ancient Confederationism, and Modern Federalism: The Background of the American Theory of Divided Sovereignty**

**Class Assignment:**

**A. Federalist Papers, Nos. 9, 10, 15, 28, 39, 44, 45, 51 (review), 56, 58, supra Lesson 5.**

Anti-Federalist Papers, supra Lesson 5, pp. 257-64, 268-80.


A Less Than Perfect Union, supra Lesson 5, pp. 361-76.
Supplemental Reading:


LESSON 12

**Individual Rights—The Declaration of Independence and the Bill of Rights: The Philosophies of Natural Law and Natural Rights**

Class Assignment:


A LESS THAN PERFECT UNION, supra Lesson 5, pp. 56-70, 379-86.


A LESS THAN PERFECT UNION, supra Lesson 5, pp. 104-34, 303-34, 346-60.

Supplemental Reading:


LESSON 13

**Slavery, the Declaration of Independence, and the Constitution: “The Witch at the Christening”—Whether the Principles of the Declaration are Fulfilled or Denied in the Constitution of 1787**

Class Assignment:


Supplemental Reading:


A COURSE ON THE CONSTITUTION


LESSON 14

**Perspectives:** *A Study of Beard, the Anti-Beardians, the Neo-Beardians, the Progressives, the Straussians, the Civic Humanists, and Critical Legal Studies Scholars*

**Class Assignment:**


F. McDonald, supra Lesson 3; pp. 185-224.


B. Turner, *“Democracy” and Other Words You Won’t Find in the Constitution*, in *Documents and Materials*, supra Lesson 1, pp. 380-84.
Views from the Bench, in Documents and Materials, supra Lesson I, pp. 385-403.

A Less Than Perfect Union, supra Lesson 5, pp. 1-15, 40-55.

Supplemental Reading:


