

**ASSESSING THE US CONSTITUTION: TWENTY-FIRST-CENTURY
RESPONSES TO EIGHTEENTH-CENTURY ASSUMPTIONS**

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A central premise of this seminar is that the drafters of the 1787 Constitution had a number of basic assumptions about the workings of what they called a “Republican Form of Government,” including the belief that (most of) the institutions established in Philadelphia reflected these assumptions. To be sure, some of them, such as equal voting power in the Senate or the basis of representation in the House (i.e., the 3/5 rule), were the result of compromises, in which the losers (like James Madison with regard to the Senate) viewed the result as a “lesser evil” (than the greater evil of no Constitution at all) rather than a positive instantiation of “republican government.” Still, almost all of the institutions were defended by proponents of the Constitution, the most prominent, of course, being the collective Publius. To a remarkable degree, America in 2012 continues to be governed through the structures established in 1787.

A second premise, though, is that we in 2012 do not necessarily share the assumptions of our political ancestors. That premise is certainly subject to (informal) empirical examination, and one way of defining the seminar is as just such an examination. That is, we shall read (sometimes quite closely) some of the central debates concerning some relevant structures and, after analyzing the arguments presented, go on to speak in our own voice, as it were, regarding the extent to which we agree or disagree with them.

Although we will, of course, try to understand the historical contexts within which these arguments were initially presented—and I particularly look to the historians among us to emphasize such contexts and how they might help us to interpret certain arguments that are being made—the discussions will ultimately have an undeniably “presentist” quality. For example, should the *Federalist* essays be read *only* as historical documents imparting useful information as to the way people thought long ago, or are they genuinely worth reading today because of continuing wisdom they impart to us in 2012? Or, perhaps, are they worth reading precisely in order to demonstrate how fundamentally different our assumptions may be today? After all, it has been said that “the past is a different country.” Mikhail Bakhtin is famous for his literary theory of “defamiliarization.” So, in reading *The Federalist* (and some of the other materials), are we slipping comfortably into well-worn intellectual clothing or in fact being brought up short as to some very basic presuppositions?

Although most of the readings will focus on the 1787 Constitution and some of its subsequent amendments (though, importantly, *not* the “Bill of Rights” or Fourteenth Amendment,” for reasons made clear, I hope, in chapter one of *Framed* and, if not, then during

our first session together), attention will also be paid to American *state* constitutions. Almost all differ in interesting ways from the United States Constitution, and it is certainly worth paying attention to some of those differences and to the arguments presented in their support (or opposition). A major theme of my recent work, reflected in this seminar, is that it should be treated as disciplinary malpractice to identify “American constitutionalism” exclusively with the literally singular United States Constitution. There are 50 other constitutions—and, over our history, there have been many more, inasmuch as most states have had multiple constitutions—and any cogent theory of “American constitutionalism” must pay genuine attention to what John Dinan has labeled “The American State Constitutional Tradition.” To be sure, that tradition does not have such luminous texts as *The Federalist* to provide a base for support, but texts (including, for example, the records of over 100 of the 233 constitutional conventions that have been held in the various states) certainly do exist, and many of the arguments quoted by Dinan in his book are (at least) as eloquent and thought-provoking as many of the statements made at the Philadelphia convention.

You will find below the readings for the particular morning and afternoon sessions of our time together, along with what I hope will serve as some initial framing questions. For better or worse, a principal focus will be my own book, *Framed: America’s 51 Constitutions and the Crisis of Governance*. The fact that I know all of you are reading it will, I hope, rein in my propensity to speak too much and, instead, contribute to your own active creation of the actual discussions. I am well aware that even close friends and family often disagree with me, and you should certainly not hesitate to do so.

I am also assigning a number of readings from the truly magnificent *Founders’ Constitution* co-edited by Philip Kurland and Ralph Lerner. Anyone interested in the Founding period should have the entire five-volume collection in his/her library. The Liberty Fund publishes a wonderfully produced, remarkably inexpensive, edition. It *is* very heavy, however, and I can’t really expect any of us to bring all five volumes to Palo Alto. If possible, though, you should try to bring Volume One, which focuses on some of the “general themes” we will be discussing (from which I will be making fairly extensive assignments). Alternatively, you can simply download assigned materials from the website maintained by the Liberty Fund, http://oll.libertyfund.org/index.php?option=com_content&task=blogcategory&id=109&Itemid=332. We will also read much from John Dinan’s *The American State Constitutional Tradition*, available in paperback. Finally, I am assigning some material from Akhil Amar’s *America’s Constitution: A Biography*. It, too, is available in a relatively inexpensive paperback edition.

SESSION ASSIGNMENTS

Monday, July 9

(Morning) Introduction: The basic distinction between the Constitution of Settlement and Constitution of Conversation (and why the former is of more than “mere” intellectual interest).

Levinson, *Framed*, Chapter One, pp. 1-32, 347-358, 1 *The Founders’ Constitution* 147-183; *The Federalist* No. 40, available at http://thomas.loc.gov/home/histdox/fed_40.html (This is from the Library of Congress site of the entire *Federalist*. There are obviously several others, as well as numerous print editions, the most recent including republications by the Harvard and Yale presses.).

Question presented: To what extent must the Constitution (and its structures) be understood against the background of the dissatisfaction with the Articles of Confederation? E.g., does our assessment of the Framers and the particular actions they took in Philadelphia (and, of course, of the Constitution they drafted) depend on our having a specific view as to the adequacy of the Articles and, consequently, the nature of the “exigencies” facing the delegates at the Convention? Similarly, does contemporary discussion of the United States (or any particular state or other national) constitution depend on one’s views about its/their adequacy? Of course, a central question is “adequacy in terms of what?” This leads to the topic for the afternoon:

Afternoon: On compromise and constitutions

Levinson, *Framed*, Chapter Two, pp. 33-52; Amar, *America’s Constitution*, pp. 87-98, *Federalist* #41

Question presented: What were the central compromises entered into at the Philadelphia Convention? Are they better analyzed under the rubric of “deliberative democracy” or “bargaining”? Were some compromises worse than others, indeed “indefensible,” or can *all* of them be defended, contextually, in terms of the overriding goal to achieve a constitution that would replace the Articles of Confederation? Does this negate the notion of a “rotten compromise,” or is it simply the case that the circumstances of 1787 justified such compromises? (Thus the obvious connection with the morning discussion.) And is one of the 18th century assumptions simply that political ends (invariably) justify whatever means might be necessary to achieve those ends, including rotten compromises and, indeed, infidelity to existing legal frameworks (such as the Articles of Confederation—and, later, the new Constitution itself)? Does the presence of “compromised clauses” (in the full sense of that term) matter with regard to the degree that one should “venerate” the Constitution and have “faith” in it (or care deeply about whether contemporary decision-makers necessarily display “fidelity” to its presumptive commands)?

Tuesday, July 10

Morning: So what is a “Republican Form of Government” anyway, and are we committed to such a form of government today?

Framed, pp. 75-131, 1 *The Founders’ Constitution* 96-142, Amar, pp. 276-281, 364-380

Question presented: In a previous book, *Our Undemocratic Constitution*, I made the case that the Constitution violates many 21st century notions of “democracy.” So what? More than one critic of that book reminded me that “The Framers established a republic, not a democracy, and we should keep it that way.” If that’s the case, should the United States renounce its commitment to spreading “democracy” around the world and instead carefully explain that it’s really committed to the spread of “republicanism” as a solution to the problems presented by “democracy”? Can we at one and the same time declare our commitment to (21st century notions of) democracy and remain silent, as a country, about the extent to which the Constitution deviates from many of these notions? Or is the point that “democracy” in the 21st century is a mansion with many differently designed and furnished rooms, and that Georgian colonialism can co-exist very well with Danish modernism (or, indeed, something designed by Frank Gehry)?

Afternoon: Is “republican” government necessarily (and only) “representative government”? Enter the state constitutions

John Dinan, *The American State Constitutional Tradition*, pp. 65-96

In addition, please read your state constitution(s) and be prepared to discuss the aspects of direct democracy that is, unless you are from Delaware, to be found in them.

Question presented: Imagine that you are an advisor to an American state or foreign country that is tasked with revising its existing constitution or, indeed, drafting a brand new constitution. What advice would you give regarding including aspects of direct, as well as representative, government? And then imagine that you are a delegate to a new national constitutional convention in the U.S. How, if at all, would your advice differ?

Wednesday, July 11

Morning: Aspects of representative government: How should bills become law?

Framed, pp. 133-174; Dinan, pp. 99-123, 137-183; 1 *The Founders’ Constitution*, 355-381, *Federalist* 73

Question presented: What is the optimal number of institutions that should be required to assent to proposed legislation in order for it to become a law? Is it accurate to describe the national government of the United States, with regard to the law-making process, as (at least) tricameral? If so, is that a feature or a bug? What, if anything, does Nebraska have to teach Americans? South Africa?

Afternoon: The “executive”

Framed, pp. 175-228, 358-384; *Federalist* ## 67-77

Question presented: How, if at all, does one’s conception of the President change if he/she is viewed as the active head of a political party? Should we view the President not only as “Commander in Chief,” but also as “central banker in chief,” “doctor in chief” regarding, say, decisions involving how best to stem off public health emergencies,” and so on? Your answer to this question will necessarily lead us to the next topic:

Thursday, July 12

Morning: A “unitary” or “divided” executive branch

Framed, pp. 229-244; *Federalist* ##47, 51; Christopher Berry and Jacob Gersen, *The Unbundled Executive*, downloadable through http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1113543

Question presented: Consider that 48 of the 50 states in fact have “unbundled” executives, in one form or another, most dramatically, perhaps, with regard to “splitting” the Attorney General from the Governor. Are the states mistaken, is the national Constitution mistaken, or is it the case that these quite different ways of organizing an executive branch are “just right” for the states and the nation, respectively?

Afternoon: More on “divided government”: The problem of federalism

Framed, pp. 287-329; 1 *The Founders’ Constitution*, pp. 242-297; *Federalist* 46

Question presented: Assuming you like federalism, for whatever reason (and what reasons *do* support federalism, as distinguished from “decentralization” as a preferred strategy of designing and implementing programs?), does the national Constitution adequately protect whatever you think best in a federal system? If not, how would you amend the Constitution? With regard to states, would you support a greater degree of constitutionally protected “home rule” for municipalities than is likely to be the case in the states from which you come? If you don’t particularly care for federalism (as distinguished from decentralization), would you strip from the present Constitution what textual protections *do* exist for states? Would you, for example, leave it exclusively up to Congress to decide whether the two Dakotas should be unified as one new state or whether California or Texas should be divided into multiple states with more manageable populations?

Friday, July 13

Morning: Organizing a judiciary

Framed, pp. 245-285, *Federalist*, ##78-83, Brutus, No. 15, document 10 on Article III, Section 1, in 4 *The Founders' Constitution*, available at http://press-pubs.uchicago.edu/founders/documents/a3_1s10.html ; Dinan, pp. 123-136

Question presented: How much “independence” (autonomy) *does* one want in either the judiciary as an institution or in the hands of individual judges? Do the states have anything useful to teach with regard to answers to these questions? For historians: Why have the states overwhelmingly rejected the “federal model” of appointment by governor and confirmation by the state senate? For political scientists: What does the empirical literature show about the actual consequences of different modes of judicial selection?

Afternoon: Responding to perceived imperfection: The problem of constitutional amendment

Framed, pp. 331-345, *Federalist* No. 49, Donald Lutz, *Towards a Theory of Constitutional Amendment*; Dinan, pp. 1-63, Amar, pp. 285-289

Question presented: Who gets it right as between (particular) state constitutions and the national constitution with regard to the stringency or ease of formal constitutional change? Again, does it in fact make a good deal of sense to make the national constitution significantly more difficult to amend (formally) than the state constitutions? And, independently of “amendment,” would the national Constitution be better if it had a procedure whereby the electorate could call a new constitutional convention?