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## REFLECTIONS ON THE TEACHING OF CONSTITUTIONAL LAW

WILLIAM W. VAN ALSTYNE\*

### I. INTRODUCTION

Nearly the same year as that in which I first taught the basic course in Constitutional Law, in 1960, the very first volume of the *Supreme Court Review* also appeared in print. The idea of that new, annual, hardcover collection of articles and essays was to educate an interested readership on the work of the Supreme Court. The editor of the *Review* was an already well-established professor of constitutional law, Philip Kurland, of the University of Chicago Law School. And the publisher was—and still is—the University of Chicago Press. At the time, I read it at once from cover-to-cover, as I have with each subsequent volume, pretty much ever since.

These four decades later, my regular reading of this work is now principally a mere matter of simply wanting to stay abreast of how others may usefully assess the work of the Court, and then, also, to compare it with my own thoughts, such as they may be. The first time, though, in 1960, I read it partly from fear as well as from hope. The “hope” was the obvious part: that it might help me in being somewhat better prepared to conduct this class. The “fear” was less obvious, but at the time at least as real: that if I did not read it, but students taking the course did, then something they would know, gleaned from its informative pages, might well be my own undoing in class.<sup>1</sup>

My immediate and still continuing interest in the *Supreme Court Review*, however, went well beyond the coincidence that it appeared on the scene even as I was just then attempting to settle into regularly teaching the ordinary foundation law school course in Constitutional Law. Rather, it had much to do with the orientation Philip Kurland provided in the Preface of the 1960 *Review*.<sup>2</sup> In the course of explaining why such an annual volume was just then being brought forward, in 1960, despite the very large supply of law reviews already virtually “overpublished” with full length articles, extended Notes, and

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1. Is this a good thing to admit, even now? Probably not. But still, this is not the only—or principal—reason for bringing the *Supreme Court Review* into a discussion on my own teaching of constitutional law, and we shall get to that reason soon enough.

2. Philip B. Kurland, *Preface*, 1960 SUP. CT. REV. vii–viii.

abundant Comments devoted to the Supreme Court and to developments in constitutional law, Philip Kurland declared that there was nonetheless, in his own view, a niche not yet adequately filled.<sup>3</sup> Quoting from an observation by Henry Hart, he suggested that despite the yearly surfeit of writing on the Supreme Court, it was still true that “neither at the bar nor among the faculties of law schools is there an adequate tradition of sustained, disinterested, and competent criticism of the professional qualities of the Court’s opinions.”<sup>4</sup> Thus the explanation for the genesis of the *Supreme Court Review*.<sup>5</sup>

For me, at that time, and still at least as much today, this was quite an important point. In dedicating the task of its authors to a close review of “the professional qualities of the [Supreme] Court’s opinions,” on the strong claim that *that* kind of work was still largely missing in the mass of other journals and books about the Constitution and the Court, the *Review* thus willfully distanced itself from a variety of other tasks. These were tasks already in rich (and even redundant) supply. And so, just as one kind of easy example of what one would *not* expect to find, the *Supreme Court Review* was not to serve simply as a form of excellent legal journalism, providing a running, accurate report each year on what the Court had done or had failed to do. Other journals (and news services) could provide that service, even as a substantial number of journals already quite serviceably presumed to do. There was no niche here that needed to be filled.

And neither, on the other hand, to pick a very different kind of example, were the contents of the *Supreme Court Review* yet to be particularly judgmental in some merely *political* way of assessing the work of the Court. That is, according to Philip Kurland’s own explanation, it was assuredly *not* designed merely as a means to render or encourage suitable applause in praise of some alleged social good attributable to the decisions rendered in the Court in a given year, or—virtually as another feature of the same idea—to fault the Court whenever its decisions might appear to fail to advance the greater good (however that greater good was to be defined). Those pretensions, too, were *not* to be its task, nor could they be, for there would clearly be no novelty were they to be its main idea.

For indeed, many writers then (even as many more today) had already made that their main business, i.e., they judge it to be their task to examine the work of the Court in just this “social” way, just as it was true (and still is) that a surfeit of law journals freely carried that kind of work. Indeed many law journals—perhaps most—seemed to be just hopelessly enamored of publishing

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3. *Id.* at vii.

4. *Id.*

5. And so, too, the *Supreme Court Review* has continued to serve in just this capacity, during four-and-a-half decades of publishing a high level of professional reflections on the work of the Supreme Court.

mostly this kind of work and very little else.<sup>6</sup> Plainly, then, the *Supreme Court Review* could scarcely aspire to any distinction of its own if it merely followed suit.

And neither, as still a third possibility, was it to follow a lead strongly gaining ground in the newest empirical kinds of work common in various political science departments, namely, longitudinal, quantitative studies of “judicial behavioralism” such as they were most usually known, even then.<sup>7</sup> These were studies structured to *ignore* the Court’s opinions (opinions better seen, in this view, as but window dressing on outcomes determined elsewhere) and given, rather, to the fashioning of correlations of patterns of votes and of the names and profiles of the several Justices, yielding an impersonal empiricism and providing a kind of solid data base from which projections to other cases still to come before the Court might be sensibly made.

Eschewing these several different concerns and approaches without (overtly) belittling any of them (for none need be seen necessarily as any less useful than what the *Supreme Court Review* set as its task),<sup>8</sup> the *Review* put its function into this different framework: to take the Court’s opinions, as well as its decisions, seriously. And then to assess their professional quality—or lack thereof—as best as those invited to provide that assessment might set it as their own task to try to do, with whatever degree of skill and clarity of expression as each might professionally command.<sup>9</sup>

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6. In retrospect (i.e., after four decades of reading its frequent reports and editorials on new decisions and opinions handed down by the Supreme Court), I am strongly inclined to describe this particular genre of teaching, as well as of writing, as “*The New York Times* view” of constitutional law and of the Supreme Court. Why? Because *The New York Times* appears to judge the Court pretty much exclusively by the degree to which its decisions do—or do not—advance causes *The New York Times* editorially favors, neither more nor less. Accordingly, the *Times* predictably condemns the Court when (from the *Times*’ editorial point of view) its decisions seem unprogressive, just as it applauds the Court when its decisions seem suitably progressive (again from the *Times*’ editorial point of view of course). And that is just about all it does, i.e., therein lies the “rub.” For *The New York Times* appears to have little—if any—interest in measuring the extent to which the Court’s decisions have any clear connection with the Constitution such as it is, as distinct from what the *Times* desires of its decisions whether or not they find warrant in the Constitution itself. Accordingly, one will despair to look to the *Times* to take much interest in that particular matter, for it treats that matter pretty much as though it were a matter of little or no particular concern.

7. See, e.g., GLENDON SCHUBERT, *THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES, 1946-1963* (1965); GLENDON SCHUBERT, *THE JUDICIAL MIND REVISITED: PSYCHOMETRIC ANALYSIS OF SUPREME COURT IDEOLOGY* (1974).

8. And, indeed, many readers—now as then—may quite fairly insist that any of the enumerated services I have just listed are practically much more useful than the seemingly more pedestrian task that Professor Kurland proposed as the object of the *Supreme Court Review*.

9. And, in doing so, moreover, just provisionally to set aside such questions as to whether the Court itself did—or did not—treat its opinions with equal seriousness; rather, to give the Court the benefit of the doubt for purposes of assessing its professional integrity as well as the

Finally, however, having set for itself this essentially professional task, it was for me also an important saving grace of that very first volume of the *Supreme Court Review* that Philip Kurland had thought to add to the title page a useful, self-chastening thought. It was a thought suitably captured in an admonitory quotation from one of the most senior and most admired federal judges, Judge Learned Hand. The quotation had most likely been chosen by Kurland, I supposed, as a kind of quiet reminder both to himself and, presumably, to his authors as well, to put things in a less arrogant way than what some prospective readers might otherwise have been inclined to attribute to what the *Review* and its authors would be presuming to do in passing judgment on the work of the Court.

The particular quotation from Judge Hand was placed second on the title page. It was placed just beneath a bolder utterance by Harlan Fiske Stone, an equally famous figure who had not merely served on the Supreme Court (as Learned Hand never served) but was also for five years (1941–46) its twelfth Chief Justice. The lead—or first—quotation from Stone avidly embraced the idea of freely ventilated public criticism of the judiciary; indeed, effusively he praised its value (one might say praised it unstintingly and quite without reserve).<sup>10</sup> Learned Hand did not outright disagree, i.e., on the plausible contributions or helpfulness of such criticism; he could scarcely do so without appearing defensive or quite thin-skinned. He nonetheless offered the following mild remonstrance by way of partial demurrer:

“[W]hile it is proper that people should find fault when their judges fail, it is only reasonable that they should recognize the difficulties. . . . Let [the judges] be severely brought to book, when they go wrong, but by those who will take the trouble to understand them.”<sup>11</sup>

For four decades, this characteristic counsel of care and carefulness by Learned Hand, as I think it might even now be suitably addressed to *all* of us who teach and who write on these matters, has continued to appear in every subsequent volume of the *Supreme Court Review*. And it is, I think, a suitable tribute to Philip Kurland, as its first editor, that it still does thus appear in the beginning of every volume, even as it may be noticed—as one hopes it *will* be

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persuasive efficacy of what it wrote, which, essentially is what contributors to the *Supreme Court Review* were to be asked to do, even as others might not particularly care. (Perhaps the Court *did not* take its own opinions seriously, or though such a sweeping judgment would seem extremely cynical and not generally warranted, perhaps it did not or does not always do so (even as sometimes seems to be the case); or perhaps some Justices did even as certain other Justices did not or do not now—and sometimes hardly seem even to try (in which case, however, perhaps also so much the worse for them—and for the Court on which they had been called to serve—so far as what the contributors to the *Supreme Court Review* might well be expected to suggest).

10. Stone encouraged “fearless” public fault-finding with the Court and praised it as virtually “the only protection against unwise decisions, and even judicial usurpation[s].”

11. 1960 SUP.CT. REV., *supra* note 2 at iii.

noticed—by each new generation of teachers and scholars in considering how they go about their own work, in teaching and writing on the subject of the Constitution and on constitutional law itself.

## II. FIRST THINGS FIRST—THE CONSTITUTION ITSELF

Insofar as one wants to address a foundation course in Constitutional Law critically and professionally for lawyers, which I take it to be one's first responsibility when teaching the subject in a school of law (rather than, say, within a department of history, of sociology, of economics, philosophy, or political science),<sup>12</sup> one will, I think, quite naturally start with the Constitution itself and *not* with (or not *just* with) what the Court has said about it. One will do so, moreover, despite the often-quoted observation (more of a claim as I think it is than anything in the nature of a self-evident truth) by Charles Evans Hughes, suggesting that such a mere emphasis on the document as such is more than a little naive. For, as Hughes was quick to note, it may hardly matter what is nominally declared or provided in the various articles, clauses, and amendments of the Constitution insofar as—

“We are under a Constitution, but the Constitution is what the judges say it is.”<sup>13</sup>

Maybe so, and yet, as Felix Frankfurter was later to suggest, quite appropriately, in partial rebuke to the notion that “what the judges say” rather than what the Constitution may itself “say” is frankly all—or even mostly all—that counts:

“Judicial exegesis is unavoidable . . . [b]ut the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it.”<sup>14</sup>

And just because it is surely true as to what the “*touchstone*” is—it is not the judges' holdings but the document and its provisions such as they are—in

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12. Which is not to say that an address to the same subject (“constitutional law”) from within each of these other disciplines is any less worthy of one's interest (it is not—rather it is merely different). Even less is it to suggest that considerations that preoccupy each of these—and other—fields have played no substantial role in what shapes and accounts for what “the law” is, whether it is constitutional law or something else (e.g., torts, contracts, taxation or trusts).

13. Governor Charles Evans Hughes, Address before the Elmira Chamber of Commerce (May 3, 1907), in ADDRESSES AND PAPERS OF CHARLES EVANS HUGHES 133, 139 (G. P. Putnam's Sons, 1908).

14. *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 491–92 (1939) (Frankfurter, J., concurring). Elsewhere, Justice Frankfurter also offered the following useful counterpoint to a famous—perhaps the most famous—dictum by John Marshall (a dictum most frequently invoked side by side some implausible holding by judges and writers who may need a rhetorical device to explain how it is that they got to where they did): “Precisely because ‘it is a constitution we are expounding,’ we ought not to take liberties with it.” *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 647 (1949) (Frankfurter, J., dissenting) (citation omitted).

nearly every course I have taught on this subject, it has begun with the classroom distribution of pocket-size booklet copies of the Constitution inclusive (of course) of all its amendments such as they are.

To be sure, this personal habit, as a way to begin the course, may strike one as a bit naive, especially as virtually every major law school casebook published for purchase and use in courses on Constitutional Law reproduces the Constitution at the front or as an appendix at the back. Distributing what are essentially souvenir pocket-sized copies, the first class day, may therefore seem to be unnecessary—even amateurish, or infantile.<sup>15</sup> I think the time not wasted, however, not least because, given the extent to which “what the judges say it is”—as the standard way of learning constitutional law—so thoroughly demands the attention of students in preparing for and participating in class, it is too easy, once things are under way, to forget that there is in fact a text in this house.<sup>16</sup>

So, for example, despite a number of judicial “interpretations” declaring that there is a provision in Article I, granting to Congress a power to regulate whatever may substantially affect commerce among the several states, it may then be useful, if merely in passing, at least to give a glance at the Constitution to see whether there is any text suitably so framed (or whether the Court, as a coordinate branch of the national government, has merely befriended another branch of the same national government with the convenience of a falsified clause). The superior skills of some who have served on the Supreme Court to craft their opinions in very compelling prose may itself, on occasion, so anaesthetize the reader from further critical thought as to virtually distract the reader from making even this useful, minimum reality check: to compare the provision, rephrased *quite precisely* to reflect the Court’s “interpretation” or

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15. After all, though typically those enrolled in the basic course in Constitutional Law are merely in their first year of law school, they are all graduate and professional students. They hardly need gratuitous aids of this sort, one might suppose, especially when, insofar as some textual reference may become pertinent to a matter then under review in class, they can easily flip back or forward to the casebook page supplying whatever particular clause or text in the Constitution as may happen to be at issue in the wedge of case law assigned for classroom discussion and review. Moreover, in these days of vastly enhanced classroom technology (“power point,” as well as established capacity for wireless simultaneous transmission of graphs, statutes, citations, lengthy paragraphs from secondary sources, etc. to the individual laptop screens provided at every seat), distributing pamphlet-sized paper copies of the Constitution may seem especially quaint.

16. Well into his third decade of service on the Supreme Court, Justice Hugo Black (who was famous for carrying with him a pocket copy of the Constitution) noted the following in an interview: “I think most [Americans] do not [understand the Constitution]. It’s all because each one of them believes that the Constitution prohibits that which they think should be prohibited and permits that which they think should be permitted.” Interview by Martin Agronsky with Justice Hugo Black, Supreme Court Justice (Dec. 1968), reprinted in *Newsmakers, Objection Overruled*, NEWSWEEK, Dec. 9, 1968, at 52.

“construction,” with the provision as it is actually phrased in the Constitution itself. As the degree of variance becomes ever greater, the strain on one’s own willingness to suspend one’s sense of disbelief may itself become proportionately greater as well—until, no doubt, at *some* point it must at last simply snap.<sup>17</sup>

Sometimes, moreover, there may be more than one text, i.e., more than one *relevant* text, which is merely to say that while it is the Court’s “interpretation” or “construction” of a *particular* clause that is under immediate consideration in a given hour, during which three or more cases and thirty to forty pages of different judicial opinions demand the close attention of students (in readying themselves for class), there may in fact be *other* clauses nearby—or even distant from—the one under review one might not want to ignore.<sup>18</sup> And for just such occasions (there turns out to be quite a number of them), it may be quite useful to have all—and each—of them readily at hand.

So, for example, it may well be that a given hour—or even nearly an entire upper-class course—may trace the (heavily congested) case law and interpretations solely of the following familiar clause: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>19</sup> There are, however, no fewer than six other clauses located elsewhere in the Constitution that one may want to notice, and to *worry* about as well, before finally committing oneself to what *this* clause may (or may not) mean to say. I omit all but one of them here, if just to keep this short.<sup>20</sup> But the one I shall quote . . . is itself hardly *ever* quoted, indeed, may itself virtually never be seen or noticed by students (probably not by their teachers either), least of all if it appears just unnoticed in the casebook appendix. Perhaps it—this curious, mere parenthetical, provision—has no significance. Then, too, however, perhaps it may be somewhat significant after all. However that may be, only this much is certain—that in either case, one can hardly venture a view one way or the other, unless one begins by noting *what* it says, and next by trying, as best one can manage, to determine just how it came to say what it does . . . and then also to consider what further implications—if any—may

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17. As it may not, of course, but also as it may (perhaps even as illustrated in the Commerce Clause example just provided *supra*, in the text). And this may assuredly be so even after fully conceding to an appropriate initial predisposition toward a maxim of “generous” (rather than of a more grudging) attitude in assessing the work meant to be done in the various working parts of the document at hand. For example, see the despairing conclusion of John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1973) (“[I]t is *not* constitutional law and gives almost no sense of an obligation to try to be.”).

18. The point is particularly well-developed by Charles Black, in his brief but enduring essays, CHARLES BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

19. U.S. CONST. amend. I.

20. And no, do not expect to find them neatly listed or identified in this footnote; the point is more usefully made here in suggesting one look them up for oneself.



flow from that. Here is that particular clause: “If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it . . . .”<sup>21</sup>

Why “Sundays excepted,” one may ask? And what, if anything, may *this* have to do with any kind of accurate understanding of the scope—or meaning or expected reach—of either restriction in the First Amendment laid on Congress (specifically, on the one hand, that Congress shall make “no law respecting an establishment of religion,” and likewise, on the other hand, that Congress shall make “no law . . . prohibiting the free exercise thereof”)? Inquiring minds may want to know.<sup>22</sup>

As another example—of noticing “distant” clauses far away in the Constitution from the immediate clause the judicial “unpacking” of which preoccupies the heavy case law students prepare in advance of a particular class, one might refer in the first instance to the following provision, just as it appears in the Sixth Amendment: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . .”<sup>23</sup> This Sixth Amendment provision is binding on the federal government. It also raises an assortment of questions. Among the most obvious is just what is meant by “an impartial jury,” such as it may (or may not) be. Just for starters, to pick an easy example of such a question, is a “jury” as that term is used in the Sixth Amendment necessarily a jury of twelve persons or may it consist of a smaller number (even of but two or of three), assuming only that in its selection and empaneling, it is constituted in a fashion to reassure one that it is suitably “impartial” (i.e. neither predisposed to the government nor predisposed to the accused) as the text of the Amendment appears to require?

Another way of putting the same question is this: Is the Sixth Amendment reference to a “jury” more in the nature of a mere general reference (i.e., to some empaneled group of lay persons as distinct from professional judges but not necessarily a group of any specific size) or may it be more in the nature of a “technical” term (i.e., a term meant to carry the detail of a certain understood sort, including an assurance that the central government may not prevail in

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21. U.S. CONST. art. I, § 7, cl. 2.

22. So too, surely, should those who teach this subject feel some professional concern not to let them down, as one would by failing to raise some sort of obvious questions arising from this express, special, treatment of “Sunday.” Note, of course, that it is not “Saturday,” nor “Friday,” nor any other day that may—or may not—relate to a given President’s own particular faith—assuming he may have one—that may be subtracted. Rather, it is *only* “Sunday” as such that is given this constitutional “deduction” so to have it not count as part of what is otherwise set forth as the rigid, expressly declared, ten-day time frame within which the President must act—if he means to do so—to forestall a particular bill from becoming law.

23. U.S. CONST. amend. VI.

securing the criminal conviction of persons prosecuted in its courts unless it succeeds in persuading *all* of a group of *twelve*, rather than all of a far smaller group (of merely two or of three), of the guilt of the accused)? Inquiring minds, not least those charged with federal crimes, surely *do* want to know.<sup>24</sup>

Here, too, just as in respect to the religion clauses of the First Amendment, there are dense thickets of explicative case law for students and their professors to traverse in examining and refining the meaning of these particular Sixth Amendment terms. Possibly, however, the answers to *some* of these “Sixth Amendment” questions—including the critical question of the jury’s size (if there *is* any requisite size)—are frankly not to be found in the Sixth Amendment, but found (or, if not literally found, at least illuminated in some useful way) *elsewhere*, in closer association with some other clause one might usefully consider and take into account. And, again, as it happens, the Sixth Amendment provisions respecting the “right” to trial by jury in “all [federal] criminal prosecutions,” do not stand alone. And once again, insofar as that is so, it might well be that despite the utter inconclusiveness of one’s conscientious review not merely of the case law of the Sixth Amendment but also of its own immediate legislative history (insofar as one might hope that that investigation may be at least highly suggestive—or even conclusive—of the uncertainties one encounters regarding the scope and the requirements of the Sixth Amendment), the better illumination will be found in the consideration of some other provision in the Constitution: a provision like this one (indeed, this very one) in Article III, the article of the Constitution specially addressed to the federal courts: “The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . . .”<sup>25</sup>

Of course, the word “jury,” as it appears in Article III, is merely the same as the word “jury” as it appears in the Sixth Amendment and just by itself may therefore be no more informative of the requisite size of the body (or even whether it need be of any particular size) than as it appears in the Sixth

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24. Relatedly, for that matter, is it *constitutionally* necessary that, indeed, the government must at least persuade *all* of the jurors of the guilt of the accused to secure conviction, or may it suffice to send such a person to prison or possibly to an ignoble death by lethal injection, if it convinces some mere fraction thereof (and, if the latter, just what might that “mere fraction” be)? Moreover, in respect to the selection of such a jury, may Congress deny to the accused any right of peremptory challenge, and may it do so whether or not a right of just that kind was itself already an established fixture of the inherited English practice (even as boasted of by Blackstone in his Commentaries, and even as stressed by James Madison himself, when the provision in Article III was under close review in the Virginia debates), or is at least *some* (limited) right of peremptory challenge preserved—not by the Sixth Amendment provision *per se*, but rather, by the use of the word “jury” as it already was embedded in Article III? For one answer to this latter question, albeit not an answer the Court has itself seen fit to provide, see William W. Van Alstyne, *The Constitution In Exile: Is it Time to Bring it in from the Cold?*, 51 DUKE L.J. 1, 15–25 (2001).

25. U.S. CONST. art. III, § 2, cl. 3.

Amendment itself. Yet, *merely noticing* this provision—which may be one point of having it handy to see—may at a minimum suggest an additional line of inquiry one might not otherwise have thought pertinent to raise and to pursue. And here is pretty much how that exact inquiry might logically proceed.

Lawyers and judges may obviously seek guidance (if there is any) into this question by going behind the word “jury” as it appears in the Sixth Amendment. The most plausible way to do so, obviously, is by a conscientious undertaking to determine whether there was some possible discussion of this very question when the Sixth Amendment was under consideration (in Congress, in 1789, and subsequently in any of the state legislatures voting its ratification during the ensuing twenty-four months), and/or an understood—or even stipulated—set of attributes associated with the term “jury” as employed more generally, indeed, perhaps even in reference to this particular text.

And, to be sure, perhaps even a brief inquest of this sort, into the sparse but relevant discussions of the Sixth Amendment, within Congress and among the ratifying states, restricted (as it might be) to the immediate period of 1789–1791, could be sufficient.<sup>26</sup> Oppositely, however, it might well not suffice at

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26. For example, it would surely matter, would it not, *if*—at the very time Madison’s list of proposed amendments in the first session of Congress were under discussion (and that Congress—unlike the constitutional convention meeting earlier—in 1787, was conducted in public and not in executive session), the very question had been raised, and that Madison himself, without demurrer from any other member of that Congress, had replied:

The requirement of an ‘impartial jury’ is a requirement for empaneling suitable laymen from within the State and within the district in which the crime was allegedly committed. Commonly, today, such juries do consist of twelve persons. It is not intended, however, that that number be mandated by this provision, assuming only that the stipulated requirement of insuring its impartiality is scrupulously met. In brief, while it is to be expected that the tradition of twelve-person juries will most likely be reflected when, if this Amendment is ratified, Congress, pursuant to the Necessary and Proper Clause, in Article I, Section 8, enacts suitable legislation setting the particular size of federal trial juries for uniform use in federal criminal cases, it will nonetheless be a matter within its sound discretion, and not a matter frozen into the Constitution itself.

And if, to complete this possible scenario, no one—either in Congress or among the ratifying legislatures—disagreed (or, as could have happened, while all expressing themselves on the matter agreed that Madison’s view would carry into the Amendment, some, now so understanding the matter as set forth by Madison, strenuously objected and thought the amendment as thus understood to be far too weak, and therefore opposed it on just that ground, but simply did not prevail), it would be a most remarkable feat of judicial legerdemain if the Supreme Court were nonetheless to “hold” that “nothing smaller than a twelve-person jury will meet the Sixth Amendment demand.” (In effect, the judges would be “amending” the Sixth Amendment, neither more nor less, would they not?) Finally, to extend this already extravagant hypothetical one additional step, however, *were* the Court so to do, yet were a subsequent Court later to overrule its decision (precisely because it would not condone the original error of its

all,<sup>27</sup> if only because little, if any, relevant contemporary discussion can be found in respect to Sixth Amendment, and none that bears on the particular point. Let it be so.

But perhaps this might have been so, at least partly or even substantially just because *most* of the relevant discussion *had already taken place*, albeit at a different time and/or at a different place. How, or when? Possibly somewhat earlier—when the provision for trial by jury in all criminal cases to be brought into the federal courts, as stipulated back in Article III, had been proposed, discussed, approved, and ratified by the requisite number of conventions within the requisite number of ratifying states. Accordingly, if that were so (and surely one cannot say without investigating the matter),<sup>28</sup> one might reasonably expect that the attendant relevant discussions of the Sixth Amendment jury trial provision would be much more spare than those attending the original provision which had already become an integral part of

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predecessor), it would surely be difficult to fault this later Court, would it not, insofar as one believed that it, and not its predecessor, more nearly got the matter right?

27. And, indeed, the remarks attributed to Madison in the preceding footnote are entirely fanciful (they have been imagined, however, not whimsically, but to make a particular point).

28. Which, after all, is the whole point of this example and of many others one might as easily provide, namely, to make it plain enough that insofar as one is interested in what “this” Constitution provides and does not provide (as distinct from some other that one might prefer, imagine, pretend to, or conjure with), it is not the case that recourse to origins is as such particularly desirable per se, much less that it will answer to every occasion. Neither is necessarily true. But it is to say that in many instances it is merely inevitable if one is serious about these inquiries, like it or not.

To be sure, many do *not* “like it,” i.e., do not want to consider it at all; some just from fear of what a proper investigation might disclose (and so, for them, it is best to suppose that such an investigation would be inconclusive and thus need not be pursued) and others who prefer to declare that it doesn’t matter *what* it might disclose (in their view it is up to them and other members of their own “living” generation to say whether something is—or is not—required by, or forbidden by, the Constitution).

To those in each group (i.e., to the anxious as well as to the arrogant) one may not have much to say, except, perhaps to observe in passing that it is, in the express language of Article VI, § 2, just “*this*” Constitution the judges are oath-bound to support (it is not even “the” Constitution, but “this” Constitution) and certainly not merely one of their own particular fancy; nor even one as might be suggested by the late, very capable John Rawls, by the living Ronald Dworkin or other notables, any more than one as might be suggested by the late Lester Maddox, or the living Sophia Loren; nor yet one as either the Congress or the President may contend for in the various actions *they* presume to take. If, *despite* the nature of the specific oath they take, the judges (or some of the judges) choose not to give it their first loyalty (as some may choose not to do, influenced as they will let themselves be by some different loyalty instead), that may simply be so. The constitutional system we have allows it to happen. Even as it may happen also that insofar as their infidelities meet with sustained popular approval, it may well be they and not their more conscientious colleagues who become feted. (The constitutional system we have obviously allows for this as well.)

Article III. Why? Again, perhaps just because that “larger” discussion would *already* have taken place.

More concretely, just to follow this thought one additional step, one might expect that it would be only to the extent that the already-embedded provision in Article III seemed to some to leave too much slack for prosecutorial discretion, to operate to the disadvantage of the accused, that some “tightening” new provisions would be subsequently proposed.<sup>29</sup> On the other hand, to the extent that the provision in Article III was *already* believed to be fully adequate and unattended by any serious controversy (for example, that indeed the word “jury,” as set forth in Article III, was itself *already* accepted as a sufficient enactment of the understood requirement of a *twelve-person body*), no further language would be felt to be needed, or gratuitously proposed, for inclusion in the Sixth Amendment itself.<sup>30</sup>

### III. THE BANANA PROBLEM

The sort of thing just illustrated in Part II,<sup>31</sup> however, may also do service as a kind of synecdoche for what I even now find to be a serious challenge in trying to teach Constitutional Law both professionally and well. It is to try to find some tolerable way of coping with “the banana problem.” The problem is familiar to nearly every child under six or seven years of age. If asked to spell “banana,” even a six-year-old child has little, if any, problem in knowing how

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29. As one such “tightening” provision, note that while the clause in Article III permits the prosecution to be brought *anywhere* “in the State” where the crime was allegedly committed, the Sixth Amendment narrows this discretion significantly—by requiring that the prosecution be brought not merely within that state, but within the particular (judicial) “district” wherein the crime was allegedly committed, a considerably more limited vicinage, to be sure.

30. So, in brief, merely to summarize: only such provisions in Article III respecting trial by jury as were felt to require specific clarification or modification would figure in the immediate Sixth Amendment debates. That the word “jury” as such was *not* among such terms would not mean that disputes respecting its meaning were simply left unresolved. Rather, it might mean nearly the opposite: that certain questions (such as its requisite size) were *already* deemed adequately well settled in the existing, embedded clause in Article III. And, if so, courts (and Congress) would be expected to respect it and to apply it. And, moreover, insofar as Congress might presume otherwise, e.g., by presuming to reduce the number of required jurors to some figure less than twelve (whether merely in the interests of economy, or in the interest of facilitating more convictions, or simply to induce even more numerous plea bargains), the courts (including the Supreme Court) would hold their effort futile and void.

31. That is, to have at hand the whole Constitution for easy reference, insofar as one may want to draw attention to provisions additional to those identified in the cases under immediate review in class discussion. Additionally, insofar as their *own* inspection of the Constitution’s multiple provisions may well prompt questions in class that might not otherwise be raised (if just because there was no reference to these other provisions in the assignment of the cases then under review), one may—more often than one might suppose—find those questions not to be diversionary. Rather, they are (sometimes) shockingly good.

to begin. The problem comes, rather, from not having any certainty in knowing when to stop!<sup>32</sup>

So, too, one encounters this problem acutely in teaching the basic course in Constitutional Law. One aspect of that problem obviously arises from the need to draw some delimiting boundaries as one attempts to fathom, understand, and raise suitably professional questions regarding the cases and materials assigned for their explication of particular doctrines in the applications of particular portions of the Constitution. An obvious example is simply the imperative to try reasonably to master one provision at a time, just very much as it is examined, expounded, and explicated in the case law, even while acknowledging that the “one provision” then under interpretive review (in the assigned principal case law) does not exist in a vacuum and that, indeed, even its own content, or scope, or main idea may be “shaped” by the imperative of understanding its co-existence with other provisions in this same Constitution, very much as in the examples we looked at in Part II.

The resulting banana problem, even in this respect, is simple: The more one *knows* of those “other” provisions, the greater becomes the tug of their gravitational force not to be excluded from the discussion of the clause currently under critical classroom review. Of course, one may elect to exclude them, often simply by not raising them in class and by knowing (from experience) that given the focus of the materials in the casebook, they are extremely unlikely to come up on their own.<sup>33</sup> The better wisdom of this benign neglect is to keep the discussion more focused, clearer, simpler, and the class itself much more satisfied that the hour has gone well. The cost, moreover, is invisible. It is nonetheless very real. It is that one knows that while the class may have been a very good one from the students’ point of view (i.e., that things seemed clear, that the issues seemed to have been fairly ventilated and quite well worked out), one has helped make it so successful in part by withholding what one is well aware would have made it more of a trial and ordeal, *but knows, too, that the best professionals (and the best judges) will not—and cannot—turn away on that account.* They will, rather, face the

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32. For obvious reasons, the “banana problem” is sometimes also known as the “Mississippi problem.”

33. It is a commonplace belief among seasoned academics that one tends to do one’s “best” teaching roughly in the third or fourth year of teaching any particular course. The first two years tend to be preoccupied simply with settling in with the materials, learning them well, overcoming one’s own uncertainties, and finding out what works well and what does not. Somewhere beyond the third or fourth year, on the other hand, one’s own immersion in the subject may itself become a handicap. The questions, such as one considered them earlier, no longer seem the same. The connections with other things now seem important, too important just to be ignored. One must struggle to keep in mind a student’s perspective, even as one once possessed it more clearly, before time and more of one’s own deepening study of the subject put the shared enterprise of classroom conversation at increasing risk.

difficulties with whatever unnerving effects on one's original confidence in one's opinions that may necessarily result. In a word, that is, they will be responding to the cautionary advice of Learned Hand.<sup>34</sup>

The banana problem arises, too, from the ever-increasing pressures on those who prepare the comprehensive casebooks from which those who teach law school courses in Constitutional Law must generally make some election

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34. An elegant example may readily be found in comparing the Opinion for the Court by Justice Stewart in *Carrington v. Rash*, 380 U.S. 89 (1965), with the solitary dissent in the same case by Justice Harlan, *id.* at 97. On its face, the decision in *Carrington* is an easy one to understand, explain, and defend. And the Opinion for the Court by Justice Stewart seems quite straightforward and fair. (A serviceman enlisted in Alabama in 1946 and was assigned to a military base in Texas, in 1962. He, his wife, and two children owned their home in El Paso, off the military base, and he also owned a small business there (even while remaining in continuing active duty in the Army). Despite the length of time he had then been living in Texas when he applied to register to vote in Texas, he was deemed ineligible by force of a Texas statute uniformly treating all personnel entering the military originally in some other state and then later assigned to a Texas location by the military, as ineligible to register as Texas residents, while continuing in military service. The Supreme Court easily concluded that that provision of the Texas statute was arbitrary and was invalid as a denial of equal protection. The vote was virtually unanimous (Warren, C.J., not participating, Harlan, J., the sole dissent.) The case, as usually summarized, seems merely to provide an easy and excellent example of how the Supreme Court will provide close scrutiny in respect to state and local laws affecting who may vote, whether in federal elections, or otherwise. It might thus seem to be worthy of perhaps ten minutes of one's class.

The usual treatment of *Carrington* in the principal casebooks either merely summarizes it or, at best, also provides a few key excerpts from the opinion by Justice Stewart and merely notes the fact of dissent by Justice Harlan. It would at most suggest that Justice Harlan merely disagreed as to whether the particular restriction was sufficiently related to some neutral interest of the state as to pass muster under the Equal Protection Clause. Instead, however, that dissent maintained that the Equal Protection Clause *does not provide a source of restriction on states in respect to setting standards respecting who may vote and who may not*. To be sure, this is—on its face—a startling suggestion. And especially as it came from but a single Justice, moreover, one might—even as the casebooks tend overwhelmingly to do, just mercifully pass it by.

Yet, doing so, I think, may give one at least *some* pause. Not so much because it would be some slight disservice to Justice Harlan (a small matter one might well believe), but because it could be a major disservice to serious students of constitutional law. As it was, Justice Harlan could—and did—draw surprising support for his bracing observations from no fewer than six related constitutional provisions (including the fifteenth, nineteenth, twenty-second, twenty-fourth, and twenty-sixth amendments) and even more emphatically from an often-unread provision (section two) of the Fourteenth Amendment itself. Indeed, the points he made here, and also in *Reynolds v. Sims*, 377 U.S. 533, 589 (1964) (Harlan, J., dissenting), and in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 680 (1966) (Harlan, J., dissenting), may be answerable, to be sure, but there is frankly no answer forthcoming in the majority opinions in any of these cases, nor (and here's the point) would students be at all likely even fully to grasp the basis, much less the significance or correctness of the Harlan dissents, unless put on suitable notice preparing them to do so, and an ensuing discussion in class likely to consume an additional half hour at least. (And so goes the “banananana” of this unexpectedly rich, instructive, and finely complicated case.)

to assign for purchase and use in the basic course. One part of that problem arises simply from the fact that as each successive term of the Supreme Court yields an *additional* layer of case law refinements, casebook editors and authors are under relentless pressure to make ever-more severe abridgments of nearly every case appearing in their published product, i.e., of these newer cases as well as the older. The necessary effect of these ever-more severely truncated versions is one of serious frustration in class: Too much has simply been left out of even principal cases to provide a satisfactory basis for a sound critical understanding, or even a useful discussion, of the decision, such as it was, much less of its ramifications, such as they may (or may not) be.

Increasingly, as a result, one finds oneself in the dilemma of either just ignoring how other portions of the Court's opinion (portions omitted from the severely abridged version the students will have read) may have clarified what otherwise may seem quite unclear, or, by importing into the discussion one's own references to such missing parts of the cases which, once taken into account, make the case somewhat clearer and indeed quite useful, nonetheless risk considerable student frustration, even resentment, for treating matters in this way.<sup>35</sup>

To be sure, a few casebooks, notably those by Ronald Rotunda<sup>36</sup> and Charles Shanor,<sup>37</sup> cope with this problem by providing fewer, but less brutally-edited, cases. Yet, in making that editorial choice, these casebooks necessarily give up a great deal to a more comprehensive treatment reflected in the other casebooks<sup>38</sup> one must thereby forfeit for classroom use. Nor, to anticipate the seemingly obvious modern answer to this kind of concern, will it be satisfactory to just abandon the use of these professionally prepared books (with edited cases) in favor of directing students simply to download and read many cases, unedited, together with certain scholarly references to read as well.

At one time, had the technology for such quick personal computer downloading-and-copying then been available, this manner of coping might

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35. The frustration is surely understandable. It is as though one had "hidden the ball" by keeping these matters from being seen—matters omitted from the severely abridged version in the casebook—only to bring them out, "eureka" fashion, from one's notes, as a kind of "professorial one-upmanship" in class.

36. RONALD ROTUNDA, *MODERN CONSTITUTIONAL LAW* (7th ed. 2003).

37. CHARLES A. SHANOR, *AMERICAN CONSTITUTIONAL LAW: STRUCTURE AND RECONSTRUCTION* (2d ed. 2003).

38. A nonexclusive listing would include as a minimum: KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* (15th ed. 2004); JESSE H. CHOPER, RICHARD H. FALLON, JR., YALE KAMISAR & STEVEN H. SHIFFRIN, *CONSTITUTIONAL LAW* (9th ed. 2001); GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN & MARK V. TUSHNET, *CONSTITUTIONAL LAW* (4th ed. 2001); JONATHAN D. VARAT & WILLIAM COHEN, *CONSTITUTIONAL LAW* (11th ed. 2001); NORMAN REDLICH, JOHN ATTANASIO, & JOEL K. GOLDSTEIN, *CONSTITUTIONAL LAW* (4th ed. 2002).



then have been entirely satisfactory. Now, however, given the sheer prolixity of the Justices, the sharp divisions within the Supreme Court during any substantial brace of years, and the Court's own resolve to take fewer cases each term (precisely to have time for more elaborate consideration of those it elects to review), for any of us who teach Constitutional Law merely to distribute a syllabus providing a list of cases to be prepared pertinent to each constitutional clause or theme to be drawn into classroom review, would be but a cruel joke. The sheer "tonnage" of that undigested (i.e., *unedited*) material would be crushing. So, for example, while *Marbury v. Madison*<sup>39</sup> itself spans no more than thirty pages in the United States Reports, the Court's decision just last year in a single election finance law case consumed 272 pages in those same Reports (i.e., it is *nine times* longer than Marshall's compact discussion for a unanimous Court in *Marbury*, in 1803).<sup>40</sup> Nor is that particular case all that one can call to mind. Consider just the following mere prefatory statement that precedes the sheaf of opinions (they will doubtless spread through more than 100 pages when eventually appearing in the United States Reports) in a significant case from the Court's current term:

Stevens, J., delivered the opinion of the Court in part, in which Scalia, Souter, Thomas, and Ginsburg, JJ., joined. Breyer, J., delivered the opinion of the Court in part, in which Rehnquist, C.J., and O'Connor, Kennedy, and Ginsburg, JJ., joined. Stevens, filed an opinion dissenting in part, in which Souter, J., joined, and in which Scalia, J., joined except for Part III and footnote 17. Scalia, J., and Thomas, J., filed opinions dissenting in part. Breyer, J., filed an opinion dissenting in part, in which Rehnquist, C.J., and O'Connor and Kennedy, JJ., joined.<sup>41</sup>

It is surely apparent, even from this abbreviated review, that it is not merely we who struggle to teach our courses in Constitutional Law who have found no ideal solution for the "banana problem." Rather, evidently, neither has the Supreme Court itself. For, on the one hand, while Marshall's opinion in *Marbury* may have been highly compelling, it may frankly also have been much *too* spare in furnishing answers to the many substantial questions raised by the case (even as it was my limited object to try to show in a brief essay

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39. 5 U.S. (1 Cranch) 137 (1803). And even *Marbury* itself, brief as it is and pivotal as it has become, does not appear *unabridged* in any of the major casebooks used in professional law school courses on Constitutional Law.

40. See *McConnell v. Federal Elections Comm'n*, 540 U.S. 93 (2003). Although nine times longer than *Marbury*, *McConnell* certainly cannot be said to be nine times more lucid or nine times more illuminating. Rather, if only inadvertently, it may but constitute a compelling argument of why "advisory" opinions should be more strictly eschewed by the Court.

41. *United States v. Booker*, 2005 WL 50108 at \*4 (Jan. 12, 2005) (striking portions of an act of Congress mandating sentences to be imposed by federal judges when based on facts neither found by the jury nor admitted by the accused).

review some three decades ago).<sup>42</sup> On the other hand, it surely now appears that many of today's work products may suffer as much, but that they suffer from the opposite defect (i.e., they tend to be characterized by an *inverse* relation between length and persuasive effect).<sup>43</sup>

#### IV. A BRIEF CONCLUDING OBSERVATION: WHAT EVERY STUDENT SHOULD KNOW

These brief and merely partial reflections on one's teaching of Constitutional Law, admittedly quite incomplete as they are, must nevertheless, and for now, quickly come to some end. And in concluding, I mean to put aside any larger themes (if there are any)<sup>44</sup> to be drawn from this brief essay, just to add some few personal words. One knows that the students who sit in one's classroom have already similarly sat in literally hundreds of other classrooms, even as they also may have some additional dozen courses and classrooms still to go. The monotony of this extended experience can understandably make them seasoned judges of those who stand before them, in the front of that room. One also knows, however, that *far more* than they may suppose to be true, that person, young or old, standing before them in that classroom, typically and actually cares a great deal about them—even as he or she also cares about the integrity of the subjects they teach. It is often the tension between one's concern not to be a "failure" in the classroom on the one hand, and not to be a cheat of sorts to one's chosen subject on the other hand, that perpetually creates a certain tension for oneself, or at least it has been so in my own experience, in finding some proper balance.

It is a common canard that because salaries and status, particularly in major universities and well-regarded professional schools, are determined far more by the scholarly standing of its faculty than by student reviews of how well they teach (which in some substantial measure is quite true), it inexorably follows, as many students will conclude, that the faculty must simply therefore be more driven to care about their research interests than the "routine" of classroom instruction or about what takes place there. But I quite believe that they are wrong. They should know it. This is why. Going to class, after all, is what we do virtually every day. And, considering that that is so, frankly it would be an extraordinary person *not* to be concerned with his or her life as it is actually "lived out" as an adult in just this way. I have met few (I'm not sure there were even any) who actually didn't give a damn for their students.

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42. William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1.

43. For one "solution," see Philip B. Kurland, *Jurisdiction of the United States Supreme Court: Time for a Change?*, 59 CORNELL L. REV. 616, 631 (1974) ("I have facetiously suggested that the answer to this problem would be the discharge of all law clerks and the requirement that every Justice confine his opinion to two thousand words.")

44. And, indeed, perhaps there are none.

Appearances to the contrary notwithstanding, as no doubt they sometimes are, overwhelmingly those who enter the classroom, whether to teach Constitutional Law or something else, devoutly want their classes to go well. Far more than students might plausibly imagine, moreover, most who teach try as best they know how to make it so.<sup>45</sup>

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45. No doubt they—we—sometimes fail. Suppose it is so, when it is so, it is merely appropriate that we, too, “be severely brought to book, when [we] go wrong.” 1960 SUP. CT .REV., *supra* note 2 at iii. To make it count for something worthwhile, however, even as Learned Hand suggested in his own reflections, may it also be “by those who will take the trouble to understand.” *Id.*