

American Epic

Reading the US Constitution

GARRETT EPPS

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*For the many dedicated teachers who taught me to read, and especially
for R.H.W. Dillard,
best teacher ever*

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We have had founded for us the most positive of lands.
The founders have pass'd to other spheres—but what are
these terrible duties they have left us?

“Democratic Vistas”
Walt Whitman

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PREFACE

How to Read a Constitution

In 1987, the American novelist E. L. Doctorow observed the Bicentennial of the United States Constitution by sitting down to read it from start to finish. Doctorow is a profound and affectionate student of American history, and a writer who can (as he did in his famous novel *Ragtime*) wring pure poetry from a description of the early twentieth century interurban streetcar system.

But Doctorow found no poetry in his nation's Constitution. "It is five thousand words long but reads like fifty thousand," he reported sadly. "It lacks high rhetoric and shows not a trace of wit, as you might expect, having been produced by a committee of lawyers. It uses none of the tropes of literature to create empathetic states in the mind of the reader."¹

Doctorow quickly moved from the Constitution to more welcoming turf—the soaring words of the Declaration of Independence—"as alive with passion and the juices of outrage as the work of any single artist"—and the stirring history of the Revolution and the Framing of the Constitution.

Doctorow is one of America's finest writers and readers, but I think on this occasion he missed a good deal of high rhetoric, many literary tropes, and even a trace of, if not wit, at least irony. But Doctorow did tackle the text, read it as a whole, and tried to make something of it. In that attempt, he outdid many of his fellow patriots; many of them insistently proclaim fidelity to a Constitution they seem to have barely read.

The United States Constitution turned 225 years old in 2012. It is the central document of American history and politics. From all sides of the political spectrum, from ranks of society low and high, it is ceaselessly venerated, admired, and invoked. But all too seldom is it read. It sometimes seems that Americans worship the Constitution so deeply that they find its actual text a distraction.

When I started teaching law students twenty years ago, I was surprised to realize that my students had no more interest in actually reading the Constitution than does the ordinary person. When I ask them to read the Constitution from start to finish, they quickly skim its 7,500 words. (Doctorow undercounted, by the way; he apparently made the common American error of assuming that the amendments somehow don't "count.") They then arrive in class, expecting that I will now tell them what it means.

They are disappointed when I tell them that I don't know the answer, and that other scholars and judges don't really know it either. As a people, Americans are like my students: we have little interest in what the Constitution says; but, as befits the culture that spawned *The Da Vinci Code*, we are obsessed with what it means.

The meaning of the Constitution is a national obsession, pursued in a number of ways. For my apprentice lawyers, those words signify what the Supreme Court has said it means. That is the Philosopher's Stone lawyers seek, in order to manipulate it to the advantage of their clients.

There are at least three problems with this Court-centered approach. To begin with, even the Court that issues a decision may not know what the decision "means." These hard-working federal employees can really only *know* what words—written by a law clerk, edited by a justice, and circulated to all nine chambers—can get five votes on this day of this term of court. It may take the legal system a generation to settle on an agreed meaning of even a single case—that is, on the ideas for which a lawyer can cite it to a later court. And as time goes on, that agreed meaning will change. Meanwhile, lawyers must not only cite but argue the case, using its fact pattern and specific wording to shed light on widely varying situations in new cases. What lawyers learn is cases, not meanings.

Second, part of a lawyer's job—and for that matter, part of any citizen's—is to decide whether the Court is right. "We are not final because we are infallible," the late Justice Robert Jackson once wrote. "But we are infallible only because we are final."² Jackson, a man of great intellectual integrity, understood that the infallibility of the Court was limited and temporary; a Court decision resolves a specific dispute among specific parties at a specific time. What it does not do is end the debate.

Within the legal system, lawyers and judges will criticize and defend the Court's decisions; and in the larger political system, the correctness of a decision—whether it is *Roe v. Wade* or *Citizens United v. Federal Election Commission*—is always legitimate grounds for debate. "I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the

Government," Abraham Lincoln explained in his first inaugural address. "At the same time, the candid citizen must confess that if the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased to be their own rulers, having, to that extent, practically resigned their Government into the hands of that eminent tribunal."³ Criticism by "candid citizens" often has eventual effect—years or even generations later, the Court itself may reexamine its precedent, and even overturn it.

Third, many important parts of the Constitution are never tested in any court. The other two branches of government make decisions all the time, and not all of them can give rise to a lawsuit. As an example, consider the decision by President Barack Obama to allow U.S. aircraft to participate in the NATO intervention in the 2011 Libyan civil war. Many people—including me—believed that the Constitution required him to get congressional approval. Obama, on the advice of some of his executive branch lawyers, chose not to do so. A group of members of the House brought a federal lawsuit against the president, and were unceremoniously tossed out of court. War and peace is just one of the great constitutional questions that courts don't usually touch.

In 1998, the House of Representatives impeached President Bill Clinton and brought him to trial in the Senate on the charge of having lied in a deposition about his affair with the intern Monica Lewinski. Many people—including me—believed that a president's sexual behavior, and his efforts in a private lawsuit to cover it up, simply did not match the standard of "high crimes and misdemeanors" the Constitution sets for impeachment of a federal official. But no one was foolish enough to ask a court to stop the impeachment. Article I, Section Two, Clause Six of the Constitution gives to the House "the sole power of impeachment"; a court involving itself in the case would be wandering far off its Article III reservation. Again, the grounds of impeachment is a great constitutional question that will always be outside courts' jurisdiction.

In deciding whether Obama violated the Constitution in Libya, or the House violated the Constitution in impeaching Clinton, then, we are on our own, and must rely on the Constitution itself.

But the quest for the *meaning* of the Constitution is not limited to lawyers. Citizens seek it as well. To them the secret code is not what the courts have said, but *What the Framers Intended*. The words on the parchment, to many Americans, are much less important than what the Framers were thinking when they said them. If we knew these secret thoughts, they would answer all our questions. So persistent is this popular belief that best-selling novelist William Martin recently wrote a book entitled *The Lost Constitution*, a Dan Brown-style thriller about the quest for a copy of the Constitution "annotated by the Founding

Fathers" that can answer all of our current constitutional riddles.⁴ If we could just get our hands on some *other* words the Founders wrote, they would tell us the meaning of the words we already have.

The Constitution, as Doctorow noted, is not light reading. The drafters of the Napoleonic Code intended their handiwork to be a central document of French identity, to be read before every Gallic hearth. The Framers of our Constitution had less lofty ambitions. Unlike the drafters of the Code, the Framers were not academics concerned with consistency and elegance. (There was one exception: America's first law professor, George Wythe of Virginia, was a delegate to Philadelphia, but Wythe left the Convention only ten days after it convened, called home to tend to his sick wife, and never returned; his signature does not appear on the Constitution.) They were practical men of affairs (contrary to popular belief, only about half were actually lawyers); most lacked the talent or literary ambition of a Jefferson or even a John Adams. They were worried less about generations to come than about the immediate future of the country. They knew what they were doing would not matter centuries hence if the document they wrote did not win ratification in the next eighteen months.

The Constitution, nonetheless, has its moments of metaphor, even of grace. Its text offers us at the most basic level the means we can employ today to create a "more perfect union . . . to ourselves and our posterity"; at a deeper level, it tells us much about who we are and how we got here. It is a tool kit of our politics and a testament of our history.

It is worth reading. So I propose that we read it together, even the "boring" parts, and try to understand it both as a whole and in detail.

How then shall we read it? This question is not as easy to answer as it seems. The usual way for a legal scholar to write about the text is, as noted, to *explain it*. The explanation sometimes draws on Supreme Court doctrine, treating that as authoritative explanation. Or, equally often, it may consist of a history of each clause and phrase, guiding us through the author's version of the thought of the Framers and the vagaries of interpretation.

I don't want to explain the Constitution to you. I do not want to tell you what it *means*. If I were to do that, you would then know something about what I think, but perhaps not much about what the Constitution says.

Besides, I don't *know* what it means. I can carefully read what it says; and as I do so, I find many parts that have no clear, definite, single meaning. I find no single overarching philosophy, but some hints at underlying ideas. Some of those ideas are self-contradictory, some are profound, some are repulsive. Some seem to relate to other parts; sometimes the parts don't fit together at all. Most of all, I find, as Hamlet did in his book, words, words, words—words that spark memories, thoughts, and imaginings in me, that remind me of other documents of American history and works of American literature, and of events that I have

read about and sometimes seen. The words stir thoughts in me, but they do not tell me which thoughts are correct.

I read the Constitution as I do because of who I am. I am a constitutional scholar and a teacher. I have also been a lawyer in both constitutional and ordinary cases, and have seen the effect of the law and the Constitution on ordinary people as they confront the daunting power of government. In my own writing, I have studied the development of religious freedom in particular, and of democratic ideas in general, through the work not only of the courts but of Congress and of social movements from the anti-slavery movement of the 1840s to the women's movement of the 1970s.

But like any reader, I bring to the text more than my job title. I am a former journalist; my fifteen-year career with newspapers large and small has given me a practical, non-lawyer's respect for the Constitution, and particularly for the First Amendment. I am a novelist, a literary critic, and even a published poet, with an overwhelming fascination and concern for words in themselves and the ways they can combine to stir wonder, admiration, anger, and despair in the minds of those who read them.

By birth, I am a white Southerner, born at the midpoint of the last century. I came of age in a society that was in the process of being transformed from a racial dictatorship into a full part of America's flawed democracy. That change was wrought by the devotion of ordinary citizens to the ideas of the Constitution and by the willingness of the legal system to follow those ideas into areas that at first seemed impossible and even terrifying. To my mind, the most profound constitutional statement uttered during the 1950s is found not in the words of the Supreme Court in *Brown v. Board of Education* but in those of Martin Luther King Jr. two years later, when he stood before a crowd at the Holt Street Baptist Church and inaugurated the Montgomery bus boycott by saying, "If we are wrong, then the Supreme Court of this nation is wrong. If we are wrong, the Constitution of the United States is wrong. If we are wrong, God Almighty is wrong."⁵

To grow up in those years was an extraordinary experience; southern society was consumed with a debate about the Constitution, and everyone understood that underlying the debate was the threat of private violence and civil chaos. That experience made me very skeptical of much of what is claimed for "state's rights," of the idea that local beliefs should prevail over national values, and of the rhetoric that exalts the work of the Framers but slights the democratic changes the amendment process has made in the Constitution's text.

(I am the first, however, to say that my experience may make me insensitive to other dangers—centralization, standardization, the potential tyranny of the majority—that you, my reader, may find more salient than I.)

And before I was any of the things I describe, I was a bookish, bespectacled boy who at an early age decided that words and books were the finest things on

earth, and who treasured more than anything else the time to sit alone with a book—whether it was the Bible or Charles Dickens's *David Copperfield*—and marvel at the way words could change me and change the world.

How do I, the product of those experiences, read the Constitution? I count no fewer than four ways.

First, and perhaps most obvious, I have learned to read the Constitution like the Bible. Americans have had, over the years, a more intense relationship with Christian Scripture than perhaps any other people on earth. American constitutional theory, for much of our history, has often been nothing more than slightly retooled Protestant biblical interpretation. (In fact, I sometimes think that I love the Constitution and its interpretation so much because studying it takes me back to my elementary school days, which included a daily "Sacred Studies" in which we read the stories of the kings of Israel and of the parables of Jesus.)

The idea of a single meaning, available to all, is a uniquely Protestant idea. Throughout the history of Christianity, the faithful have read the Bible in many ways: as an allegory of divine love, for example (as in the seemingly erotic *Song of Songs*) or as an "anagogy," a deliberately concealed key to events in another world, to be understood only by those who had by study gained mystical access to God.

The idea of a single, literal, intended meaning gained primacy only during the Reformation. The religious historian Jaroslav Pelikan writes that Martin Luther and the other Reformers believed that what mattered was "the original intent and *sensus literalis* (literal meaning)" of the words of the Bible.⁶ Pelikan sees in Luther's biblicism a direct forebear of American constitutional interpretation.

For Americans in particular, this general Protestant notion of "original intent" was strengthened and elaborated a century ago, when a group of American Evangelicals published a set of theological essays on "the fundamentals" of Christian belief that have given rise to the movement we call "Fundamentalism."⁷ Fundamentalism was fueled by opposition to what was called the "higher criticism"—scholarship that analyzed the Bible as a human work of literature, without any assumptions of divine origin or authority. Higher critics, for example, viewed some books of the Bible as blends of earlier books, or as appropriations from other early religions of the region. They studied the Bible stories as they studied non-Christian myths, and they refused to take stories like the deliverance from Egypt or the raising of Lazarus as fact.

Fundamentalists rejected the "higher criticism." The Bible, they wrote, is the Word of God. This means that all parts of it are *inspired*. The inspiration is not general, but verbal—meaning that God has fixed for all times not just the ideas in the Bible but the precise words. There are no mistakes or inconsistencies in the Bible, and nothing it says—whether about the Sun standing still, the "gift of tongues" at Pentecost, or the coming apocalypse described in Revelation—is

false. The Bible is *true*. It says it is true, and the prophecies of the Old Testament have been fulfilled in the New.

Thus every word has a meaning; that meaning is invariably correct and immune from question by history or contemporary morality; and all the words fit together into one divine whole.

So influential has Fundamentalism been in this country that these attitudes are now cultural rather than specifically religious values. Many Americans profoundly believe that the Framers in Philadelphia made no mistakes or omissions; that every provision in the Constitution is there for a clear reason; that the Framers of the Constitution, like Isaiah and St. John the Divine, saw forward in time and made prophecies that have been miraculously fulfilled; and that nothing in the Constitution—not even its provisions recognizing slavery—can be wrong, or more properly "wrong for its time." They often test the constitutionality of a measure by asking whether they think the Framers foresaw it. They say, "If the Founding Fathers could see what we are doing today, they'd be appalled."

The Founders actually had no idea what America would become 225 years after Philadelphia and weren't thinking about it much; they were trying to write a set of rules that would work for the moment, not to foretell and control the future. Some Americans—by no means only those of a Fundamentalist background—find this idea threatening, in much the way the writers of *The Fundamentals* feared the insights of the "higher criticism."

We are all influenced by this school of reading—even though a moment's conscious reflection should convince us, no matter what our religious beliefs, that a human document like the Constitution cannot be read as if it were written by God. As we confront the text, the "fundamentalist" reading may prevent us from seeing everything that is there; that's because much of the Constitution is in fact confusing and ambiguous. Some of it seems in fact to be wrong, and some is even, as far as I can tell, meaningless.

But the biblical reading of the Constitution cannot be put aside. That's because for Americans, reading the Bible and reading itself are closely intertwined. The high levels of literacy in early America can be traced to the ambition of ordinary people to read the Word of God. Every time we interpret any text, we are drawing on our culture's rich history of biblical interpretation. For that reason, we should bring to reading the Constitution all the resources of readers of Scripture. The literal mode of reading exists beside other traditions—those that see the Bible as a source of poetic inspiration, of divine allegory, and historical understanding. These too are a part of any American reader's palette, and they can show us the ways in which parts of the Constitution may resemble the laws of Leviticus, the Psalms of David, or the Sermon on the Mount—similarities that may illuminate the proper application of those parts to practical problems.

Lawyers have a great deal of experience in reading texts that are ambiguous and contradictory. Many of these texts are called statutes. And the second way you and I can read the Constitution is in fact as a set of rules written to operate as law, to be read as law using the methods lawyers use.

Statutes have only become dominant in the legal field in the past century; when the Constitution was written, most lawyers most of the time studied the “common,” or unwritten, law, or read large theoretical volumes by scholars of English and international law. But even in the eighteenth century, statutes were a part of their trade; rules for reading them had been evolving for at least a century. Today, the “science” of statutory construction has evolved its own techniques and doctrines, including a set of Latin “canons” that can be wheeled out when they favor one side or another. Lawyers like to intone solemnly that “*expressio unius exclusio alterius est*” (to express one concept in a statute is to exclude all others) or “*noscitur a sociis*” (a word in a statute can draw its meaning from those around it). These “canons” rarely, however, settle anything in a court of law, because, as the famous scholar Karl Llewellyn once wrote, “there are two opposing canons on almost every point,”⁸ each accepted maxim contradicting another.

The term “strict construction” is an example. Presidents and senators like to intone that they are seeking justices who will “strictly construe” the Constitution. But they’d be appalled if they actually found one. “Strict construction” is a statutory, not a constitutional term; it directs a court to read a statute as narrowly as possible, disturbing the unwritten, common law as little as it can. That presupposition makes no sense in the context of a written Constitution, which was inspired by a desire to change the unwritten law and substitute for the British Constitution an entirely new one.

By a “strict construction” of the Constitution, it seems to me, Congress would have no power to establish an Air Force—the Constitution authorizes only an Army and a Navy. For that matter, Congress wouldn’t have the power to designate a national flag—American forces would be required to march under one of fifty state flags—because there is no textual “flag power” in the document.

Of course this makes no sense. No less a conservative icon than Justice Antonin Scalia says, “A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably.”⁹

Any introduction to statutory construction will state that its aim is to discern “what the legislature intended.” The quest for “legislative intent,” however, is by and large a much more formalized (indeed almost ritualized) pursuit than is constitutional interpretation. Statutory intent is to be derived first from the text, and when that is unclear, from “legislative history,” a complex bundle of official committee reports, hearing transcripts, and floor speeches compiled by Congress during the writing of a statute. Judges are expected to scry this chaotic mass

of words and conclude which way the legislature would have applied the statute to the specific case had it considered it.

In fact, the pursuit of “intent” usually seems half-hearted at best, and increasingly some judges question its utility at all. Justice Scalia has written that “I reject intent of the legislature as the proper criterion of law.”¹⁰ To Scalia, the only sound basis of statutory construction is *the precise literal meaning of the words* (sound familiar?), supplemented, if necessary, by a nice, thick dictionary.

Justice Scalia contends that constitutional interpretation differs from statutory interpretation only slightly. It “is distinctive not because special principles of interpretation apply, but because the usual principles are being applied to an unusual text,” he says.¹¹ Thus it falls particularly to judges to “give words and phrases an expansive rather than narrow interpretation—though not an interpretation that the language will not bear.”¹²

Here again we see the quest for the “literal sense” of the words. The special quality that Scalia gives to this endeavor is his insistence that the only criterion is “the original meaning of the text, not what the original draftsmen intended.” And among judges and scholars, the term “originalism” today applies to that kind of reference—to what some scholars call “the original public meaning” of constitutional language, what an ordinary American at the time of the ratification would have thought the words meant—rather than to the “original intent” of “the Founding Fathers.”

A statutory approach to reading the Constitution is important because it reminds us of the background against which it was written; but applied too enthusiastically, it can thus lead us in one of two directions—neither of them, to me at least, wholly satisfactory. One the one hand, we can extract meaning from the document using traditional statutory construction. The problem with this is twofold: first, it applies highly artificial principles developed *after* the Constitution was written—since the “age of statutes,” as Judge Guido Calabresi calls it, began in earnest only in the twentieth century.¹³ Second, it seeks meaning from “legislative history” that doesn’t exist.

A number of people (including, at times, Justice Scalia) claim to divine the “original intent” (or “understanding”) from Madison’s *Notes of Debates* in the Philadelphia Convention and from the essays published in 1787 and 1788 as *The Federalist*. But the debates were never intended to be part of public record; the delegates swore themselves to strictest secrecy. The *Notes* were a private project of Madison’s, not an official record of the Convention. They were not published until Madison’s death in 1836, largely because Madison did *not* want people to rely on them for constitutional interpretation. In fact, Madison said repeatedly that the “intent” of the Philadelphia delegates was largely irrelevant to interpreting the document they wrote.

The Federalist, the second common source of “original intent” or “original understanding,” is a bracing and fascinating work of political theory. It was not

written as a book, but as a series of what we today might call “op ed” articles for newspapers. A current volume of *The Federalist* contains eighty-five essays hastily written by one of three major figures: Madison, who was present every day of the Convention; Hamilton, who attended very few of the sessions; and John Jay, who was not a delegate at all.

These essays were also a private project—the authors did not ask the Convention for permission to write them or show them to other delegates for their approval. The essays were most assuredly not designed as an explanation of “intent” to future generations; they were aimed at influencing the voters of one state, New York. They are, in short, a partisan document.

There’s reason to think that *The Federalist’s* authors, pressed by a desperate political struggle, said some things they did not really mean. We know for a fact that Madison’s defense in Federalist 62 of equal representation in the Senate, lukewarm as it was, was written between clenched teeth. His friend Thomas Jefferson tried to console him for the unpleasant task of explaining parts of the Constitution he despised: “With respect to *The Federalist*,” Jefferson wrote Madison from Paris after reading the essays, “[i]n some parts it is discoverable that the author means only to say what may be best said in defence of opinions in which he did not concur.”¹⁴

Nonetheless, because the authors write brilliantly, because they pretend to be one person named “Publius,” and because “Publius” displays the good salesman’s certainty that every aspect of the product is perfect in every way, many people who prize “original intent” or “understanding” have come to regard the essays also as a kind of secondary scripture, a set of divine epistles, with Publius in the role of St. Paul. One scholar recently explained that *The Federalist* should be viewed in almost precisely the terms often used of the Bible: “Use of a single pseudonym suggested that *The Federalist* possessed a uniformity of intent: that *The Federalist* was to be read as the work of one mind, not three, and was coherent throughout.”¹⁵ Not only coherent, he adds, but also eternal: “The teaching of *The Federalist* was intended to be true for all times and all places.”¹⁶

This scriptural faith rests on even shakier ground than does a belief in what we might call the inerrancy of the Constitution. As a mild gesture toward proper reading, I pledge here and now that nowhere in these pages will you find a quote from *The Federalist*. We are here to read the Constitution itself.

Anyway, even if we could somehow find the “legislative history” of the Constitution (like William Martin’s imaginary “lost Constitution”), there is a further question dogging this way of reading the Constitution. If a court misconstrues the “intent of Congress” in reading a statute, Congress can always change the statute. This happens regularly, when Congress changes a law’s wording to “over-rule” a judicial reading of it.

But the Constitutional Convention does not sit. Its members are all dead, and so are the members of the ratifying conventions that approved it. We cannot revise what they wrote, without great effort. Why should their long-ago “intent” or “understanding” bind us today? If their intent was that we should not interpret the Constitution for ourselves, then their intent was undemocratic, immoral, and just plain silly. Our Constitution today is binding because of our living allegiance to it, not because of its pedigree. And our intentions and understandings matter far more than those of the dead.

Finally, the quest for “original intent” or “original public meaning” involves minute and highly technical discussions of etymology of words, the evolution of language, and the intellectual history of Anglo-American society. It is, in short, a scholastic activity; it does not just smell, but actually reeks, of the lamp. Ordinary citizens have no standing to engage in this pursuit. If we accept it as determining the meaning of the Constitution, we are thus delivered into the hands of those, like historians, who have special knowledge of these things, or justices, who usually do not but believe they do.

The document binds us, the living, together as a nation today, and perhaps thus what should matter is what the words mean to us, the living, today. And if we take Justice Scalia at his word, then “reasonable construction” of the words does not deliver our fundamental law into the hands of a priesthood. If “reasonable construction” of written law is the intent of statutory construction, surely we should not aim for less when we read the Constitution as law.

Bible or statute—these two, however, do not exhaust the ways of reading a text. I can name some others—certainly you can too. In any text, an engineer may see a blueprint, a chef a recipe, a doctor a disease. “Law, say the gardeners, is the sun,” the poet W. H. Auden once wrote.¹⁷ Each of us sees in the world around us what we love and understand in it, and reading is no different from seeing.

Before I loved the law I loved literature and poetry, and as I read the Constitution—despite Doctorow’s dour evaluation—I do hear poetry. Does that sound outlandish? Some would think so. “The federal Constitution is not a poem, a novel (chain or otherwise), a manifesto, or a treatise. The federal Constitution is a blueprint—an instruction manual, if you will—for a particular form of government,” two legal scholars wrote recently.¹⁸ Another eminent scholar rather grandly christened the idea of Constitution as poetry “the Aesthetic Fallacy,” explaining that “people in the grip of this fallacy suppose that the Constitution is like a poem, a symphony, or a great work of political philosophy. Each word and every phrase must come together to form a harmonious and pleasing composition.”¹⁹

The later “definition” of poetry tempts me to ask, “Are you sure you understand what a poem is?” No one who has read widely in poetry could imagine that “each word and every phrase must come together to form a harmonious and

pleasing composition.” By tradition, poetry can express a narrative (as in ancient epics), embody drama (as in classic drama), or give vent to emotion. Most of the poetry we read today is *lyric* poetry, poetry descended from ancient songs sung to the accompaniment of a lyre. Today’s “literary lyrics carry their own music,”²⁰ and the combination of sense and sound is designed to evoke an emotional response in the reader. Even within the lyric genre, good poetry is not all lonely clouds and daffodils any more than good music is all “moon” and June. Lyric poetry may be jagged, unharmonious, partial, confusing, deliberately or unintentionally misleading, and even horrifying; consider, for example, Allen Ginsberg’s masterwork *Howl*, which begins,

I saw the best minds of my generation destroyed by madness, starving
hysterical naked,
dragging themselves through the negro streets at dawn looking for an
angry fix. . . .²¹

Poetry is, as the famous literary scholar Harold Bloom has written, characterized not so much by airy beauty as by “figurative language, concentrated so that its form is both expressive and evocative.”²²—words that in novel combination stand for or suggest meanings beyond those we find for them in dictionaries. I see figures—metaphors, analogies, and others—in the Constitution’s text. Moreover, some of the text really does carry its own music, much like a lyric poem.

The wider genre of poetry throughout literary history has also included other forms, most particularly epic poetry, whose wide sweep and narrative drive are the very expression of a civilization’s soul. An ancient epic was, like the Constitution, the work of many hands—oral bards elaborating and refining the stories of figures like Gilgamesh or Achilles. The heroes’ deeds embody their cultures, as the Constitution embodies ours. Epic poems, like the Constitution, are assembled in part from “formulas” already known to poet and audience. Homer’s “wine-dark sea” has some kinship to legal terms used by the Framers, such as “due process of law” and “life or limb”—they are brief evocations of complex cultural ideas, of the evolving Anglo-American idea of law and the history of criminal punishment in our culture.

Homer’s verse in particular is often constitutional: much of *The Iliad* and *The Odyssey* depict law and government in his imagined version of Bronze Age Greece. Agamemnon presiding over the assembly of warriors on the beach before Troy is perhaps the earliest model we have of a deliberative body like the US Congress. Penelope and Telemachus, in their struggle against the suitors who demand the wealth and throne of Ithaca, are dealing with potential violence in the transfer of ultimate power, a problem that bedeviled the Framers of Article II and those of the Twelfth, Twentieth, and Twenty-Fifth Amendments.

Homer’s broad vision, his sweeping diction, and his raw enthusiasm for all of human life make him to this day the greatest poet in Western culture. Walt Whitman, who consciously aspired to that kind of greatness, is America’s Homer. Whitman was also deeply influenced by the Constitution, which he studied during his years as an editor and a political journalist. In many ways, he considered his great, much revised epic *Leaves of Grass* a companion work to the Constitution, a document that would constitute the American soul much as the Constitution brings into being its government. Generations of children have learned such verses as “I Hear America Singing”; their vision and diction are part of our heritage as surely as the Bible and the Constitution. Whitman’s poems often consciously depict the process of “singing” America—putting our nation into words. What better metaphor for constitution-making could there be?

“I am large. . . . I contain multitudes,”²³ Whitman wrote—and the multitudes he sought to contain were us, and our country, and “the song of the throes of Democracy.”²⁴ We can learn a good deal from comparing the Constitution to Whitman’s work, and noting both what is in the text and, as all good readers of poetry must do, what is not.

These examples propose four modes of reading—scriptural, legal, lyric, and epic. In what follows, I will return to them over and over—not so much because they are the *right* ways of reading as because they are the ways of reading I delight in and partially understand. What follows is my own reading of the Constitution. It is in part a lawyer’s reading, to be sure, focused some of the time on the meaning of clauses and commas; but it also supplies some means of interpretation that lawyers often do not use. Lawyers enjoy splitting texts up into pieces; when they are done with them, they too rarely stitch them up into a whole again. It is common in legal analysis, for example, to take Congress’s Article I Power “To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes” and divide it solemnly into three self-contained entities—the “interstate commerce” power, the “Indian commerce” power, and the “foreign commerce” power—then consider one of them in isolation. In literary terms—that is in terms that seek an understanding of a text beyond an immediate, specific application—this makes no more sense than trying to analyze, in the quote from Ginsberg’s “Howl,” which of the “best minds of my generation” were “starving,” which were “hysterical,” and which were “naked.”

Readers of poetry, epic, and Scripture, at their best, look for the whole as well as the part. They remember to ask themselves what sort of text they are reading—invocation, elegy, psalm, commandment—and they ask how it fits into other parts of the work.

Let me emphasize what this book is not. It is not a formal legal commentary, of the sort written by Chief Justice Joseph Story in 1833 and carried forward by brilliant scholars like Akhil Reed Amar today. These are wonderful books either

for browsing for an evening of reading; but I have been as careful as possible not to absorb their reading and instead offer my own. A scholarly monograph would quickly become a dialogue between me and those who have written before me; I want this book to be a conversation among author, reader, and text.

Second, I will not explain, as some scholars do, the *real meaning* of the Constitution. After two decades of study, I don't know it and often doubt that it exists. I certainly do not propose to offer comprehensive explanations drawn from history—*this is what the Framers said, this is what they were thinking, this is what they must have meant*. Nor is my subject a detailed explanation of Court precedent. There are many very fine books that offer this kind of analysis. I read them with pleasure but also with some bemusement.

They bemuse me because, to begin with, they do not agree one with another, and to accept any of them I must often deny what I read in the text. For another, too much of this kind of historical and doctrinal reading can make a reader weary, with the fatigue Whitman depicts in "When I Heard the Learn'd Astronomer." After listening to a recitation of the astronomer's proofs, figures, charts and diagrams, the poet writes that, "tired and sick," he left the crowded lecture-room and

*wander'd off by myself,
In the mystical moist night-air, and from time to time,
Look'd up in perfect silence at the stars.*²⁵

After twenty years of late nights under the lamp, and many hours in the crowded lecture hall, I confess that the Constitution for me sometimes still seems as distant as the stars. But every time I look at it in "perfect silence"—not as a learn'd astronomer but as a reader capable of wonder and confusion—it shows me new and surprising things.

I am approaching the reading ahead, then, as a reader in the mystical moist night-air. I know what I think I know; I am well aware of what I do not know. As a reader, I don't know more than you do, and I want us to read together.

In his essay, "Good Writers and Good Readers," the novelist Vladimir Nabokov suggested that readers should read great texts without critical theory or specialized training, but armed with a dictionary, some imagination, a good memory, and some artistic sense.²⁶ I have, as best I can, strapped this armor on, and I will battle the text only as someone who aspires to be Nabokov's good reader.

From time to time, I will consult a dictionary—particularly, when I encounter specialized legal terms. I may mention the Supreme Court, particularly when I think the Court has read the text wrong (or at least oddly), and I will even look into history, not because this is a historical guide but because some of the phrases in the Constitution are so opaque that any sane reader would wonder what its

framers thought they were talking about. (History shows us that in some cases, they didn't know what they meant any more than we do.)

Never if I can avoid it will I tell you the reader what *the meaning* of the words is. Instead, I will ask myself, and you, "What *could* this mean? What meanings could we draw from this? How many of them are plausible, and how would we decide which of them is best?"

I expect that readers will not agree with much of what I say. Some things I consider clear will seem murky to you. In other places, you may think I am introducing ambiguity into provisions any child should understand. So be it. Constitution reading is, like baseball, an American national pastime. Kids love baseball because any American can stand up and boo the ump. Feel free to boo or cheer as we move along.

I do not aspire to be your teacher, but to be what Whitman would have called your *camerado*, a companion on the open road. We will wander through the Constitution, and loaf and invite our souls.

To paraphrase *Leaves of Grass*, do I contradict myself? Very well, I contradict myself. And if you contradict me, very well. For every atom belonging to me as good belongs to you.

Preamble

"Tell me, Muse, how it all began"

"We the people." Whatever it is, it is not a statement of fact; and whatever else it is, it is also a distraction.

Many Americans remember nothing of the Constitution's Preamble but those words. They burst into the mind; they tell us we are reading no ordinary document, indeed not even an ordinary law. We are being addressed by ourselves, looking into our own faces; we are being welcomed to a party where we are not only honored guests but also hosts. Who remembers what is *said* at a party? Often we don't even remember the occasion—was it a birthday, a wedding? What we remember are smiling faces, warmth, and the feeling of belonging.

There are two problems with these words. First, the Constitution may not be in fact our party; and, second, in this context, both the occasion and the speeches matter as much as the glow of fellowship. The claim that "we" wrote the document is false. Someone has written a Constitution, and done so for specific reasons. We need to understand both hosts and occasion.

What is meant by "we the people"? In no real sense was the original Constitution written by the people. As every American schoolchild learns, the authors were a group of some fifty-five men, distinguished in the new nation by their wealth and prominence, meeting in the Pennsylvania State House in Philadelphia between May 25 and September 17, 1787. The "United States" already existed as a society and an independent country. In fact, the Convention was held in the eleventh year of Independence, the sixth since Britain had recognized American freedom as an accomplished fact.

The Convention assembled under conditions of strictest secrecy. The "people" were to take no part in the drafting; indeed, they were not even represented there. The delegates were sent by their individual state legislatures, and each state, whether tiny Delaware or mammoth Virginia, had one vote. The people had not summoned them; the convention had been called by the Congress, a

body in which again the states, not the people, were represented. The people had no notice that the meeting would write a new constitution in their name; the formal purpose of the meeting was to "propose amendments" to the existing constitution, the Articles of Confederation.

No one was told that these men might, in contemporary terms, "go rogue" and write a new fundamental law. And when their work was done, they instructed (in Article VII) "the people" to approve or disapprove. No changes; no amendments. Just a simple "yes" or "no."

Nonetheless, they presumed to speak in the voice of "the people." The choice may have been adventitious. The first draft of the Preamble, reported by a committee on August 6, 1787, read, "We the people of the States," then listed each by name.¹

That has a very different sound. More modest? Perhaps—though equally false. Not every state named in the draft was even present in Philadelphia. (Rhode Island scorned the Convention, and later was slow to ratify the Constitution.) Beyond that, what of those places that were not yet states? Would the Constitution have established an order of precedence, a sort of First Family of states, with others implicitly inferior? Would it have spoken as powerfully as it does to the people of Vermont, then independent, or Kentucky or Ohio, then being formed, or Louisiana or Oregon, undreamt of? The words "we the people" have a contemporary sound; in 1787 they were positively futuristic. The words, "we the people of the states" would instead have been archaic on the day of publication and would emphasize to any contemporary reader the historical distance between the Framing and today. Whatever impulse led the drafters to make the change has led to profound consequences, certainly in rhetoric and probably in politics. It was an inspired act of ventriloquism.

But it was more than pretense. It was aspirational. The Constitution is not a prayer—prayers are addressed to someone, a superior, either an earthly king or a divine lord, and great care is taken to name the addressee and less to characterize the speaker. The Preamble does the reverse. The speaker is "the people," the words are addressed to the world at large. But if not a prayer, what? Consider these words: "Goddess, sing the rage of Peleus' son, Achilles . . ."² Or these: "Tell me, Muse, how it all began."³ These sound like prayers, addressed to Calliope, the Muse of poetry, who was herself a goddess. But they are in fact, just like "we the people," a deceptive claim of authorship. It is not I, the poet, who brings you the tale of Achilles and Hector, but Calliope herself. I did not see Aeneas's meeting with Dido in Hades, but Calliope surely did. In epic poetry, the poet speaks the Goddess's words; in constitution-making, the drafters speak to us in our own voice.

"We the people" are thus not precisely impersonated but invoked. The act is not one of imposture but of aspiration—let me speak in the voice of the Muse,

let me give voice to the spirit of the people. In "By Blue Ontario's Shore," Walt Whitman writes of being accosted by a grim phantom (probably history):

Chant me the poem, it said, that comes from the soul of America,
chant me the carol of victory,
And strike up the marches of Libertad, marches more powerful yet,
And sing me before you go the song of the throes of Democracy.⁴

So successful has the Preamble's invocation been that the generations that came after have heard the words as their own, have come to believe the fiction that they gave birth to the Constitution, that it issued from, rather than being all but imposed upon, "the people." It has been too successful, in fact—for the Preamble was not only designed to give a kind of epic authorship to the Constitution but to spell out its purpose, to explain why "we the people" had brought it into being. Those purposes are as important as the invocation.

Therein lies the distraction. Quick—what are the purposes of the Constitution as laid out in the Preamble? Most people cannot recite them by memory. Here they are: "to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity." These purposes are as relevant as the claim of "authorship," but the brilliant rhetoric of "we the people" all too often dims their importance. This passage has some striking qualities that should bear on our understanding of the Constitution.

First and most important, they are national purposes. Americans often think of the Constitution as a defensive document, designed to shield "the people" against the reach of government and "the states" against federal authority. But where is either in the list of purposes? In fact, the purposes are active—"form, establish, insure, provide, promote, secure"; strong verbs that signify governmental power, not restraint. "We the people" are to be *bound*—into a stronger union. We will be *protected* against internal disorder—that is, against ourselves—and against foreign enemies. The "defence" to be provided is "common," general, spread across the country. The Constitution will *establish* justice; surely this means not merely the Aristotelian ideal of giving each her own, but a system of justice, courts, judges, and jails. The new Constitution will promote the "general" welfare, not welfare varying by condition or by place of residence. It will *secure* our liberties—against whom?

There's an ambiguity here; liberty could be secured against foreign enemies and domestic subversives, or against the new government itself. The latter interpretation is soothing to American ears; but in this context, it seems far-fetched. The clause appears in a list of things government is to do, not things it is not to do; a list of powers, not of prohibitions. The new government, it would appear, is not the enemy of liberty but its chief agent and protector.

The purpose then, in its most plausible reading, is to create a strong, active, national government, one whose benefits will flow directly to the people who create it. "Limited government" as an idea receives at best an incidental nod; the states are nowhere to be found. It would seem legitimate to interpret the rest of the Constitution *purposely*, as a remedial statute is interpreted in terms of the evil it seeks to remedy. If one interpretation of the document will further these national and public purposes more fully than another, we have no obligation to be "neutral" between them, or to finely parse the grammar of other constitutional provisions considered in isolation from the entire text. The purposes laid out in the Preamble are broad and general; but they are not meaningless. They might constitute for constitutional interpretation what Aristotle called "special topics" peculiar to a specific field of discourse, mental "places" that orators and advocates could visit to find subjects for their speeches and writings, means of persuasion directed at the particular audience. These "special topics" may not answer constitutional questions; but they can shape the way we ask them.

Some things are conspicuous by their absence from this list of topics. (Remember, we read poems by what they do not say as well as by what they do.) Constitutional historians often see the Constitution as first and foremost an economic or commercial pact, creating a continental free-trade zone and an authority that could regulate and foster the economy by coining money and protecting commerce. There is no question that such purposes were in the mind of the Framers in Philadelphia. From the oldest, the diplomat and commercial printer Franklin, to the youngest, the lawyer and land speculator Jonathan Dayton, these prosperous men were caught up in the world marketplace and aspired to extend its reach and ease impediments to its workings. (In that, as in other things, they were not fully representative of "we the people"; many Americans in 1787 lived on small landholdings, grew food crops, and sought no place in the thickening web of eighteenth-century global trade.)

But when they spelled out their purpose, "trade" and "prosperity" were not mentioned. The document's stated aims are wholly public, not private. "We the people" hope for justice, security, and liberty, not for wealth.

Another idea is strikingly absent. "All men are created equal," the Declaration of Independence had said. The Preamble makes no such claim. The new nation is to have security, order, law, liberty—but these things can exist without equality. In North America, vast inequalities by law were not only tolerated but enforced—between slave and free, between apprentice and master, between woman and man, between Native American and white, between "free black" and "free white." "We the people" show no disposition to disturb this state of affairs.

In fact, it is not just the Preamble but the entire Constitution of 1787 that is silent on the subject. Human equality as an explicit concept will not appear in the document until 1868, eight decades after the Federal Convention.

(The word "equal" appears in the Convention's Constitution, but it refers almost exclusively to equality among states.)

Finally, "we the people . . . *ordain* and *establish* this Constitution for the United States of America." The two words can be seen as boilerplate, like a lawyer's claim that his client did not commit fraud "in any way, shape, fashion, or form." But taken separately, the words have different connotations. "Ordination" is sacerdotal; priests and rabbis enter into their sacred functions by way of ordination. The Christian sacrament of ordination for many believers even today refers to a physical touch that brings in an unbroken chain the authority of Christ's own Apostles. To "ordain" a Constitution or a government is more than simply to set it up.

"Establish" is already making its second appearance in the Constitution. The people seek to "establish" justice, and in order to do so they do now—not in the future but at the moment they speak—"establish" the Constitution. To "establish" a government means to set it up; but it means something more, and in 1787 meant it even more strongly. "Establishment" referred to churches—more than half of the thirteen states had established churches, official links between God and the state supported by tax funds. Not very long before, established churches had enforced conformity with fire and the rope. Later the First Amendment would spell out that there was to be no national establishment—religious establishment, that is. The new Constitution, however, is brought to us by a Muse, ordained by the authority of the People, and established at the center of our common life. We can read these words as creating a national religion, one at which we still worship.

Surely the Preamble, no matter how scholars may grumble, is a poem. In 1950, the poet Charles Olson defined a poem as "energy transferred from where the poet got it . . . by way of the poem itself to, all the way over to, the reader . . . a high-energy construct and, at all points, an energy-discharge."⁵ Beyond invoking the Muse, beyond specifying a purpose, the Preamble crackles with that "energy-discharge." As the lightning brings life to Frankenstein's monster, the Preamble quickens the structural provisions that follow.

In the beginning, the nation is without form and void. There is darkness; then someone speaks in our voice: *Let there be law.*