1.00 – OPENING STATEMENT

1.01 - Publius Again

There’s a lot to be said for the U.S. Constitution, but from where I sit, looking out my law office window toward the Creek County Courthouse, nobody seems to be saying it. That made me think we needed another Publius again. We needed a new defense of the Constitution like in the old *Federalist Papers*. That made me think, Why not me? In these articles for the “Daily Herald,” I’ve been trying to keep you current on what’s goes on with the law and in the courts. What’s going on with the Constitution no more than the same topic write large. But what gave me pause was the deserved reverence for the great originals. Anyone who sets out to rival their eloquence is riding for a hard fall. But if we value the Constitution, someone has to appear for the defense. Someone has to try and do their best. The long and the short of it being, I decided to have a go. I figured I had at least this much going for me. I could stand on their shoulders and had the over two hundred years experience since.

Back in 1787 and 1788, three of the Founding Fathers (Alexander Hamilton, James Madison, and John Jay) collaborated on writing the *Federalist Papers*, 85 essays that appeared in the New York newspapers. They were advocating for ratification of the Constitution. Following the custom in their day, they didn’t write under their own names, but under a joint pseudonym – *Publius*. That referred to the Roman *Publius*, also called *Publicola*, the friend of the people, who played a lead role in overthrowing the last of the Roman kings and founding the Roman Republic, traditionally in 509 BC. Hamilton, Madison, and Jay saw themselves as taking up a similar role again, as trying to found a new American republic.

Hamilton receives the credit for *Federalist No. 1*, and he began with these words, “After an unequivocal experience of the inefficiency of the subsisting federal government, you are called upon to deliberate on a new Constitution for the United States of America.” In other words, he was saying that “the subsisting federal government” (since 1781 under the Articles of Confederation) was “inefficient” and we needed “a new Constitution.” But if we could imagine that brilliant gentleman to come back to life, sit down at his desk, dip his quill pen in the inkwell, and begin to write again, he would have to reverse that start. He would have to begin with something like, “After over two hundred years unequivocal experience of the efficacy of the existing Constitution, we are now constantly told that the Constitution is dysfunctional.”

At least, that’s the sort of thing one reads all the time. Take a 2012 article in “New York Times,” bearing this title, “Our Imbelic Constitution.” The contributor, a distinguished constitutional law professor at a leading law school, went on to inform us that, “Critics across the spectrum call the American political system dysfunctional, even pathological. What they don’t mention, though, is the role of the Constitution itself in generating the pathology.” During the budget crisis the same year, the “Times” followed with another article titled, “Let’s Give Up on the Constitution.” This time the contributor, another distinguished professor of constitutional law from a prestigious university, told us that, “As the nation teeters at the edge of fiscal chaos, observers are reaching the conclusion that the American system of government is broken. But almost no one blames the culprit: our insistence on obedience to the Constitution, with all its archaic, idiosyncratic and downright evil provisions.”

But I want to say, Hasn’t America had over two hundred years unequivocal experience of the efficacy of the existing Constitution? These critics must not think so. A dysfunctional constitution can’t have functioned well. A pathological constitution can’t have produced a healthy body politic. Then what do they say the malfunctions and maladies? They don’t hesitate to tell us. In addition to filling the editorial pages, their books fill the mainstream and scholarly press with titles such as *The Frozen Republic: How the Constitution is Paralyzing Democracy* (1996) or *Our Undemocratic Constitution* (2006). Who has the time to read all this stuff? But who doesn’t catch the drift?

Hamilton wrote in *Federalist No. 1*, “I will not amuse you with an appearance of deliberation when I have decided. I frankly acknowledge to you my convictions, and I will freely lay before you the reasons on which they are founded.” Let me follow his example. “I frankly acknowledge to you my conviction” to answer these critics. After what I hope you will agree more than “an appearance of deliberation,” I am decidedly a friend to the Constitution. It only remains for me to lay before you the reasons on which my friendship is founded that you may decide for yourselves whether to be or remain a friend.

1.02 – Half Empty or Half Full

If you’re willing to sit on this jury, there’s an open invitation. It’s the case of the critics (the plaintiffs) versus the Constitution of the United States of American (the defendant). I’ve not so modestly appointed myself as the lawyer for the Constitution (to appear for the defense). If you’ve ever watched a trial, you know that after the jury seated and sworn to fairly try the case, the lawyers make their opening statements. That’s their chance to tell the jurors what the case about and what the evidence will show. Then here goes my opening statement.

Ladies and gentlemen of the jury, used to seem to me that when my generation in grade school, as long ago as the 50s, Americans were optimists about the Constitution. They regarded their constitutional cup as full to overflowing. Used to seem to me around our college years, the famous 60s, they began to turn pessimists. They often regarded the same cup as half empty (at most), the vintage that suited past tastes as now more than a little distasteful. But I’ve come to learn the pessimism goes way back, although lately the cup does seem draining faster.

Probably the past optimism was fullest around the time of our nation’s youthful maturity, say around 1900. Back then, most Americans seemed to regard the Constitution like the sacred text of a civic religion. By following this faith, America was seen as having become “one nation under God, indivisible, with liberty and justice for all.” This same faith was seen as holding out the promise of a better life to other peoples of the world. Dedicated in this era in 1886, the imagery of the Statue of Liberty well conveyed the reigning orthodoxy. A gift from the French people, her name properly translates as “Liberty Enlightening the World.” Her right arm holds aloft the torch of progress. Her left arm embraces a tablet with the date of the Declaration of Independence (July 4, 1776). A broken chain lies at her feet. At the base the plaque with the poem by Emma Lazarus reads, “Give me your poor, your tired, your huddled masses yearning to breathe free, … I lift my lamp beside the golden door!”

This old time civic religion preached “the American dream,” the hope of a better life for you and your children. The preachers’ sermons urged, Leave behind the Old World. Sail away from those shores ruled over by privilege and class. Come to this New World, the “land of opportunity.” On these shores good values and hard work were the rulers. Horatio Alger’s rags to riches novels have gone out of fashion, but once made such optimism a staple of popular fiction. But never mind the fiction, didn’t the nation teem with real life success stories? Read a biography of Andrew Carnegie. Born poor in Scotland (1835), emigrated with his parents at the age of thirteen (1848), and by 1900 (age 65), owned Carnegie Steel Company and one of the richest men in the world. Weren’t there thousands of such real-life success stories across America, even if not quite so spectacular? Then how not see earthly salvation on a vast scale?

But already, some skeptics saw this civic religion as riddled with hypocrisy and fraud. They called for a cleansing of the temple, sometimes rejected the faith altogether. One of the earliest and longest running denunciations cried out against the pollution of slavery within the precincts. As long ago as 1833, the abolitionist David Lloyd Garrison called the Constitution, as a “compact” which bound the non-slave states to the slave states, “a covenant with death and an agreement with hell.” While during industrialization, the progressives of that era began to denounce the civic religion as nothing more than worshipping at the Temple to Mammon. In 1907, a progressive historian wrote, “It may be said without exaggeration that the American scheme of government was planned and set up to perpetuate the ascendency of the property holding class.” They called for casting out the buyers and sellers and overturning the tables of the moneylenders. In our present time, we hear increasing complaints about “structural flaws,” such as the Electoral College that can elect a president who wins only a minority of the popular vote or the separation of powers that can lead to gridlock. Over the years, the skepticism has reached a bottom where a Jeremiah was recently heard preaching from his pulpit, “No, no, no. Not God Bless America; God Damn America!”

Well, our constitutional cup may be half full, filling, or full to overflowing. It may be the fullest cup around the table. It may be like the jars at the wedding feast in Cana, which constantly refilled with new good wine. But when people start to regard the cup as drained, leaving a sour taste behind, it can turn into a self-fulfilling prophecy. “The sea of faith was once, too, at the full, but now I only hear its melancholy, long, withdrawing roar.” If enough people withdraw their belief in our fathers’ constitutional faith, it will become a dead religion. But there’s no atheism or agnosticism. You have to practice a constitutional faith. If you don’t choose a constitution for yourself, someone else will impose one on you. Nor is one constitutional faith as good as another. Don’t we know of false constitutional faiths like fascism or communism that led their believers into a wasteland? We better figure it out. What’s the true constitutional faith, leading to the Promised Land?

1.03 – Come Into My Parlor

Ladies and gentlemen of the jury, on first hanging out my shingle in this town, an older lawyer told me practicing law was a lot like loafing. That can be true, if you just want to follow some easy, well-worn path of the law and make a comfortable living like he did. But followed far enough, all the paths of the law lead into a legal labyrinth. A more committed lawyer can’t but follow those paths. The harder you try, the more the law becomes a toil, time-intensive, labor-intensive. It’s an all-consuming choice. “Then come into my parlor said the spider to the fly.” By inviting you into my new defense of the Constitution, I’m not promising you a rose garden. Constitutional law is the most central law, right in the center of the tangle. When King Ptolemy asked for an easier way to learn geometry, Euclid replied, “There’s no royal road to geometry, your majesty.” There’s no easier way to follow all the twists and turns in this labyrinth than by the sweat of our brows.

Ladies and gentlemen, in the *Federalist Papers No. 1,* Alexander Hamilton wrote, “I propose, in a series of papers, to discuss the following interesting particulars,” and he set forth a lengthy agenda, concluding, “In the progress of this discussion, I shall endeavor to give a satisfactory answer to all the objections [to the Constitution] which have made their appearance that may seem to have any claim to your attention.” In my new defense of the Constitution, I don’t think I can do better than to try to follow his example. I propose to discuss the Constitution and try to answer “all the objections” along the way.

But we won’t be discussing quite the same Constitution that he discussed. It’s changed a lot since his day. We’ll have to discuss those changes, the Constitution as it has become. Moreover, our agenda has to reach beyond the Constitution itself. The law, including the constitutional law, is never more than an instrument and an instrument never without some purpose. Then unless we understand the purposes, how can we ever hope to understand how well or poorly the instrument designed to serve the purposes? And the Constitution is a complicated instrument with a great many moving parts, such as Congress, the presidency, and the courts, all designed to interlock and interact to serve a great many purposes, such as the Preamble says, “to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty.”

You’ll agree that to understand all these “interesting particulars” must set forth a lengthy agenda. Our situation is really worse than a lawyer just researching the law. It reminds more of a good friend of mine (not a lawyer) who got sued. One day I came across him up in the law library that the county maintains on the top floor of the courthouse, trying to look up the law on his case. An extremely intelligent guy, he was perfectly capable of understanding what he read. But there he sat, surrounded by a couple thousand law books, and not being trained in the law, he didn’t have the context. He was just finding some bits and pieces. He might as well have tried to put together a jigsaw puzzle without the picture on the box and without knowing whether some of the pieces were missing. Then don’t we find ourselves in an even bigger library? All around from ceiling to floor stretch books on history, political science, sociology, and psychology. To understand the purposes of the Constitution and how well it serves those purposes, we’re going to have to find all the relevant pieces and fit them together into the right picture.

Then you’ve been warned. Gird your loins. As the self-appointed lawyer for the defense, I’ve made the commitment to present the case to you. You’ve got to make the commitment to sit as the attentive jurors on the case, paying careful attention to the evidence throughout, letting nothing escape your notice. If my task not an easy one, neither is yours. My client (the Constitution) is a very serious and complicated gentleman. He can’t be understood on a superficial acquaintance. He’s not a solitary, but a sociable sort. To understand him, we have to understand his social nature and his place in society. He’s an institution. To understand him, we have to understand his institutional nature. The Founding Fathers brought him to life with a single act of creation with the Constitutional Convention in 1787, yet he’s the product of a long history. To understand him, we have to understand his history. He’s grown and changed a lot over the years, too. To understand him, we have to understand him as he has become. Only by coming to thoroughly understand him can we put ourselves in a position to fairly and intelligently judge him.

If all this sounds a daunting task, why would we want to make the effort? Well, first of all, that reminds of still another legal war story. When I had the honor to serve as a judge, I had a good ole boy in front of me one day, an affable sort, who according to his own testimony, had managed to spend his life mainly coon hunting and drinking a little whiskey. He didn’t have much formal education, but mentioned he liked to read. When somebody says they like to read, I’m always curious to know what. His response was, “I like to read encyclopedias, anything. I just like to know.” Wow! He was a true child of nature. Aristotle says, “All men by nature desire to know.” Then we’ll want to make the effort simply because we desire to know. What could be more in our nature?

But who doesn’t know the Constitution is foundational? When some self-appointed engineers start digging around our foundations, we better have them up for an inquiry. Maybe they’re undermining or weakening the foundations. But no doubt they’ll protest the very best motives. They’ll claim that like the architects who built those old Gothic cathedrals, they only aspire to raise towers that soar ever higher to Heaven. We might be interested in building higher ourselves. But some of those old churches collapsed during their construction. Their builders aspired beyond their science. Then good intentions aren’t enough. We need some convincing science. We don’t want our constitutional structure to fall down around our heads and have to live in the ruins.

But whether we want to make the effort or not, the case against the Constitution is a class action, and we’re all joined as parties. We’re all living in the same constitutional structure, and if the structure is condemned, we’re all going to have to find someplace else to live. We better not let the judgment go against us by default. We better choose to make the effort required to defend our interests in the case.

The Constitution not only a very serious and complicated gentleman, he’s a very important one. John Jay wrote in *Federalist No. 2*, “When the people of America reflect that they are now called upon to decide a question, which, in its consequences, must prove one of the most important, that ever engaged their attention, the propriety of their taking a very comprehensive, as well as a very serious view of it, will be evident.” In the next article, let me try to convince you that neither the importance of the question, the consequences of deciding it, or the propriety of our taking a very comprehensive and serious view of the Constitution has declined in the intervening years.

1.04 – Covered with Flies

Ladies and gentlemen of the jury, let me tell you about an adventure my father went on right after World War II. Before the war, he worked for the Gulf in the oil fields around Kiefer, Oklahoma. During the war, he served as a Chief Petty Officer in the SeaBees. After the war, one morning he stepped out his front door to look for a job. “It’s a dangerous business going out your door. You step into the road, and there is no knowing where you might be swept off to.” He was looking for a job in the green hills of eastern Oklahoma, but he found a job with Aramco (the Arabian American Oil Company) and was swept off to the arid deserts of Saudi Arabia. “Home is behind, the world ahead.” My mother and myself followed shortly after in his wake.

It was an adventure all right, and who would miss an adventure? And that adventure taught me that failure in government is not an option, although I didn’t grasp the lesson for a number of years. We crossed more than time zones traveling to the Middle East. We crossed into the zone of failed governments. We arrived where “the splendor of their early history has been dimmed … by economic distress, and by the debasing tradition of centuries of misrule.”

Our lives in Arabia were a blue-collar version of the British in India. We were the colonialists and lived the good life. Aramco recreated for us a version of small-town America in the wastes of the Arabian desert. The company shipped in all the necessities and most of the comforts from home. They had to. In those days, only a Lawrence of Arabia sort could have survived on the local economy. Down at the local souk, raw meat hung on hooks covered with flies. That image pretty much sums up their standard of living.

They say a picture is worth a thousand words. When I taught political science as an adjunct over at Tulsa Community College, I would show my class old black and white photos from those days in Arabia. To stick with the ever-present flies, one was picture of an infant in a mother’s arms, the mucous on its face covered with flies she didn’t even bother to shoo away. I was trying to make the point that failure in government is not an option.

I would go on to say that failure in government is the Four Horsemen of the Apocalypse (Famine, Pestilence, War, and Death). If that sounded like pitching it too strong, I asked them only to consider. What has happened throughout history can surely happen again. What happened elsewhere can surely happen here. Then consider what has happened throughout history and what has happened elsewhere.

How many has Famine (on the red horse) carried away? During the Irish Potato Famine from 1845 to 1852, about a million died, about an eighth of the population. Yet in those days, Ireland was still a part of Great Britain, and the country as a whole grew enough food to have bridged the Irish over. But no such bridge got thrown across the Irish Sea. Some early Irish accounts accused the British government of genocide (deliberately starving them), but later and more dispassionate accounts failed to prove so much. The British authorities had no malice aforethought to starve the Irish. Rather than first-degree murder, they were merely guilty of negligent manslaughter caused by mistaken policy and bureaucratic bungling. First, they failed to grasp the scale of the catastrophe, and second, they failed to grasp the scale needed for relief, which arrived too little or too late.

But governments can starve people without Mother Nature’s help, as shown between 1948 and 1952 by the Chinese Communists under Chairman Mao. His Great Leap Forward planned to transform China from an agrarian economy into an industrial juggernaut overnight. But so bad was the planning that the juggernaut went in reverse. China went from barely feeding her hungry masses to mass starvation. Much later with the Great Leader safely embalmed and on display in his Mausoleum, the Chinese government officially admitted to an astounding 14 million deaths, but unofficial estimates go as high as between 20 and 43 million.

But governments have starved their people not just by mistake, but in cold blood. Between 1932 and 1933, the Soviet Communists under Stalin deliberately starved to death millions of Ukrainians (the Terror Famine). The peasants had resisted collectivization, and that man of steel resolved to introduce them to the twentieth century one-way or the other. If they didn’t believe in the promise of his communist utopia, let them believe in the guarantee of communist terror. After forcibly exporting their grain, the communist authorities as forcible interdicted all aid. Known as the Holodomor (or Ukrainian Holocaust), some 7 million died.

Pestilence (on the white horse) usually hunts with Famine, starvation weakening the victims for disease to kill. But Pestilence can ride alone, striking down with such deadly weapons as the Spanish influenza, which between 1918 and 1920 killed some 50 to 100 million, some three to five percent of the world population. Nor do we ever drive Pestilence farther than just over the horizon. But out of sight should not be out of mind. Witness the recent (2014) ebola outbreak in Africa. Only government has the resources to avert or fight such plagues.

While as for War, who rides the red horse if not government? During World War II, the warring governments between them killed some 63 million, about 3 percent of the world population. While as for Death (pale rider, pale horse), has government not already glutted on death? Not to repletion, since governments have turned to genocide. The Nazis murdered about 6 million Jews and others in the Holocaust. The Soviet Communists murdered even more, 20 million being an often mentioned figure. But the Khmer Rouge of Cambodia achieved the all-time highest kill ratio. From 1976 to 1979, they murdered approximately 25 percent (2 million) of Cambodia’s population.

Do we say it can’t happen here? Why not? What do we require except failed government? We don’t even require malice aforethought like the Nazis or the Communists. All we require is the failure of good intentions like the British during the Irish Potato Famine. Those murdered by the worst tyrants in history are no more dead than those killed by bureaucratic bungling.

Writing and rewriting constitutions is a dangerous business. That’s because government is a dangerous business. You never know where you might get swept off to. Failure is raw meat covered with flies. Failure is the Four Horsemen of the Apocalypse. We don’t want to go off on such an adventure. Failure in government is not an option.

1.05 – Trust the Process

Ladies and gentlemen of the jury, one morning when still a young lawyer, on the first day of a jury docket, I walked into the main courtroom of the Creek County Courthouse. Potential jurors crowded the courtroom and spilled out into the halls. All the lawyers on hand were crowded together on the other side of the rail, tightly jammed into a narrow corner between the bench and the door to the judge’s chambers. It was like a herd instinct. It was like they were afraid of the jurors and trying to get as far away from them as possible. Jury trials are judgment day all right, and not a few have a cause to fear the Day of Judgment.

But ladies and gentlemen, in those days this county still boasted some of the finest trial lawyers who ever trod the boards. None of those guys must have had a case on the docket that day. They didn’t fear a jury trial any more than a matador fears a bullfight. To them a jury trial was no more than another chance to don their suit of lights and enter the ring to kill the bull (in the process killing the fatted calf). But despite their self-confidence, winning a jury trial is far from as guaranteed as a bullfight. Over the years, I’ve seen many a renowned trial lawyer tossed and gored in the courtroom, prostrate and covered with the blood of his dying case, wanting only somehow to rise and stagger to another venue, there to rinse away the bitter taste of defeat with some cool beverage, there to begin to restore the bruised tissues of the ego. But they’re a tough lot, the trial lawyers. Usually, they recuperate as soon as the next jury docket, rising to even greater heights on the steppingstones of their dead cases. But the process takes a toll. A lot of trial lawyers look on the verge of a coronary, and they’re not a long-lived breed.

Nope, winning a jury trial is seldom a guarantee. But as one of the best of those old Creek County trial lawyers (none better) used to say, “Trust the process.” He meant that a jury trial is a good process. He meant that a lawyer who knows his business and takes care of business should win the jury trials he should win and lose the ones he should lose. Not every time, since juries make mistakes and can go rogue. But the run of verdicts will square with justice. Having attended not a few of these spectacles both as an observer and a participant, my experience says he was right. A jury trial is a good process.

Ladies and gentlemen, why am I telling you this legal war story at the start of my defense of the Constitution? I’m trying to make a fundamental point that will carry all the way through. The Constitution or any constitution is more like a jury trial than a verdict. A jury trial is a process to render a just verdict, but doesn’t guarantee either party (the plaintiff or the defendant) a favorable verdict. In the same way, a constitution sets up a process to decide on laws and policies, but doesn’t guarantee the outcomes. A jury trial is a good process and the run of verdicts will square with justice. In the same way, a good constitutional process will lead to a run of good laws and good policies even though not every outcome as good.

Ladies and gentlemen, let me try to hammer home this point, which critical to my defense of the Constitution. In *Alice in Wonderland* the King of Hearts says, “Verdict first, and trial afterwards.” But in the real world, the verdicts don’t cause the jury trials, the jury trials cause the verdicts. In the very same way, the outcomes (the laws and policies) don’t cause the constitutional process, the constitutional process causes the outcomes.

What came first, the chicken or the egg? You aren’t faced with that dilemma. You know what came first. The constitutional process has to come before the outcomes, since the first causes the second. Before you can have a law, you have to pass the law. Then ask yourself a question. Unless you have a good constitutional process, how can you have good laws? Don’t we begin to see a good constitution is a necessary cause for good government and a bad constitution will cause bad government. “Be assured that the laws … grow out of the constitution, and they must fall or flourish with it.”

Ladies and gentlemen, if you will but grasp this point and keep it constantly in mind, you will immediately begin to see what’s wrong with most of the case the critics try to make against the Constitution. Their criticisms mainly amount to quarrelling with the verdicts. They didn’t get the verdicts they wanted or not as soon or as big as they wanted. But if the trial was fair, how can they complain about the verdict? If the constitutional process was fair, how can they complain about the laws and policies (the outcomes)?

Ladies and gentlemen of the jury, what’s this case about? Remember, it’s the case of the critics versus the Constitution. “It’s a constitution we’re talking about.” Then first and foremost, this case has to be about the constitutional process. It’s about whether the Constitution sets up a good process. But lest the critics accuse me of unfairly limiting the question, I don’t mean to do that. They’re perfectly within their rights to ask for not just a good process, but for the best process. We shouldn’t have to settle for a good constitution, if a better one available. But the evidence in this case will show that if the Constitution not the best process, it will puzzle our ingenuity to set up a better one. But I’ve run out of space and need to continue my opening remarks in the next article.

1.06 - The Lawyerly View

Ladies and gentlemen of the jury, to remember where we are in these articles, I’m signed on as the lawyer for the Constitution to defend it against the critics, and I’m right in the middle of my opening statement to you, the jury of public opinion. Let me proceed by asking a question. Do you think the Constitution more about your rights or your responsibilities? Let me tell you how most any lawyer representing you will answer that question. Ladies and gentlemen, I’ve watched them in and out of court for a long time. They view the Constitution as all about your rights, or to have it both ways, all about the responsibilities the government and others owe you. Lawyers make their fees by asserting their clients’ rights and the responsibilities others owe to their clients, not by asserting the responsibilities their clients owe to others (the rights of other people). As a result, the legal mind has come to view the Constitution as all about your “rights.” There they are guaranteed in the Constitution. All that remains for you, the public, to do is hire them, the lawyers, to claim your guarantees. The Constitution is the law. All you need do is “go to law.”

But ladies and gentlemen, as the lawyer for the Constitution, I take another view. And just as the other lawyers take their view based on their clients’ interests, I take my view based on my client’s interests. Peculiar, isn’t it, how a lawyer’s views tend to change depending on his client’s interests and so his own? However, before coming to my own view, let me say the lawyers seem to have persuaded you, the public, to share their lawyerly view. After all, who doesn’t want their “rights?” Viewing the Constitution from that angle makes sense to you, the public, for the same reason it makes sense to them, the lawyers. You want to claim your rights against others, and they want to make a fee by claiming your rights for you. As a result, both the lawyers and you, the public, have come to view the Constitution as all about your rights and the responsibilities owed to you.

To confirm how widespread this lawyerly view, only open your morning newspaper and you routinely come across headlines something like, “Muslim woman files a federal lawsuit alleging County Sheriff’s Officers forced her to remove her hajib in public in violation of her rights.” Or, “Lawsuit claims a question on the census form about their citizenship violates minority rights.” Or, “Lawsuit claims law forcing a baker to make a cake for gay wedding violates his rights.” Such headlines and such lawsuits appear never-ending. Is there anything the lawyers haven’t managed to make into a right that they can sue over and so make a fee from?

Or only listen to the way our public discourse constantly phrases our political controversies. “My client has a right to own a handgun,” or “My client has a right against prayer or Bible reading in the public schools,” or “My client has a right against racial discrimination,” or “My client has a right to possess pornography,” or “My client has a right against questioning by the police without an attorney present,” or “My client has a right to an abortion,” or “My client has a right against sexual harassment,” or “My client has a right against the death penalty,” or “My client has a right to marry a person of the same sex,” or “My client has a right to health care.” Rather than trying to make a complete list, we might as well ask, what political controversy hasn’t been phrased as a constitution right and then demanded as a constitutional right?

Ladies and gentlemen, it’s really amazing, isn’t it, how many rights the lawyers have discovered in the Constitution not originally found there? Back in 1789, no one would have imagined a right to abortion or same sex marriage just to give two outstanding examples. Perhaps even more amazing, some rights have turned into opposite rights. For example, originally, the people had a right to pass laws against pornography, but later in the 1960s, that turned into a right against their passing any such laws. You almost can’t name a constitutional right that hasn’t gone through significant change with a lot of totally new rights added. Then don’t all these alterations and additions force you to ask, how say our “rights” are guaranteed by the Constitution, when our rights have so constantly changed?

As much as that, and however all these new rights regarded as a good thing (or maybe not), where does all this “rights talk” leave us, not to mention leave my client, the Constitution? As for us, the public, we’re left with nothing more than an ongoing and endless arguments between competing “rights.” For instance, over that still controversial right to an abortion, one side says there’s “a right to a choice” and the other says there’s “a right to life” and never the twain shall meet. Virtually all the arguments about our rights reach a similar deadlock. But whatever their view about their rights and however new, novel or unexpected their views, all seem to see their rights as non-negotiable. After all, if you have a “right,” why compromise? A gay rights advocate recently well summed up the prevailing attitude, saying, “We lose when our rights are considered debatable.” Such appears the attitude taken by all. Their rights aren’t debatable. While as for my client, the Constitution, everyone demands that he conform to their view of their “rights.” Otherwise, they condemn him. So my client, the Constitution, has no way to win an argument phrased in terms of “rights.” Whichever side my client takes, he’s fated to face constant and repeated condemnation from some side or other.

Ladies and gentlemen, if these were fair terms, my client would have to take them however disadvantageous. But as the lawyer for the Constitution, I say to you, these aren’t fair terms, but a false view. Not that the Constitution isn’t about rights. But this lawyerly view thinks about and has gotten you, the public, to think about the Constitution the wrong way around. If you will only recall the last article, I tried to make the fundamental point that the constitutional process produces the laws, including the laws about our rights. Then before the Constitution can be about our rights, it has to be about the process to determine our rights. I tried to drive home that point by comparing a constitution to a jury trial rather than a verdict. A jury trial is a process for arriving at a verdict, and a constitution is a process for arriving at our laws, including the laws about our rights. In either case, the process comes first. Then the Constitution can’t be first of all about our rights. Rather, it has to be first of all about the process for determining our rights and the other laws. Doesn’t the fact our rights have so often been changed prove the point? The constitutional process has repeatedly changed our rights. Then the process had to come first.

Ladies and gentlemen, since the constitutional process produces our laws, including our rights, how can we have good laws without a good constitutional process? Since the constitutional process determines our rights, how can we fairly determine our rights except with a fair constitutional process? Then before we argue about our rights, shouldn’t we ask about the best and fairest process to settle our arguments about our rights?

While here’s another thing about it. Although we might argue endlessly over our rights, yet might we manage to agree on a fair process to settle the arguments? You’ve seen a couple of kids agree to settle a dispute with a quick game of scissors, paper, rock. An adult group might agree to go with a show of hands. Although we constantly disagree, yet might we agree on some fair way to settle our disagreements and so reach an underlying agreement? While as for my client, the Constitution, if he can show his processes fair, neither side could condemn him anymore.

Ladies and gentlemen, you see what I’m trying to do. I’m wanting you to leave behind a “rights centered” (lawyerly) view of the Constitution, which has become the widely accepted view. I’m wanting you to take a fresh view of the Constitution. I don’t ask you to check your “rights” at the door. You can bring along your views to the performance. But I ask you to start viewing the Constitution as being first of all about a fair process to determine all our rights and a fair process comes even before your rights.

Now ladies and gentlemen, if my client, the Constitution, innocent of the charges against him, surely his defense can rest on no better grounds than truth (“actual innocence”). If I say to you in truth he’s innocent, it can’t be in his interest to be misunderstood. Rather, to be truthfully understood should clear him of the charges. Since the lawyerly (“rights centered”) view of him gets it wrong, what would be a more truthful view? Ladies and gentlemen, on to the next article.

1.07 – Human Architecture

Ladies and gentlemen of the jury, you may never have had the occasion to go in the main courtroom on the third floor of the Creek County Courthouse. Several generations of lawyers have cycled through there since that structure completed in 1914. No one seems to know who adorned the back walls with the large portraits of Franklin D. Roosevelt and Robert E. Lee, a pairing unique so far as known to our courthouse. However, in the recent renovation, these two gentlemen as mysteriously disappeared, replaced by the official portraits of the sitting president and vice-president. But with the exception of such minor trappings as the pictures on the walls, you don’t have to go in. You’re familiar with the standard design for an American courtroom.

But pause a moment to consider how the architecture structures the human interaction there. Go in and watch a jury trial. At the top (head) of the room, the raised bench gives the judge a commanding presence, putting him firmly over the proceedings (in charge). The jury box (somewhat lower than the bench, but higher than the floor) carefully locates the jurors off to one side. That leaves them somewhat under the wing of the judge, yet somewhat independent of him, too. He runs the trial and hands down to them his instructions on the law, yet they’re able to render an independent verdict. At the same time, they’re higher than the parties and their lawyers (in a position to judge them). The two identical counsel tables (on the floor) place the parties (the plaintiff and defendant) and their lawyers on the same level (on an equal footing), pleading up to the judge and jury. The witness stand between the bench and the jury box forces the witnesses to confront the parties while testifying before the jury, not sponsored by the judge, yet somewhat under his supervision and even protection on one flank. In front of the bench (inconspicuously) sit the court reporter and a court clerk to record the proceedings. A bailiff and sometimes an armed guard hovers around the edge to maintain order in the court. Behind the rail, some rows of seating make the trial open to the public. Recall the Constitution guarantees “a public trial.” Could we think of a better design for a courtroom (a stage setting that better put all the actors in their proper role)?

Ladies and gentlemen, let me try to make a point with a comparison. Just as a courtroom structures human interaction such as the process of a jury trial, a constitution structures human interaction such as the processes for passing the laws or carrying out government policies. But while a courtroom uses a physical architecture, a constitution uses an institutional architecture.

Ladies and gentlemen, if you look in the dictionary, you’ll find “institution” defined as an “organization.” Although economists, sociologists, and political scientists all the time insist on the significance of institutions in our lives, apparently any more precise definition not that easy. One example from a topnotch political scientist was, “Institution. The word does not have a meaning sufficiently precise to enable one to state with confidence that one group is an institution while another is not. Accepted examples, however, include the courts, legislatures, executives, and other political institutions, families, organized churches, manufacturing establishments, transportation systems, and organized markets.” That’s a lot of good examples, but if “the word does not have a meaning sufficiently precise,” I have a hard time working with that definition.

The general agreement seems an “institution” a way people organize to attain mutual goals by following rules, and significant institutions have leaders (management) and are set up in a durable way (a lasting, self-perpetuating way).” Hopefully, that’s good enough to go down the road with, but does leave the thing a matter of degree.

To flesh it out, say you take a walk in Kelly Lane Park on a Saturday afternoon and see some kids playing a pickup baseball game at one of the diamonds. They’re organized to attain a mutual goal (their mutual entertainment) and following rules (the rules of the game), but that’s too informal (lacking clear leadership) and ephemeral (just for the afternoon) to qualify as an institution. Next go down to the Salvation Army baseball fields and watch the Youth Baseball League, a citywide organization that has gone on from year to year. Next watch the Little League World Series, which put on by Little League International, draws teams from around the world, and has lasted for some seventy years. By the time you attend an MLB game, you’ve definitely watching an institution in action and a fairly significant one. They’re attaining a mutual goal (making lots of money) by following a lot of highly formal rules regulating the interaction between the owners, the players and the commissioner, not to mention the rules of the game, and have a very formal and hierarchical leadership (the management, that is, the owners and the commissioner). They’re also set up in a durable (long-lasting, self-perpetuating) way. Team ownership passes from one owner to another. The current commissioner’s office dates back to the long tenure of Kennesaw Mountain Landis, who served from 1920 to 1944, and the present commission (Rob Manfred) the tenth in the line. The players come and go as do the managers. But the league itself (the institution) has been around well over a century.

Whether or not we see an institution or a significant one may remain a matter of degree, but no doubt we see them all around and all the time. No doubt either about their significance to our lives. They give an architecture (a structure) to our human interaction (to our very lives). As we heard the political scientist quoted above say, “Accepted examples … include the courts, legislatures, executives, and other political institutions, families, organized churches, manufacturing establishments, transportation systems, and organized markets.” That’s a lot of highly significant institutions that structure a lot of our lives, but doesn’t even begin to give a complete list.

Ladies and gentlemen, I’ve said that just like the architecture of a courtroom structures our human interaction such as the process of a jury trial, the architecture of institutions structures our human interaction such as the processes for passing laws or carrying out government policies. But we’ve run out of space again. To show how, we need to go on to the next article.

1.08 – The Reserve Clause

Ladies and gentlemen of the jury, in the last article, I said that the architecture of institutions structures our human interaction. But more than that, the architecture structures the interaction in certain ways, and very often, the only way to change the interaction is to change the architecture. To illustrate, let’s stick with MLB a moment.

Until 1974, all the players had to sign a form contract with a “reserve clause,” a rule which prevented them from jumping to another team, although the teams could trade the players. A player either had to take the owner’s salary offer or hold out (not playing and receiving no salary at all). This institutional architecture decisively structured the human interaction between the owners and the players. It gave the owners a big leverage, letting them keep down the players’ salaries, keeping more money in the owners’ pockets.

But in 1974, that rule changed, changing the institutional architecture, changing the human interaction. Baseball entered the era of “free agency,” which gave the players more freedom to move from to team to team. The owners were forced to bid against each other for the best players, whose salaries quickly exploded into the multimillion-dollar range. How this happened makes a fascinating story in and of itself, but outside our purposes. What we want to take away is that the institutional architecture structured the human interaction, that changing the architecture changed the interaction, and that the interaction wouldn’t have changed unless the architecture had changed. The reserve clause structured the institution, giving the owners a big advantage over the players. That wasn’t going to change until the architecture changed.

Ladies and gentlemen, coming to government, what do we come to except another institution? What is a constitution except the fundamental laws (the architecture) that structure the institution? The government organizes people to attain their mutual goals. It decisively structures their interaction (their lives). It structures their interaction in a certain way. And often, the only way to change their interaction is by changing the structure of their government (by changing their constitution).

Ladies and gentlemen, it’s something of a hobby of mine to read constitutions, and none better illustrates this point than the present Constitution of Iran. Promulgated in 1979 after the Iranian (or Islamic) Revolution, the guys who wrote it, obviously some highly educated Islamic clerics, knew just what they were about. Obviously, they had read a lot of constitutions themselves. They took one clause from one and another from another. To give credit where credit due, they creatively came up with a combination of clauses to structure exactly the sort of government they wanted.

They called their work-product the “Constitution of the Islamic Republic of Iran.” That is, they claimed to be setting up a “republic.” Nor did they fail to write in clauses that gave lip service to democratic values. Article 19 proclaims, “All people of Iran … enjoy equal rights.” Article 20, “All citizens … equally enjoy the protection of the law.” Article 58, “The functions of the legislature are to be exercised through the Islamic Consultative Assembly, consisting of the elected representatives of the people.”  Article 114, “The President is elected for a four-year term by the direct vote of the people.” So far so good.

But then they starting writing in reserve clauses, starting with the office of the Supreme (or Religious) Leader, described as “a holy person possessing the necessary qualifications.” A number of clauses reserved to him what amounted to supreme powers. He can declare war or peace, serves as the commander-in-chief, appoints the top military commanders, appoints the highest judges, and appoints the head of the state-run media. Another clause designated the Ayatollah Khomeini as the original Supreme Leader, and after his demise, a Council of Experts appoints his successors. To which we need only add, since the Supreme Leader controls the appointments to this Council, he can handpick his own successor.

Ladies and gentlemen, it should be obvious these reserve clauses make the Supreme Leader like the owner of a baseball team in the days of the reserve clause and other Iranians the players. He’s got the leverage. The way the Iranian constitution structures their government, they’re going to play by his rules. The only way to change that would be to change the institutional architecture by changing the constitution.

Ladies and gentlemen, I don’t think we need any more examples. We’ve reached a true view of my client, the Constitution. He’s the clauses that structure our government’s institutional architecture. He structures our human interaction and in a certain way. To understand the Constitution, we have to understand how he structures the government and our interaction.

Ladies and gentlemen, it’s taken me quite a while to get to this point in my defense of the Constitution, but I didn’t see any shorter route. First, we needed to dispel a misapprehension. The lawyers have got you to thinking it’s all about your rights. And it is about your rights, but that starts at the wrong end. The Constitution is more like a jury trial than a verdict. The constitutional processes are the trial; your rights are the verdict. The processes produce and determine your rights, not the other way around. So the processes come before the rights. Second, we needed to see that the Constitution structures the institution. It’s this institution that runs the processes. The architecture of this institution (the government) crucially structures the processes.

If we’ve come so far, we’ve made a crucial start on our journey. But before concluding my opening statement and going on to hear the evidence (the next step in a trial), we need to cover a few more preliminaries in the next articles.

1.09 – Passing Judgment

Ladies and gentlemen of the jury, there used to be a free show in the Creek County Courthouse any time a jury docket going. We had some great trial lawyers (masters of the art). They could work on a narrow ledge and scale what seemed a sheer rock face to improbable verdicts. One had to admire their skill, if not always applaud their triumphs. Sometimes, they reached the ambitious heights of the ancient sophists, making the worst case seem the better (outsmarting justice). But however ingenious, they still had to win by some rules. To walk a client on a murder charge, they had to convince the jury that the case not proved beyond a reasonable doubt. No matter the type of case, there were some rules.

Well, if there are rules in court, when the critics try the Constitution in the court of public opinion, shouldn’t there be some rules? While if some friend self-appoints himself to defend the Constitution (like myself), shouldn’t he have to abide by the same rules? How pass judgment on the Constitution or any constitution without some rules?

Then in the first place, we can’t hope for absolute, ideal perfection in a constitution. If we demand the Peaceable Kingdom from government, we can only suffer continual disappointment. Nirvana doesn’t step off the night train. Let the perfect not become the enemy of the good. Things might be better, but things could be worse. When it comes to government, those who try to make it better have often only made it worse and sometimes a great deal worse. Politics being the art of the possible, let’s judge by the possible.

In the second place, when someone sets up as a critic in the political theater, he should have to do more than criticize. Finding fault with the current political actors seldom hard, but putting on a better performance as seldom easy. Before the French Revolution in 1789, critics like Voltaire and Rousseau mercilessly ridiculed the *Ancien Regime*, so inciting the audience as to drag the reigning stars off the stage and murder them as the final act in that old drama. But the revolution then staged a lousy performance and the public paid a high price for admission. In the new first act, Madame Guillotine stole the show (the Terror and maybe 40,000 executions). The second act featured a merciless civil war in the Vendee (maybe 170,000 casualties). After an interlude filled with several farcical governments, the curtain raised on the grand climax, the endless wars of the Napoleonic Empire (maybe a million French casualties). A great many critics in the twentieth century, prominently communists and fascists, when given the chance to strut across the stage of history, have performed to still less applause and at still higher costs.

“Just because I don’t have a solution doesn’t mean there’s not a problem.” But booing the current political actors off leaves an empty stage, and this show must go on. We, the public, have to stay in our seats. Many a political farce has been followed by a worse political tragedy. One might name some political melodramas where any change of cast seems an improvement, say the dictatorship of the late and unlamented Muammar Gaddafi in Libya. But short such a bad actor, we need more than a revolutionary catharsis. We need some realistic solutions for the complications of the plot.

In the third place, the Constitution itself guarantees, “No … ex post facto Law shall be passed.” In other words, the government can’t make something a crime after the fact. The Constitution itself should benefit from a similar rule. It shouldn’t suffer condemnation for not being farther ahead of its time than it was. Nor should it suffer continued condemnation for wrongs no longer committed, especially when the Constitution itself remedied the wrongs. For the most prominent example, the Constitution itself abolished slavery with the 13th Amendment in 1865. For another example, the Constitution itself guaranteed women the vote with the 19th Amendment in 1920. Why condemn or continue to condemn the Constitution in either case?

But finally, it would be great to have some objective rules by which to pass judgment on the Constitution or any constitution for that matter. It would be great to have something like a yardstick. And actually, some good objective yardsticks do exist. One is “the index of freedom,” which measures such things as free elections and civil liberties. As a well-known example, Freedom House (an NGO, a non-governmental organization) puts out an annual report (Freedom in the World). Another good way to measure is by per capita GDP (gross national product divided by the population). If counting the money sounds too materialistic, leaving out what really counts, yet a higher per capita income counts for a higher standard of living with better housing, infrastructure, education, jobs, healthcare, and a longer life.

Both these measurements fit well with our intuition. When we think we see a good government, we see a higher index of freedom and a higher per capita GDP. If the voice of the people counts for anything, they’ve voted with their feet. The tide of immigration sets strongly toward countries higher by these measurements.

We would leave behind a great deal of confusion and unfairness if we agreed up front on some rules for passing judgment on the Constitution or any constitution. First, don’t demand absolute (ideal) perfection, but settle for the possible. Second, don’t accept mere criticism, but require constructive criticism. Third, don’t condemn the past on standards not yet invented or the present for errors no longer committed. Fourth, measure success by the index of freedom and the per capita GDP.

Ladies and gentlemen of the jury, hopefully we can agree on so much. But there’s still another measure we need to apply when judging the Constitution. That’s how well it measures up to its own principles. Let me take up that topic in the next article to my opening statement.

1.10 – The Declaration

Ladies and gentlemen of the jury, if we’re going to talk about the Constitution, which ratified in 1789, we should start by talking about the Declaration of Independence, which proclaimed in 1776. Not only does the Declaration come first in time, but in pride of place. There’s the law, there’s the spirit of the law. The one is dead without the other. There’s the Constitution, there’s the Declaration. The Constitution creates the government, but the Declaration proclaims the spirit for the creation. The one is dead without the other.

We can’t re-read the words too often, “We hold these truths to be self-evident: that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness. That, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.” Not least for writing these words, Thomas Jefferson has come down to history with a great name.

Yet what exactly do the words mean? How say “all men are created equal,” when they’re obviously not? “Equal born? O yes, if yonder hill be level with the flat.” Rather, they seem born on a bell curve. The genetic lottery picks winners and losers unequally. You can’t coach speed. If you’re not born fleet of foot, forget about ever winning the 100-meter dash at the Olympics. While as for competing in the mental events, the speed of guys like Newton and Einstein leaves us ordinary mortals panting behind in their intellectual dust. But if not nature, it’s nurture. “Duke’s son, cook’s son, son of a hundred kings.” In the race for the good things of life, some are born with a head start, have a hand up, and a hand to catch them if they fall. While life relentlessly grades on a curve. No matter how talented or how hard you try, only a very few can ever make an NFL roster, whose size limited. Daniel Webster said of the legal profession, “There’s always room at the top,” and he shouldered his way in. But by definition the top rests on the bottom, leaving some at the bottom, and generally, a narrow top rests on a much wider bottom, excluding most from the top.

Legal or economic “equality” glimmers like a will-o’-the-wisp, forever leading on, never quite in reach. Nothing better illustrates than that pursuit of racial equality in our time. First, racial equality meant repeal segregation (laws that mandated racial separation); next, it meant integration (laws to break down racial separation); next, it meant affirmative action (laws to make up for past discrimination). Yet blacks are still behind by many socio-economic indicators. As long as such statistics persist, does the gap equate to failure in racial equality? Another illustration comes from all the recent talk about “income inequality.” In 1915, the richest 1 percent of Americans had 18 percent of the income, but by 2006, their share was all the way up to 24 percent. A Noble Prize winning economist commented, "The most important problem that we are facing now today, I think, is rising inequality." Unless we somehow more equally redistribute the income, do these figures equate to inequality?

What exactly are our “unalienable rights?” We might agree on some godlike generalities, but the devil is in the details. We might agree “thou shalt not kill.” So many say “an eye for an eye” and put the murderer to death. But many say the death penalty violates the commandment. We might agree about the “free exercise of religion,” but what amounts in detail to “free exercise?” Can the Mormons practice polygamy? (No.) Can the Church of Lukumi Babalu Aye sacrifice animals and scatter the body parts around the city? (Yes.) The list of such questions about our rights and the sometime surprising and sometimes dubious answers goes on and on.

Yet Americans believe “all men are created equal” and “endowed with certain unalienable rights.” They believe in these ideals. If someone wants to disagree, they can. It’s a free country. But it’s a country that agrees with Jefferson. And it’s a country that has worked out “equality” and “rights” in some considerable detail. But we shouldn’t be surprised that considerable details remain to be worked out. That’s the way with ideals. They remain a work in progress.

Which brings us to the final words, “That, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.” We might almost call those the forgotten words, since often left off the quote for some unaccountable reason. But at least we know their meaning. The “consent of the governed” means democracy. Then why would we ever leave those words off the quote? What’s more fundamental to our equality or our rights than democracy? And isn’t democracy fundamental for another reason? If “equality” and “rights” a work in progress, how do we work out the progress? If we can’t be equal or have our rights without democracy, how can we work out the progress except through the democratic process?

Ladies and gentlemen of the jury, does that somehow get it wrong? Doesn’t the Declaration of Independence proclaim the principles for the U.S. Constitution? Aren’t those principles above all democracy? And while in one sense democracy an outcome, as a choice among types of governments, once that choice is made, isn’t it a process, a method of government? That’s why as earlier said, the Constitution is more like a jury trial than a verdict. Just as a jury trial a process to reach a verdict, democracy is a process to arrive at the laws. Just as a jury trial doesn’t guarantee any particular verdict, democracy doesn’t guarantee any particular laws. Rather, what’s guaranteed is the process itself (the democratic process itself).

Perhaps Lincoln gets quoted too much, but that’s because he so often gets it right. He got it right this time, too. He said, “Now, my countrymen, if you have been taught doctrines conflicting with the great landmarks of the Declaration of Independence; if you have listened to suggestions which would take away from its grandeur, and mutilate the fair symmetry of its proportions; … let me entreat you to come back. Return to the fountain … come back to the truths that are in the Declaration of Independence.” As we study the Constitution, let’s never forget “the fountain” and to “come back to the truths that are in the Declaration of Independence.” Let’s never forget that democracy is the spirit of the Constitution.

1.11 – Take a Seat

Ladies and gentlemen of the jury, there’s an armchair philosopher in this town. One afternoon over in the Courthouse Grill, holding forth across the coffee table, he said philosophy was a stool with four legs. He ticked them off on his fingers – the nature of reality, how we know it, the problem of conduct (morality), and the problem of governance (political science). Everyone is sitting on their own stool, however unsteady the legs. Ladies and gentlemen, to take “a very comprehensive, as well as a very serious view” of the Constitution will require us getting at least one of our legs solid under us (political science).

How can we take such a solid seat? Someone else has said, “Philosophy is getting it right.” How can we “get it right?” Fortunately for us, a lot of great thinkers, not least the Founding Fathers, have already broken the trail, and the classic guys all followed the same trail. They all go from psychology to sociology to political science, all by way of history. Don’t see how we can do better than to follow along (follow the “classic tradition” of political science).

As with so much else, Aristotle long ago laid down the point of departure, saying, “As in other departments of science, so in politics, the compound should always be resolved into the simple elements or least parts of the whole.” All the classic thinkers follow him. They all start by breaking down “politics” into the “simple elements or least parts of the whole.” And since individuals are “the least parts of the political whole,” they all start with individual human nature (psychology), As he said, the “other departments of science” do the same. For example, in physics they break down matter to the least particles and the forces operating on them. From that starting point, they try to arrive at an understanding of the physical universe. Why should political science vary? We have to start by breaking it down to the least particles (the individuals) and the forces operating on them (their psychology).

Aristotle also famously said, “that man is more of a social animal than bees or any other gregarious animals is evident,” which next brings us to the nature of society (sociology). When you study bees, you may start with the individual bee, but except for a few solitary types, bees live in a hive. The bees’ behavior makes up the hive, but the hive has behaviors all its own not described by describing the behavior of any individual bee. The same goes for humans. We may start with individual human nature (psychology), but except for a few hermits, humans live in a society. Men make up society, but society has behaviors all its own. Individuals make up American society, but you can’t describe American society by describing any individual. As the English philosopher Thomas Hobbes said to kick off his great work on government, *Leviathan*, “I will consider them [mankind] first singly, and afterwards in train, or dependence upon one another.”

Aristotle further famously said, “Man is a political animal.” Instincts organize the bees, but government organizes humans. That brings us the study of governments (political science). And that finally brings us to the study of constitutions and our Constitution, since the constitutions organize the governments.

While all these sciences share the same laboratory – history. A psychologist, sociologist, or political scientist may run some experiments on some rats or even some sophomores. They may run their subjects through some mazes or over-crowd them, ask them to respond to some pictures or play some games. But whatever their theories, the real test comes from the history in the real world. How well does it hold up in practice? And with humans, your ability to experiment is pretty limited. Some experiments you shouldn’t do, and some they won’t do. More than that, the real human phenomena occur in history, either the past or the ongoing. So that’s the laboratory.

Ladies and gentlemen, to take “a very comprehensive, as well as a very serious view” of the Constitution, I can’t think of a better trail to follow that the one broken and followed by classic political science. My new defense of the Constitution will follow that trail. Admittedly, that lays out a bit of a long itinerary, but no shorter journey will reach our destination.

Remember, it’s the case of the critics versus the Constitution. You, the public, are sitting as the jury on the case. I’ve not so modestly self-appointed myself as lawyer for the Constitution. It’s my duty to present you the evidence. It’s your duty to bring in a just verdict. Ladies and gentlemen of the jury, take a seat.