How would you write an interpretive history of the U.S. Constitution? Not a story of the framing and how the founders’ political theories have survived (or not) the test of time, or a chronological exegesis of Supreme Court cases, or even a critique of American constitutionalism from a particular theoretical perspective. Those worthy projects have been done in many forms, but if you wanted to produce an accessible book that addressed the main ideas undergirding our constitutional order as they’ve developed throughout the history of the republic, what would be your organizing principle?

In The Lives of the Constitution: Ten Exceptional Minds that Shaped America’s Supreme Law, Joseph Tartakovsky, former deputy solicitor general of Nevada and contributing editor to the Claremont Review of Books, picked ten people and wove a narrative around their lives and applications of our constitutional principles. It’s an interesting approach, particularly when introduced as a way to get at our nation’s “founding myth.” Tartakovsky notes that America’s beginnings are less interesting than Romulus and Remus, the covenant at Sinai, and other similar tales. Indeed, he pointedly says on the first page of his “overture” that the United States began as “a bunch of legal documents.”

Of course, that’s what makes this country exceptional, certainly at its founding and, even with the possible exception of the Soviet Union, to this day: America is based on an idea rather than a race or ethnic group or geographical abstraction fashioned by imperial powers. Yet those dusty old parchments and the funny-fashioned men who created them are as revered in this country as Solon was in Athens. That’s why telling the story of our foundational law, charting the young nation’s twists and turns as it grew and modernized and coped with challenging political currents, can be an exciting enterprise.

Who are the personages through whom our supreme law flows? In chapter order, they are: Alexander Hamilton, James Wilson, Daniel Webster, Stephen Field, Alexis de Tocqueville and James Bryce (together), Woodrow Wilson, Ida B. Wells-Barnett, Robert Jackson, and Antonin Scalia. Tartakovsky’s selection is a bit odd. Why Hamilton and not James Madison, the father of the Constitution, or Thomas Jefferson, who played such a pivotal role in both theory and practice? (Or why not all three?) Where’s Abraham Lincoln? Why de Tocqueville, a French sociologist, and Bryce, a Scotch-Irish political figure, rather than American legal historians? Why Wells-Barnett and not Susan B. Anthony?

It turns out that those questions are merely academic, because Tartakovsky weaves in the legal and historical points he wants to make almost regardless of which protagonists serve as vehicles for them. Those points concern the evolution of constitutional thought from the Revolution through Donald Trump, with stops in Reconstruction, the Progressive Era, and post-World War II modernity.

The story begins with the surrogate son of the childless father of our country. As Tartakovsky puts it, “fellow officers recalled ‘Call Colonel Hamilton’ as Washington’s instinctive utterance when...
important news arrived.” Or, in Lin-Manuel Miranda’s lyrics: “How does a bastard, orphan, son of a whore and a Scotsman, dropped in the middle of a forgotten spot in the Caribbean by providence, impoverished, in squalor, grow up to be a hero and a scholar?” The answer is exactly what the new country and its new constitution needed: grit.

Hamilton knew instinctively that Madison’s theoretical genius would be for naught if the nascent government weren’t properly launched. Having helped persuade his fellow New Yorkers to ratify the Constitution after having helped free them from colonial rule, Hamilton set about organizing the economic channels that enabled early American growth. As the first treasury secretary, at age 34, he embodied vigor in the executive. Indeed, he turned down opportunities to be governor, senator, and even chief justice of the United States to focus on the “practical business of government,” realizing early on that “a government must have power to preserve order, because without order there is no liberty.” Hamilton is modern libertarians’ least favorite founder, but that’s something what anachronistic, conflating his belief in the national institutions that the Constitution actually authorized with expansive post–New Deal views of federal power.

James Wilson is probably the founder with the worst ratio of impact to modern recognition. Just one of six men to have signed both the Constitution and the Declaration of Independence—unlike Hamilton or John Adams—Wilson guided constitutional debate with his dazzling command of political theory and institutional design. He authored the Treason Clause (the only crime specifically defined in the Constitution) and was central to the debate over the Bill of Rights, insisting that enumerating rights was dangerous because, the 9th Amendment notwithstanding, Americans would come to ask whether they have a certain right instead of whether the government has a certain power.

A member of the first Supreme Court, Wilson coined the term “politically correct”—while explaining that “the People” created the Constitution, not the states—and brought the Scottish Enlightenment’s “moral sense” to legal debates. Tartakovsky explains that the only “party line” the Philadelphia convention delegates shared was an allegiance to natural law; if so, then the philosophical Wilson was our first party boss.

The next generation of American leaders showed that it’s not easy standing on the shoulders of giants. Although Daniel Webster is best known for his oratory, it was his steadfast commitment to the founding principles—often at the cost of personal political achievement—that made his historical mark. An early and vociferous opponent of nullification, Webster used his rhetorical skills to explain and defend the American experiment.

Like Hamilton and Wilson, he hammered the idea that the Constitution was a popular covenant rather than a compact between sovereign states. At the same time, Webster co-founded the anti-Jacksonian Whig Party, working to channel democratic impulses through republican channels. Webster’s commitment to “Liberty and Union, now and forever, one and inseparable” led him to endorse the Compromise of 1850. It wasn’t enough to head off civil war because his generation’s Southerners were more committed than their fathers to slavery.

The Civil War changed constitutional structure forever. The 13th Amendment proscribed slavery, of course, but slavery was just the most glaring state invasion of “unalienable” rights, about which the original Constitution had been silent. Thus the 14th Amendment for the first time allowed federal claims against state governments.

Stephen Field, whom Lincoln appointed to the Supreme Court during the war to achieve regional and political balance—he was a Westerner (from California, when that still counted) and a Democrat, albeit a Unionist—was a pioneer in elaborating the legal protection of unenumerated rights. Field went west with the gold rush, practicing frontier law and acquiring a keen appreciation for property rights and the right to earn an honest living.

Unfortunately, he ended up on the dissenting end of the Slaughterhouse Cases (1873), which eviscerated the 14th Amendment’s Privileges or Immunities Clause and thus the Constitution’s shield against state oppressions. While Field was occasionally able to preserve liberty against local protectionism—as in the Quong Woo case (1882), which voided an ordinance requiring anyone Chinese to first get approval from twelve white citizens before operating a laundry—all too often, he fought rearguard actions against proto-progressive legislation. He also had a racial blindspot, ending his long career ignominiously by joining the majority in Plessy v. Ferguson (1896).

Here The Lives of the Constitution takes a bit of a detour, splicing in Tocqueville (who died before the Civil War) and Bryce, a scholarly statesman who became Britain’s ambassador to the United States. It’s an odd couple; Tartakovsky notes that Bryce “sought to give readers a social scientist’s reliance on hard figures together with the legal historian’s attention to precedent, by contrast to Tocqueville, who, [Bryce] said, only had gleaming apéruç and ‘theories ready made.’” Nevertheless, the themes this duo stands for are important to the American Idea: equality of rank, constitutional democracy, the moderating force of the party system, and revitalization through immigration.

With Woodrow Wilson, we enter the age of the anti-constitutional Constitution. In common with other Claremont scholars, Tartakovsky shows how Wilson ushered in the administrative state, having found the American constitutional system outmoded. Wilson’s views were undoubtedly shaped by the German Rechtsstaat he studied in graduate school, having abandoned law school to become the only president with a doctorate. “The Constitution was not made to fit us like a straightjacket,” Wilson declaimed at the Cooper Union in 1904. “There were blank pages in it, into which could be written passages that would suit the exigencies of the day.”

Wilson was essentially the first living-constitutionalist, dedicated to overcoming the separation of powers that prevented efficient government. The problem with the founders’ vision of checks and balances, he explained on the campaign trail in 1912, is that “government is not a machine, but a living thing. It falls, not under the theory of the universe, but under the theory of organic life.” Tartakovsky credits Wilson’s flexible constitutionalism for saving the document from some of the progressive abominations written into the era’s state constitutions. That doesn’t quite ring true to me, for it wasn’t until Franklin Roosevelt’s presidency that we saw the sub rosa codification of Wilson’s political project—the implied constitutional amendment of the so-called Revolution of 1937 and all that progressive jazz.

Ida B. Wells (also known as Wells-Barnett in an early instance of feminist post-marital hyphenation) provides one of the most interesting and least-known constitutional lives. A pivotal figure in the struggle for both women’s rights and racial equality—why don’t we hear more about her in today’s intersectional age?—Wells doubly epitomized the tension inherited in fighting for reform while trying to fit into polite society. Hers is an important story and this was one of the most fascinating book chapters, but I’m not sure what it has to do with shaping America’s supreme law beyond the eventual ratification of women’s suffrage in the 19th Amendment.

Tartakovsky next examines the Second World War and the singular figure of Robert
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Jackson is the only person to be solicitor general, attorney general, and Supreme Court justice—and he served as a Nuremberg prosecutor as well. (He was also the last justice not to have completed law school.) In those roles, he was tied up in legally defending the New Deal without necessarily having been one of its authors.

Jackson is known as one of the best writers the Court has ever had, being especially famous for one majority opinion, one concurrence, and one dissent. His defense of individual freedom against flag-salute compulsion in *West Virginia State Board of Education v. Barnette* (1943) is now one of the most cited passages in First Amendment cases: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.” In the 1952 Steel Seizures Case the Court rejected President Harry Truman’s attempt to nationalize the steel industry; Jackson’s concurrence became the legal standard for evaluating executive actions in the face of congressional approval, disapproval, or silence. Finally, Jackson’s dissent in *Korematsu v. United States* (1944), in which the Court allowed the war-time internment of Japanese Americans, has gone down as the moral equivalent of Justice John Marshall Harlan’s dissent in *Plessy*.

On top of his personal achievements and writings, Jackson represented a new role for the Court as the staunch defender of civil liberties and checker of executive excess, but deferential to Congress and state legislatures on most other things.

Tartakovsky’s final constitutional life is Antonin Scalia, the Court’s greatest expositor of originalism and textualism—the idea that constitutional and statutory provisions mean what they did when enacted. It’s a simple idea—what in other eras would simply be called “jurisprudence”—but one whose advent was long overdue. Unlike Clarence Thomas, however, Scalia made his peace with the New Deal. Though he began to question judicial deference to administrative agencies—doctrines that he had helped elaborate—toward the end of his life, he remained too committed to judicial “restraint.” Conservative lawyers of his generation naturally inclined to fighting the “activism” of Earl Warren and William Brennan, but the new battle is against the sort of “passivism” that defers to legislative enactments like Obamacare and occupational licensing. Scalia was right to have questioned interpretive theories that simply allow courts to decide all of a polity’s important questions, but what do you do when judges are the only ones taking their constitutional duties seriously?

In the end, while I have a few quibbles with this book, it is masterful in marching through the main currents of constitutional thought, making them come alive through the people who shaped them. Tartakovsky also supplies delightful little details that illustrate broader philosophical points. Did you know, for example, that FDR built what’s now Reagan National Airport without congressional appropriation? What the book does best is precisely what it set out to do: to make the oft-dry text of our founding charter come alive. That’s important because, as Tartakovsky writes, “constitutionalism is not a mere institutional form but a culture, a set of loyalties, sentiments, habits, assumptions, usages, and self-disciplines, a permeating spirit that animates an otherwise lifeless paper scheme.”

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