

Nomology with Franita Tolson

Ologies Podcast

July 2, 2019

Oh heeey, it's a dish of whipped Jell-O salad with canned fruit that looks appalling, but tastes okay, Alie Ward, back with a very important episode of *Ologies*. So, you know I show up in your headphones each week to softly babble about bird butts, and word origins, and personality quizzes, but this week, the week of July 4th, the most searingly patriotic, coconut oil, barbecue-smoked, flag-draped day in America, I thought I would just drop a little context on you in an entire episode elucidating what it is to be an American and a deep dive into our Constitution.

Who's read it? [*crickets*]

I don't even know what the hell it is or what it says. I know it's got some really enviable calligraphy, it's on yellowish paper, it's signed by a bunch of dead guys, but what does it say, why does it matter? So here to help dissect it is one of the nation's best constitutional law scholars.

You might be thinking, "Constitution? Ward. This is not thrilling. This is old, this is history. It's law, it's dry." *Au contraire!* It turns out that there is nothing more punk rock, more rebellious, and more future-thinking than studying the Constitution and figuring out how to apply it to make life better for all people. I wish I had paid attention to this decades ago because this is some badass shit right here.

But first, let me pay attention to you, lovelies, and thank everyone on Patreon for making *Ologies* possible with your pledges and questions that I get to read out loud. Thank you to everyone who shops at *OlogiesMerch.com* and sports their wares, and thank you to everyone keeping *Ologies* up in the science charts, just smoking the very well-staffed NPR shows out there each week, which is a personal victory for old DadWard. So, your rating and subscribing totally matter so much, as do your reviews, which I creep with heart eyes, and I read a new one each week, just to prove it. Like this one, from Samsonnich, who says,

Alie is a loveable combination of Ms. Frizzle from The Magic School Bus and Jess from New Girl. The content is amazing and busts so many myths and has opened my eyes to so many new topics. Just can't get enough of these airhorns. Thank you, Alie, Ologies team, and experts.

Samsonnich: Cry face emoji right back at you.

Okay, nomology. It *is* a word, and it means 'the study of law'. It stems from the ancient Greek *nomos*, for law. So, a lawyer who studies how laws become laws. So what laws govern, how lawmaking happens. It's a real legal spiral; we're about to go down in it, but in the best way. So you're going to walk away from this episode realizing, "Holy shit, US history and lawmaking is for badasses, and maybe I want to start a lowkey, nonviolent revolution." We'll see.

I was introduced to this ologist by listener Alex Sarsfield [phonetic], who's an attorney who loves the history of law. And luckily, lawyers get things done, and when I was busy and dropped the ball on this email thread, Alex nudged me four times in a row to say, politely, "Hey, are you going to do this topic or what? Because I have the perfect person for you." And I was like, "Yes. Yes, I am."

I reached out to this ologist, who studied at the University of Chicago Law School and is now a Professor of Constitutional Law at USC's Gould School of Law, and I was set to interview her on graduation day. And I was so excited, and nervous, and intimidated by a constitutional law scholar that I made sure to take a Lyft, that way I could avoid parking troubles, I'd get there on time. I

showed up right on the dot and, striding into the building, I realized that I forgot my equipment. Not a piece of equipment or a cable. I forgot my *entire* equipment bag. I rode in a car, for an hour, without realizing I didn't bring my equipment.

I had to knock on her office door and just begin by apologizing. This was maybe the most embarrassing thing I've ever done in a professional setting, and I've barfed out of car sickness. I was just apparently zonked and very sleep-deprived. She was so kind and so compassionate, she sent me off, we made a raincheck date for a few weeks later.

The next time I showed up, I brought some chocolates and my recording equipment. We had a wonderful, illuminating, super informative chat about how we vote, civil rights, representation, revolutions, a little bit about Shonda Rhimes shows, her favorite articles and amendments, how law school changes the way you think, the power being in the hands of the people, and of course, the four-page parchment that holds this country together.

Gather 'round close. Let's take a good look at this country's idealist spirit of rebellion with constitutional law scholar and Nomologist, Professor Franita Tolson.

Alie Ward: Hi, we're here!

Franita Tolson: Hi!

Alie: Yay! [*both laugh*] You're technically a nomologist, though not really?

Franita: Oh, nomologist. I like that.

Alie: It's the study of law and rules that govern us.

Franita: Yeah. I guess it's consistent with me studying the political *nomos*.

Alie: Oh, yeah! There you go. Huh! You know the etymology, too, I didn't even know that! Professor Tolson?

Franita: Professor Tolson. *Dean* Tolson.

Alie: *Dean* Tolson?! Oh, I didn't realize that. Oh my god.

Franita: It's very weird. When people refer to me as 'Dean', I forget to turn around. I'm like, "Who are they talking to?"

Alie: Do people just say "Dean"?

Franita: So, it's relatively new. Actually, I'm not officially a dean until July 1, but I've been baby dean-ing, so I think people have been practicing "Dean Tolson," and so I don't realize they're talking to me, even though my last name is not common.

One thing that has become a recent passion of mine is letting the world know how much great scholarship is going on in this institution and luckily that falls within my role, as well, because I love my colleagues and they're doing really important work, and so I would love for everyone else to realize all of the wonderful things we do here at Gould.

Alie: And how long have you been a professor?

Franita: This is my tenth year. I started my career at Florida State College of Law, and I worked there for eight years and then moved over to Gould about two years ago.

Alie: What drove you to study law? When did you know that that was the field for you?

Franita: When I was in college, I went to a small liberal arts college in the middle of nowhere Missouri, which was good because you do get an opportunity to focus on your studies because there's not much else to focus on. But, hey, go Bulldogs, Truman State. [*clip of Truman State fight song*]

But it really was a wonderful opportunity, because of very small class sizes, I got to know my professors quite well. So I had professors who I could talk to about my future, and I had some who pushed me in a direction of getting a PhD in history, but I also had professors who pushed me toward law school.

All I knew at the time was that I really liked learning. Like, I hate it when I don't know something. When I'm talking to someone and they mention some fact I don't know, I'll google it because I can't stand not knowing various things. And so, really it was this thirst for education that fit quite well in either of those paths. I could've done the PhD, I think, and been perfectly happy, or did law school. So I chose law in part because I thought it would be fun to actually practice law for a few years. I knew eventually I wanted to be an academic of some sort. But oddly enough I never practiced law.

Alie: You didn't?

Franita: No. [*both laugh*]

Alie: And so, at what point did you say, "Mmm, I don't know if I'm going to practice law, I might just go into teaching and being a professor?" How'd you make that choice?

Franita: When I went to law school... Interestingly enough, I had some ambitions about being a law professor, but I didn't know how realistic it was. I had a professor my second year of law school who said to me, "You should be a law professor." And to this day I still tell her, "You changed my life," because I did not realize that it was a direct path to the academy in that way, and the law school I went to isn't exactly representative in terms of diversity. There were two African American professors at the time: Barack Obama and Tracey Meares.

Alie: Heard of one of them.

Franita: [*laughs*] Tracey's at Yale, she's fantastic, and Barack ended up being the president, obviously. [*Obama speaking over a cheering crowd his name: "Thank you, thank you."*]

Aside: Franita says that when your role models are *that* iconic, it's kinda hard to see yourself just stepping into their shoes, kind of like if you dropped into a Zumba class and the instructor was like, "Hi, I'm Shakira." But her professor Lisa Bernstein was like, "You could do this," and encouraged her to join a legal scholarship workshop, and Franita realized...

Franita: "This is what I want to do. I just want to teach, I want to learn, I want to write." And so I clerked for a few years after law school. I clerked in the district court and on the court of appeals, and then I went into the academy.

Alie: Wow.

Franita: Yeah, so I never actually had a real job, which is pretty cool.

Alie: I would call being a dean of a law school quite a real job. [*laughs*] What were your focuses like in terms of history? What kind of history did you study?

Franita: I studied history in undergrad, and it was a pretty comprehensive program. I focused on, in terms of minor, women's studies and African American studies, but I took a wide variety of classes.

Aside: Franita has gone on to teach and write about everything from election law, to gerrymandering, to employment discrimination, Civil Rights era voting, and of course about Reconstruction-era voting rights. And side note: the Reconstruction era was that period after the Civil War and in it, three amendments were passed.

Franita: I write about voting rights from a historical perspective. Right now, I'm writing a book about Congress's power to protect the right to vote, and I start at the founding and it goes all the way to the present. So basically 200 years of federal power over elections. I focus on the right to vote, but also election procedure, so voter registration, the time, places, and manner of federal elections, and so on. The book is pretty comprehensive, and that's how I'm using my love of history and connecting it with law.

Alie: And did what you learned in terms of women's history, African American history... How much of that really made you want to continue to change what's happening today? I mean, there must be so much drive to continue and to make things better.

Franita: Oh, yeah. It's always amazing to me that we still live in a time where women make less than everyone else, and African Americans have to consistently prove their humanity, and Latinos have to consistently prove their humanity, just people of color in general facing the difficulties that... They've changed over the years, but so much has remained the same. And so, in my work, I realized that we can't keep using the same tactics to address discrimination, because it's changed, it's evolved, and so we have to change and evolve.

The obvious question I get is, "How does looking to the past signal that you are doing something different with respect to the future?" The past is static, right? But the reality is that we have forgotten the lessons of the past, so in many ways the past is present, and so you can use the past and think of new and creative ways of interpreting, really, in the case of my work, the scope of federal power, and say to both courts and legal scholars, "Hey, Congress actually has a lot more power than it's using to protect the right to vote."

Alie: Wow.

Franita: Right? And so it's really important to tell this story.

Alie: It must be so frustrating having all of that historical perspective and to have people think everything's fine now. Like, "Whuuut?"

Franita: I haven't met anyone who thinks everything is perfect. *[laughs]*

Alie: Yeah, okay, good.

Franita: Yeah, I know those people exist, but that is a choice to literally put your head in the sand if you think that everything is fine. I voted for President Obama twice, and even then, things weren't fine.

I feel like, especially as lawyers – and this is something I tell my students – we have an obligation to fight, even if the party you prefer is in the White House, even if policies that you support are being enacted by Congress, because the reality is that there are still people who are left behind. We're only doing as well as the least fortunate people in our society. You always have an obligation to fight, even if you think things are fine.

Aside: Okay, side note. Since conducting this interview weeks ago, I have thought of those words, “We’re only doing as well as the least fortunate people in our society,” every single day. So, how do we make this happen? What tools do we need? Well, one is this four-page, two-foot by two-foot document written on animal skin parchment with a goose quill 229 years ago. Now, you can score yourself a full-size replica on Amazon for about 16 bucks, but you might want to have those pages nicely framed like Franita’s.

Alie: We’re surrounded by the Constitution on your walls. Can you tell me a little bit about, when you study the Constitution, where do you begin with that? I mean, most Americans have probably not read the Constitution, and I know this is a very stupid question, but what does it even consist of, between the Bill of Rights and the amendments?

Franita: No, it’s not a stupid question at all. Because as you mentioned, most people haven’t read it. And let’s be honest, it’s kind of boring, right? [*Quite a page-turner.*]

But it’s important, and this is what I tell my students. This is why I force my students to read it, because I think we take it for granted, and it’s important to just sometimes sit and read the words. I made my ten-year-old daughter – she’s twelve now – when she was ten, I made her read it, because it’s a really important document and there’s so much promise there. But in order to force the government to adhere to the promises made in that document, you have to read it and know what’s in it.

Aside: Okay, let’s get into it. So we’re going to dissect this like a book report, but I’m going to run through the anatomy really quick. So, here is the preamble:

We the People of the United States, in Order 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 to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Essentially, like, “Okay, here’s how we’re going to do this, ye all shalt buckle up.”

So this original 1787 document has articles. Article I creates Congress, that’s the legislative branch. Article II created executive branch, that’s the president. Article III creates the judicial branch, aka the courts. And Article IV, that’s just all about the states. Article V is about how to amend it, should we need to – which... We will need to – and Article VI is about federalism, that’s meaning the federal law is supreme over state law. Now, Article VIII of this original document is about ratifying it and voting the Constitution into law.

Now, two years later, we have the Bill of Rights, from 1789. These are the first ten amendments to this original document. They deal with – and I will run through this quickly – one, freedom of religion, speech, and the press; two, the right to bear arms; three, the housing of soldiers; Fourth Amendment, protection from unreasonable searches and seizures; Fifth, protection of rights of life, liberty, and property; Sixth Amendment, rights of accused persons in criminal cases; the Seventh Amendment is the rights of accused persons in civil cases; Eighth Amendment, excessive bail, fines, and punishments are forbidden; the Ninth Amendment, other rights kept by the people; and the Tenth is undelegated powers kept by the states and the people.

Now, that’s the Bill of Rights, that’s from 1789, the first ten amendments. There are 17 amendments after that, and here I’m going to rely on my friend Wok-uh-podia [*Wikipedia*] for this. Governmental authority are Amendments 11, 16, 18, and 21,

safeguards of civil rights are Amendments 13, 14, 15, 19, 23, 24, and 26, and government processes and procedures are Amendments 12, 17, 20, 22, 25, and 27.

Should I just put out a bonus episode – hear me out – that’s just me reading this whole frickin’ thing to you? So that you can garden, or do chores, or clean the toilet with a toothbrush, or nap, while listening? Because this hour that I sat down with Franita just has me amped as hell about it.

Okay, anyway, let’s go back, let’s talk about those original, 1787, those four pages. Those are composed of articles. There’s seven articles. They establish what the government is.

Franita: So the original Constitution is a framework document. It lays out the three branches of government and it also sort of describes the power that each branch has. To my students, we discuss in Constitutional Law 1, separation of powers doctrine. But the Constitution has also been amended 27 times, right? [*“That’s so many.”*] And the original Constitution also sort of delineates the authority between the federal government and the states, which we refer to as federalism.

So it is a framework document that we’ve amended in order to expand the rights side of things. So what are the rights people have relative to the federal government and the states? That’s probably the easiest way to think about the Constitution, the original Constitution, as a framework document for establishing the relationship between the federal government and the states, and the branches relative to each other, and each amendment as an opportunity for the people to hold their government responsible for protecting certain rights.

Aside: So, yes, the original four-page Constitution is the shortest and oldest of any major government. It’s like a friendly old gnome in the garden. And the original 4,400 words outlined, “Okay, we’ve got a legislative branch with the Senate and the House. We’ve got an executive branch, aka the prez. We’ve got the judicial branch with the courts.” And the initial document was just the scaffolding of federalism, meaning that federal governments work in tandem with state governments under one big system. And then we souped it up over the years with those 27 amendments that make sure things are fair for everyone and that the government can’t legally dick us over. So, the Constitution. It’s just important to get cozy with this very powerful tool.

Also, if you’re secretly wondering what the differences between the Constitution and the Declaration of Independence are, don’t worry about it. So, they’re different. But it’s like when you accidentally mistake two brothers. Like, both are on parchment-y things with pretty dope penmanship, but the Declaration of Independence is 243 years old this year, and that’s just a one-pager that essentially breaks up with England. Now the Declaration of Independence has the very famous sentence:

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.

Now, the Constitution came fourteen years after that and the Constitution addresses that “all men are created equal” part. That’s why the Constitution rules.

Franita: It really is a remarkable document. It’s both conservative and progressive. Conservative in the sense that the founders wanted to protect certain ideals, but progressive in the sense that there’s room for change and evolution, and I think that’s why it’s lasted so long. So it’s remarkable in that sense. I try not to venerate it, you know, [*laughs*] but as a

constitutional law professor, it's hard to do that, because I do respect it, and I do respect the court, but that does not mean that I'm not going to push them to be better, because we can be better.

Alie: And how did it become amended? Where does it say in there, "But we can change it, provided it's a good change"?

Franita: Article V allows us to change the Constitution. It is hard to change it because it has to go through Congress and then a certain number of state conventions have to agree, but it can be changed. Now, it hasn't been changed since 1992.

Aside: PS, that change was the 27th Amendment, which reads: "No law varying the compensation for the services of the Senators and Representatives shall take effect, until an election of Representatives shall have intervened."

It dealt with the Congressional salaries. So maybe not as popular as other constitutional quotes, just based on my Google Image search of "Constitution + amendments + tattoo." I've seen a fair amount of freedom of speech tats, plenty of freshly inflamed Second Amendment gun tattoos, but not *one* 27th Amendment body art. I'm sure someone has strolled into, like, a boardwalk tattoo shop, just like a little piña colada drunk, and just been like, "Ink me up, brother." But it was probably, like, a member of our US legislative branch who's keeping that part of their body tastefully under a blazer.

Anyway, back to amendments. Can we expect a 28th? Or is it mostly about how we read the existing ones?

Franita: Most of the changes – and this is why Supreme Court nominations are so high-profile and so controversial – most of the changes have come through the Supreme Court. They interpret the document in a way that changes the document's meaning, even if it's not explicitly within the document. This is why we're arguing about same-sex marriage, this is why we're arguing about abortion, because the Constitution does not explicitly say, "You have a right to abortion," but the Constitution has been interpreted to protect a woman's right to choose. And so I think the Supreme Court, in part, has become so politicized because they have taken up the role of amending the Constitution.

Alie: Should it be such a small number of people with that power? I know that's a tough question.

Franita: That's a "What is the meaning of life?" question. [*both laugh*] [*"One of those, 'What does it all mean?' things."*] There are proposals now to change the size of the court, to make it so that justices only serve for, like, 18-year terms. Because right now it's a lifetime appointment, so not only is it a small number – nine – who are responsible for making these huge pronouncements that affect so many of us, they serve for life. So I do think it's a conversation that needs to be had. Is that structure reflective of the type of society that we live in? When nine justices are mostly white, most of them went to a set number of schools, they are not geographically diverse, there are only a couple women on the court even though the population is half female, there are only a few people of color – not even a few. It's not religiously diverse.

Aside: Okay, side note. I'm just going to quickly list off the US Supreme Court justices, because most of us are probably able to name nine *Real Housewives* and, like, 35 *Star Wars* characters, but I'm going to pause, just for a quick second, I'm going to let you see how many US Supreme Court justices you can name. Okay, I'm going to pause for a second.

[silence] Okay, so how many was that?

All right, in the name of transparency and shameless learning, I'm going to tell you, I could name three-and-a-half, because I just guessed right on one, but I wasn't sure.

So here's what I did. I looked it up for you, and I'm going to tell you right now. Now, in the order of the most historically conservative: Clarence Thomas, nominated by George W. Bush; Brett Kavanaugh, nominated by Donald Trump; Neil Gorsuch, nominated by Donald Trump; Samuel Alito, nominated by George W. Bush. There's Chief Justice John Roberts, who was nominated by George W. Bush.

Now, those five of the nine tend to be more conservative. There's Stephen Breyer, who leans more liberal. He was nominated by Bill Clinton. There's Elena Kagan, appointed by Barack Obama. There's the notorious RBG, Ruth Bader Ginsburg, appointed by Clinton, and Sonia Sotomayor, appointed by Barack Obama. Those are just some names to get in your brain.

So, my heart was filled with hope, and I checked Instagram to see if there was, like, an account for SCOTUS. I looked at Instagram.com/SCOTUS. It has nine followers and it's just some jabronie, sitting on the handle, having posted one blurry photo of some bathroom tile three years ago. So if you own the SCOTUS Instagram handle, just give it up! Let's make the Constitution as cool as makeup for your butt, which Kimmy K just started selling this week for \$55 a tube.

Now, until Ryan Seacrest produces an E! reality show of the Supreme Court chambers, you can just read about their bios at SupremeCourt.gov. Six dudes, three ladies.

Now, since 1790, there have been 114 Supreme Court justices, and 108 have been white men. Four have been women. Three have been people of color. And none have been openly LGBTQ.

Franita: It raises very difficult questions about whether or not the Supreme Court is actually representative of what society looks like now. I think for that reason it's worth having the conversation.

Alie: And what can people do if they are concerned about voting rights and about elections, other than just to vote? What do you think, as a law professor? Where does our power really lie?

Franita: People don't vote in local elections. In theory, most people don't realize... I shouldn't even say "in theory." *Actually*, most people don't realize that the bulk of the decisions that affect you happen at the local level.

Alie: *Really?*

Franita: Yeah. School board elections, your property taxes, right? Trash pick-up. Anything. These are local officials who make decisions that affect your everyday life. And people don't vote in those elections. They have the lowest voter turnout.

Aside: The 2014 midterm election had a low 41.9 voter turnout, but that spiked in 2018 to 53.1, which is *huuuuuuuuge*. So more younger voters, more women, more people in minority groups made it to the polls than in previous years. But local elections – whoo boy. Oh, man, this is sad. This is like throwing a party barely anyone shows up to. So voter turnout in previous years has been as low as 14% in New York – that's in *New York* – and

around 20% in a lot of American cities. So just imagine if everyone voted. *Imagine* if everyone showed up to that party. That would be a *rager*.

Franita: Even state elections, state elections that are off cycle, meaning they happen in non-presidential election years, people don't turn out the way that they should. 2018 was an aberration in that sense. People were mad, they were fired up. It was a non-presidential election year, but people turned out. That needs to be every election.

Aside: Franita says that policies in state legislatures determine how people can vote. So this blew me away.

Franita: So for example, if you live in Arizona and your state is requiring that you show proof of citizenship in order to register to vote, you can hold your state reps responsible for that, if you don't agree with that policy, because that makes it harder for people to vote. But people are so focused on, you know, the president and what he's doing, that they're ignoring that our broader political structure is such that the major decisions that affect us happen at the state and local level. You have to pay attention to all of it.

I know it's a lot, right? I feel like the president is constantly in the news and sort of drawing our attention away, but we have to focus on him, we have to focus on our state legislatures, and we have to focus on the local bodies that affect us.

Alie: And where do law professors, and law students, and the average person get a lot of their information to be informed?

Franita: [*quietly frustrated*] God... Twitter.

Alie: [*laughs*]

Franita: Oh, god. Which is the *worst* place to get your news, right? But my sense is that a lot of people get their news from social media. I'm still somewhat old school. I still read the paper occasionally. I still watch cable news. I need some variation when it comes to my news consumption. But my sense is that most people get their news from social media, which is terrible.

Aside: I asked the internet for advice on how to consume news media for the busy person, and folks suggested subscribing to one email newsletter a day so you have condensed news articles in your inbox every morning, and just setting aside, like, 15 minutes of your morning or your commute to just bone up. Or you can use an aggregator like Feedly or listen to a daily 15-minute news podcast. But a lot of doctors and experts agree that you should only listen to those podcasts if it doesn't cut into *Ologies* listening time. That's just a report I read.

Also, having a news buddy that you share stories with daily can be kind of a fun way to put information into your dome.

Alie: One thing that I just sit back when it comes to lawyers and just wonder at – my friend Hannah is a civil rights lawyer – I don't understand how you keep all of that information in your brain. And how do you not get overwhelmed by words and by particulars? What's a good way for people to digest things that seem very broad and very intimidating?

Franita: I think for law professors, we pick areas. My area of law is election law. I just feel like I should know, and understand, and think about things related to election law. I am not sitting here trying to sell you on tax law. I know nothing about tax law. I don't pretend to

know anything about corporate law. But the best thing about the law school education is that I feel like I could learn it if I needed to.

This doesn't mean it's easy, but it's just that when you go to law school, our job as professors is to teach you how to think in a certain way. We teach you how to identify good and bad arguments, we teach you how to be clear in your writing and be clear in your thinking. So there's room for all of it. There's room for various approaches to law and our life experiences, arguably, bear on how we view the law and how we interpret the law. But, that being said, it does not require us to be an expert in *law*, broadly defined.

Alie: Do lawyers and law professors read the terms and conditions of every website?

Franita: No.

Alie: Okay. *[both laugh]* I didn't think so.

Franita: That is an awesome question. Uh, no. Although I did, the first time I bought a house, I did read everything.

Alie: *[groans]* That's a lot of papers!

Franita: That's a *lot* of paper. And I never did that again. I bought another house recently when I moved to LA. I did not read it. I was like, "That was just dumb."

Alie: And when it comes to... Let's say, people want to get cozy with the Constitution. I have a friend named Jerry; he has a copy of the Constitution in a booklet he keeps with him in his bag all the time. He's amazing. Most of us aren't like that. If people wanted to get cozy and just get to know your Constitution, do we read it all the way through? Do we read it article by article and let it digest? Where do we start?

Franita: The easiest way to actually read the Constitution and remember what you've read is to tie it to some controversy that you care about. For example, if the president has done something that you like or you don't like, read Article II to see if he can actually do it.

Aside: Article II is all about the executive branch, so how we elect and remove the president, and what their job and their responsibilities are.

Franita: If the Supreme Court issues an opinion and you like it or you don't like it, read Article III.

Aside: Article III, remember, establishes the judicial branch.

Franita: If Congress does something and you wonder if Congress can actually do it, read Article I.

Aside: Article I is like, "Here's how we're going to do the legislative branch, folks."

Franita: To be clear, this may or may not shed light on whether or not they can do it. But it gives you a general sense of what they can do, and it enables you to form an opinion about what they've done.

But I will go a step further. So now that you've read the different articles that relate to whatever the news of the day is, find any Supreme Court opinions that might actually bear on what's happening and see what the court says about it. Now, that might be a step too far for most people. People are like, "I am not reading Supreme Court opinions." Okay, so I have a solution for that as well. There's a website called SCOTUSblog. Go there and get the recap. *[laughs]*

Alie: Amazing. That was going to be my next question because, like, I don't even know where to find those.

Franita: Get the recap. The website does a really good job of giving you the issue and then linking to the opinion if you want to read it, and then they'll occasionally bring commentators on to discuss whatever the explosive issue of the day is before the court. It's a way for people who may not want to sit and read a lengthy Supreme Court opinion to figure out what's going on and why they should care about it. So you can read the Constitution and then you can follow up with SCOTUSblog.

Alie: *Nice!*

Aside: Okay, so side note, I went to SCOTUSblog, and I was just delighted to see an icon of ABC children's building blocks with the words "Plain English" under it. So click that tab, it lays out the cases in words that make sense to most non-law scholar humans.

I hereby decree that SCOTUS gossip is the hottest of the gossips, and at the scorching center of it all is that old parchment document. Goose quill realness!

Alie: Do you have a favorite line or article of the Constitution?

Franita: I really like Section 2 of the 14th amendment.

Alie: What is it?

Franita: Right. Here's the thing: Section 2 of the 14th Amendment allows Congress to reduce a state's delegation in the House of Representatives if the state abridges the right to vote. It is a really clonky and uncomfortable provision. It's not pretty to read. But it has so much import.

To me, it says a lot about the society that congressional Republicans were trying to create in 1866 after the end of the Civil War. They're trying to figure out how to incorporate the formerly enslaved into society. It says something powerful about what that society should look like and how important voting had become to securing freedom.

So, it's my favorite provision, even if it doesn't read very pretty. And I think the 14-2, combined with the 19th Amendment, which extended the right to vote to women, really says a lot about the promise of the American dream, just in terms of "we the people" as a political community. The founders, they created this political community separate from this monarchy that they wanted to get away from. They wanted something closer to democracy. And if you read those two provisions, it tells you what we can be. We're not quite there yet, because even after the ratification of the 19th Amendment, there was... you know, black women still really couldn't vote.

Aside: Quick side note on how to prevent people from voting. Oh, there are all kinds of ways to do it! You can charge poll taxes equivalent to a whole day's wages, there were literary tests, educational requirements, there were property and tax requirements. But then there were also grandfather clauses, which meant that if your grandfather could vote, you could skip all those hurdles. So, black voters and impoverished whites – oops! Couldn't vote.

Now in this day and age, you see early voting programs being stripped, certain ID hurdles at the polls in some states, so just know this is a long-standing American tradition and it deserves our attention and our rage. And by that, I mean action.

Franita: African Americans, more generally, were still disenfranchised, but it showed that we *can* do this. We can do this. We had to fight for it, it was bloody, it was contested. It took really

four decades after the ratification of the 19th Amendment for it to start to manifest, but when I read those provisions, it tells me that we can do it.

Alie: That the intention is there.

Franita: The intention is there.

Alie: How do you wrap your brain around something that was seemingly so fair in concept but absolutely overlooked huge swaths of the population who were not white men who owned land? Like, what were they thinking?

Franita: They were thinking about worthiness and virtue. So, people who didn't own property did not have the requisite independence that they thought one needed to exercise the right to vote. They knew it wasn't perfect, and arguably there were founding fathers who pushed back against this notion that property ownership was a prerequisite to voting, or should be. Benjamin Franklin didn't think that it should be. But it was a really imperfect way of trying to create a just and perfect society.

Then I think, to some extent, they recognize the problems, which is why I think of the Constitution as a framework document that we can change and build on. They did not set out to create a document that was complete in its entirety. They recognized that things needed to change, that they had made some mistakes. And so, I give them credit for that, but at the same time, these are not perfect human beings. They made some serious missteps. But I think it falls upon us as the later generations, as the people who have inherited this system of government, to basically make it better. "We the people" needs to be more inclusive, and now it falls on us to make sure that it is.

Alie: How can we make sure that rights to vote aren't being infringed on?

Franita: Here's the thing. I think that a lot of people feel like they have to sacrifice everything in order to make change. Everybody doesn't have to be Dr. King. You don't have to put your life on the line in order to try to change the way of life for a group of people. If everybody does something small, it can have a huge impact.

And I'm applying this criticism to myself, as well, because there are times where I write something and because I'm advocating for a position that I feel is the right position, but it's also inclusive, and it's also trying to bring people in who have been overlooked, I pat myself on the back and say, "That's enough." And it's not, because, let's be honest, a lot of people don't read legal scholarship. A lot of times, law professors are talking to each other. And so it's folly to think that if you write something, even if it is a great piece of scholarship that could affect the landscape of voting rights, that can influence the Supreme Court, to think that it makes a difference in the lives of everyday people.

Aside: So, what can we do?

Franita: One of the things that I've done for myself is, I force myself to say something. If something is wrong and I see that it's wrong, I say something about it. Even something that small. Because one of the things I've realized in the last couple years is that so much wrong has become normalized, and part of it is because we don't say anything.

So, yes, I will continue to write scholarship that I hope has an effect on how we think about voting and the ability of people to cast a ballot, but I also feel like I have an obligation to be vocal about wrongdoing. And towards that, I have tried to be more assertive in terms of social media, in terms of writing op-eds and writing for popular

outlets, because I think that that's one way to point out wrongdoing in a way that everyday people can see and kind of relate to. So... Speak up.

Alie: And if you are in an area where maybe... Or if you, say, find yourself in an echo chamber, try to speak outside of it.

Franita: Yeah, yeah. So we have to be open-minded, I think, just in terms of talking to people who might have different viewpoints and trying to show them that there's more than one way of thinking about things. That's the problem with cable news. It has created this perception that there's one way of looking at the world. If you never change the channel, you'll believe that there's only one way of looking at the world. But you have to be open to differing viewpoints.

Let me clarify that. There's just certain things that I don't have patience for. I just don't. Maybe it's a product of getting older. [laughs] I am very open-minded. In my classroom, we have people who are on, really, both sides of the political aisle, both sides of issues, very controversial issues. I teach constitutional rights, so always people have opinions about whether or not affirmative action is appropriate, whether or not abortion should be legal. There are ways to have that conversation where you can include people, even if they don't agree, because law school is not necessarily about changing people's minds. I'm not trying to indoctrinate anyone.

But I don't have room for certain things, and I will shut down people who I feel are being sexist or racist, and that's not something that being open-minded requires, for you to entertain opinions that are clearly offensive. But that does not mean that you cannot have a constructive conversation about controversial issues.

But as I get older, I realize it's really important to draw that line, because when you invite certain types of dialogue, it does have an effect on people of color, people who don't have power, people who are historically discriminated against and oppressed, in a way where they shouldn't have to internalize those costs. So as I get older, yeah, I have less patience for certain conversations, but that does not mean that I don't invite critique of the things that I believe in.

Aside: There's a difference between arguing something ideologically and just being a cruel jerk who says things to get a rise out of people and hurt them.

Franita: I think they call them trolls online. [both laugh]

Alie: Yes, that is what they are. And where do you think our Constitution stacks up globally, in terms of other governments?

Franita: It's one of the oldest, I think. I don't know if it's *the* oldest, but it's definitely top-five oldest. The interesting thing about the world is, especially as I've really learned to appreciate other societies, this is not the only way to do this. Our Constitution is so old and we kind of hold it up as a model. I think that politicians love to call America "the light on the shining hill," or whatever the term is.

Aside: I looked up this term and it's been said a few different ways over the centuries, many times in presidential speeches, but remixes include "that light on the hill," "that shining city on the hill," "the shining city," and "a city upon a hill," and it's said to come from Puritan colonist John Winthrop's speech as a bunch of folks were boarding a ship to set sail to form the Massachusetts Bay Colony. And Winthrop said that the new settlement would be, "As a city upon a hill, the eyes of all people are upon us," which meant, "Don't

screw this up. Don't wild out. It's not spring break, okay? Everyone's watching. So keep your holy bits in your breeches and, like, try not to kill too many people." Paraphrasing.

Franita: But this is not the only way to do this and so, comparatively, I don't know how it stacks up, because I've never lived under any other system. But I also welcome suggestions from other forms of government because I recognize that this is not the only way to do it, it's not perfect, and we're still working on it. It really is a question of how much work are we willing to put in in order to build a society where everyone can feel included? [*dramatic reading: "We the people of the United States."*] And that might require looking at other constitutions and looking at other countries and seeing how they do it.

Alie: And how about this "two senators for every state" situation?

Franita: [*laughs*]

Alie: Like, can we just go in there with a little eraser and... Do you think that that will continue, or was that what they had in mind when they wrote it?

Franita: Yeah, that's what they had in mind. It's part of the compromise. The House of Representatives is based on population and every state gets two senators. I don't see that changing anytime soon. I know that people have strong feelings about it. It seems weird that Wyoming, and New York State, and California, and North Dakota all have the same representation. And then the Senate rules make the Senate especially non-democratic and non-republican in some sense, as well. But I don't see that changing anytime soon. That would actually require a constitutional amendment.

Aside: So, just a side note. After this interview, I realized that I forgot to ask Franita about the electoral college, so I emailed her, like [*Seinfeld voice*] "Whaaaat's the deaaaal with the electoral college?" Is it fair? Is it unfair? Is it going anywhere?

And she wrote me right back and said,

Unfortunately, the electoral college is not going anywhere without a constitutional amendment. However, some states have taken steps to neutralize its effects by joining the National Popular Vote Interstate Compact, where participants pledge their electoral votes to the candidate that wins the popular vote, and so far sixteen states have joined the compact. There's more information available at NationalPopularVote.com.

I was like, "Whaaaat?" So I went and looked it up, and those sixteen states that have pledged their electoral votes to the candidate with the popular vote include: California, Colorado, Connecticut, DC, Delaware, Hawaii, Illinois, Massachusetts, Maryland, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington.

If you're like, "Hmm, my state was not listed. How might I get myself some of that legislative action?" go to NationalPopularVote.com. Now remember, amendments can take a little bit longer than state-to-state legislation.

Franita: As I pointed out, we haven't amended the Constitution since 1992, and because we have depended on the court so much, I don't even think there are people in this generation that understand the political capital, and the political cost, and the political mobility that will be required in order to change the Constitution. Constitutional change comes as a result of movements, political movements. And so we have political movements now, but I don't think they're the same as the political movements of the 1960s, for example. [*Dr. Martin*

Luther King, Jr.: "And I want you to know tonight that we as a people will get to the promised land!"]

Or the political movements of the Progressive Era, which also led to some constitutional changes. And so I just don't think that people alive today – no offense, millennials, no offense, my generation included – have a clear sense of what will be required in order for us to actually amend the Constitution.

Alie: What would be required? What kind of revolution or uprising?

Franita: Oh, gosh. You know, I don't even know, because I think that in the Progressive Era, they were really concerned about corruption in government.

Aside: Okay, side note. I did not know when the Progressive Era was, so I googled it, and it was in the 1890s to around 1920. According to a glossary on the George Washington University page, the early progressives rejected social Darwinism. They believed that poverty, violence, greed, racism, and class warfare could best be addressed by providing things like a good education, and a safe environment, and a good workplace, and they encouraged Americans to register to vote and to fight political corruption.

Now, the Progressive Era came to an end after World War I, this glossary says, when the evils of humankind were exposed. But by the 1960s, we had the Civil Rights Movement, and Franita rightly calls that one of the biggest political movements in history. That kind of action, and engagement, and sacrifice is what gets amendments made.

Franita: People were really politically active. People were paying attention, they were focused. It would have to be like that across many states and for a longer period of time. And given the fact that we live in the social media, Twitter, Facebook, what's-going-on-today world, will people pay attention that long? I don't know.

Alie: Yeah... But we could always try.

Franita: Right, we *could* try. I am an advocate of trying. I have nothing against using Article V.

Aside: So, Article V was on the original Constitution, so this is not to be confused with the Fifth Amendment on the Bill of Rights. So Article V on the original parchment Constitution says that to make an amendment, you need two-thirds of the House and Senate or two-thirds of all the states calling a convention. So, who ends up in the House and Senate matters.

Franita: And in fact, I think that constitutional amendment is important because even if you are able to go to the Supreme Court and get them to interpret the Constitution in a way that you agree with, it's only good for as long as that coalition is on the court.

Right now we have justices like Justice Thomas who don't believe that the court should really adhere to precedent, so if others adopt his view and precedent has no value, then there's nothing keeping the next coalition of justices from overturning an interpretation of the Constitution. And so, I think given the direction that the court is headed in, Article V will probably be more important. But in order for Article V to really work, people have to pay attention.

Alie: Is there anything anyone can do in their communities to help bolster election turnout or to help get people to the polls without worrying that they'll be stymied politically?

Franita: I think that besides driving people to the polls... I always tell people: Take someone to vote with you. Don't go by yourself! *[laughs]* Always take someone with you. But... *[sighs]*

Let me go bigger, bigger than your community. One of the really important things in the wake of President Obama's election was the fact that a lot of states expanded early voting, including over Sundays. I lived in Florida for eight years, on Sundays they called it "Souls to the Polls," and a lot of black churches would rent buses and take people to the polls. [newscaster: "Many in the crowd part of the campaign called 'Souls to the Polls.' Many area churches taking part to drive people to the board of elections."]

But after 2010, when the Republicans took control of a lot of state houses, they cut back on that. And so I really think, in terms of grassroots activism, there needs to be a concerted effort to force state legislatures to expand early voting. I think it's one of the huge indicators of large turnout. And also, I'm a fan of automatic voter registration. It should not be hard to vote. It just shouldn't. If people want to vote, they should be able to vote.

I know we give a lot of thought, and airtime, and media attention to voter fraud. It is not a thing, okay? There was a study recently that looked at elections since, I think, 2000 and it was a billion ballots, or some crazy number, and it was, like, eight instances of voter fraud. We cannot build an entire political system based on something that rarely happens.

The more common occurrence is the fact that people want to vote, and they try to vote, and they can't vote because we've made it harder to vote. So yes, there are things people can do in their communities in terms of taking someone with them to vote, but the focus really needs to be on forcing these state legislatures to make it easier for people to cast a ballot and stop relying on voter fraud as a justification for disenfranchising people when it doesn't really exist. [*"It's. Rigged."*]

Aside: Can we make Voting Day a thing? Like, let's dress up, let's get fancy. We can plan our outfits like it's the prom. We can go out afterward like it's our birthday, or celebrate by staying in with a frozen pizza!

Now, if we can all tune in simultaneously to eat nachos and watch the Super Bowl, we can make voting day a thing. So let's start planning it now. I want people to vote and then I want them to have friggin' parties.

Alie: In terms of debunking flimflam, which is mythbusting, any myths or misconceptions about constitutional law that you really just wish you could clear up?

Franita: Facebook is a private company. Why am I saying that? When people shout about the First Amendment? [*laughs*] Twitter is private. I have to tell people this all the time.

Because social media is such a big part of our society and how we get our news and how we communicate with each other, people think that the Constitution should always apply. It doesn't. The Constitution actually has limited application, and this is why local elections are important because those are the entities that are affecting your day-to-day life. Not to suggest that the Constitution isn't important, I'm not trying to put myself out of the job. But one myth is that the Constitution applies to everything, and it just simply doesn't.

Another myth... My job is not like the woman from *How to Get Away with Murder*. [*Viola Davis: "Despite what you think, this is not a class at all. This is a sacrifice."*]

That is not what I do. I don't involve my students in my private life, much less do they plot to kill my spouse. That is not my day-to-day. [*both laugh*]

Alie: It's not a documentary?

Franita: No, no, not a documentary. Also, law professors don't get the summer off for real. We don't teach, but we write and we think about law and we still talk about law in domains other than the classroom. So that's another myth. Maybe I should stop while I'm ahead. There's just so many!

Alie: Any movies or TV shows that get law professors right or get the Constitution right?

Franita: [pause] No.

Alie: [laughing] No?

Franita: No. I literally can't think of one. ["Not. One!"] I know there are, like, 12 *Law & Orders*, but they all get it wrong.

Alie: Do they have anyone on the writing staff, you think, that's a law professor?

Franita: Probably. They probably have real lawyers, they probably have... some law professor at some school in New York, probably advises them. But the writers will still take creative license, no matter what. Even if the law professor is like, "That's wrong." They're like, "But it's exciting!"

Alie: It's television! [both laugh]

Aside: Okay, we are about to take your questions, patrons, but before that, some words about some sponsors of the show.

But before that, the sponsors of *Ologies* make it possible for us to donate each week to a cause of the ologist's choosing. This week, Professor Tolson chose the American Civil Liberties Union. With more than 1.5 million members, nearly 300 staff attorneys – hi, Hannah! – thousands of volunteer attorneys, and offices throughout the nation, the ACLU continues to fight government abuse and to vigorously defend individual freedoms, including speech, and religion, a woman's right to choose, the right to due process, citizens' rights to privacy, and much more. So thank you, Franita, for pointing that donation in their direction. And now, some sponsors, making that possible.

[Ad Break]

Okay, your questions.

Alie: Dylan Manthei, first-time question-asker, asked: Have we drifted far from the initial intent of the Constitution because we have to interpret its meaning relative to today's technologies and developments? For example, large technology companies' terms and conditions that allow them to legally collect and store every moment and decision because you checked a box, things like that. So do we have to look at the Constitution differently now that we have all this crazy technology?

Franita: I think that they expected that. So to the extent that the intent was that the Constitution would endure across time and account for changes in society and technology, then maybe we haven't. Even the more conservative justices believe that the Fourth Amendment, for example, which prohibits unconstitutional searches and seizures, can account for new technologies. So I don't think that there's this resistance towards reading the document in a way that freezes it in 1787 totally.

But I feel comfortable in saying that, regardless of their intent, I think they were on the same page with the idea that the Constitution should move *with* society instead of against it. I believe that the Constitution is more flexible, it is more reflective of the society that exists at the time, the people interpreting it. For example, equal protection of the laws is a

great example, because equal protection of the laws meant something different in 1868 than it does now or than it did in 1965 when the Supreme Court was interpreting it. It's one of those open-ended terms where the meaning has evolved over the years, and so to say that the document is set in stone or that we have to act in a way that's completely consistent with the intent of the people who adopted it, I don't think that that's right.

Alie: Andrew G. says: How long does it take to amend the Constitution? Just, on average. Yeah, what does it take?

Franita: It depends. It really depends. The constitutional amendment that was adopted in 1992, which has to do with congressional pay, I believe – I haven't looked at that one in a while – was first proposed in 1791. *[laughs]*

Alie: Wow.

Franita: Yeah. But it can be really, really quick. I'm trying to think. The 14th Amendment took two years. The 15th took two years.

Aside: Okay, quick aside. So more than 1,100 amendments have been introduced in Congress, but just 27 have made it in. Now, the speediest ratification was for the 26th amendment. This was in 1971, and it constitutionally protected voting rights for folks aged 18 to 21. And this was important because in the Vietnam War era, so many students could be drafted but weren't able to vote. They were like, "Ummm, if I'm grown enough to fight for this country, maybe trust me at the polls, you dinguses?" And the courts were like, "Good point. Yes. We are dinguses. Let's make an amendment."

Now, this next question... Whoo. Okay. I was afraid it would just be like a hornet's nest of horrors, and screams, and poltergeists, and maggots, and explosives, and hot lava.

Alie: Andria Marsh asks: How many times has Trump actually violated the Constitution, and what does it mean to violate it? Hmm... might want to skip that one. What does it mean to violate the Constitution?

Franita: It depends. Every president violates the Constitution.

Alie: Really?

Franita: Yeah.

Alie: Oh. *[slow, deep Alie voice: "Ohhh."]*

Franita: And this is why it depends. Is it a violation if no one does anything about it? *[laughs]*

Alie: Oh, man. That's existential.

Franita: Yeah, it is! You know, I've wondered about this, because one might say President Trump is violating the Emoluments Clause and have a really good argument that he's violating the Emoluments Clause.

Aside: PS: An emolument is a salary, fee, or profit, and this clause is from Article I of the original Constitution papers. It states: "No title of Nobility shall be granted by the United States" – so no one can call themselves King of America – "And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."

So Article I of the Constitution: Don't go accepting free shit. You're not an influencer getting free sandals or taking money to 'gram about hair gummies. You're the goddamn president.

Franita: But if a court comes in and says, "This is a non-justiciable political question," meaning we can't resolve it, and so Congress has to resolve it, and Congress doesn't do anything, one might say, yes, it's still a constitutional violation, but what does that get you? Nothing. Because there's no remedy.

So I think every president has an inclination to read their power broadly, and they're going to push limits. It doesn't matter if it's a president you like or you hate. They have every incentive in the world to see how broad their power is. And because of that, they will violate the Constitution and the court will occasionally come in and say, "This is a constitutional violation." No president is exempt from that.

So in terms of President Trump, I don't know how many times he's violated the Constitution, but I want to make it clear that he's not unique in that. He might be unique in other ways, but in terms of pushing the boundaries of executive power, this is why people have to be vigilant.

Alie: And what happens if you do violate the Constitution as a president and you come against pushback for it? Congressionally?

Franita: So under prior presidents, usually they back down. Especially if you get a Supreme Court pronouncement. We haven't entered in a situation where the Trump administration has gotten a contrary judicial decision and they've just disregarded it. That has happened before. Andrew Jackson got a contrary judicial decision from the Supreme Court and he just ignored it.

Aside: Okay. Just quickly, if you're like, "What is that about?" This is the 1832 case *Worcester v. Georgia* in the Supreme Court, and it ruled in favor of Indigenous tribes establishing their own rules, but President Andrew Jackson just straight-up disregarded it, and later that led to the Indian Removal Act and the Trail of Tears in which thousands of lives were lost. This was an important case, though, in establishing tribal sovereignty. Now every time I look at a \$20 bill, I'm just going to think, like, "Why were you such a dick, dude?"

Now, the twenty could use a makeover, we all know that. Jackson out. Tubman, you're in. There were plans to replace Andrew Jackson with abolitionist and certified hero Harriet Tubman by 2020, but just in the last few weeks – I just looked this up – it's looking like that plan may be delayed another six years. So, if anyone's up for raising a ruckus, count me in.

Franita: It's not like these things haven't happened, just that people don't study history anymore, so they forget that these things have happened. This is why the media is so important because the media shines daylight on things that will otherwise stay in the dark. It forces the president to be accountable for decisions that he has made. Usually, we look to the courts as our first resort in terms of telling the president that he has exceeded the scope of his authority. Hopefully, I can say *her* authority one day. His or her authority. *[laughs]*

Alie: Knock on wood. *["Knock, knock!"]* Kacey Wight wants to know: Do they really have the original on display at the National Archives and have you seen it? The original Constitution.

Franita: I've seen it. Is it the original? That sounds like a conspiracy theory. I don't know if it was the *original* that the delegates walked out with in 1787 after discussing it over a hot summer. I don't know. If I'm remembering the history correctly, there was more than one original.

Alie: Oh, okay!

Franita: But I'm not 100% sure.

Alie: Ooh, I'm going to look it up.

Aside: Now, if you would like to gently drool on the glass of historical documents, the rotunda in the National Archives has ya covered. They house the Declaration of Independence, the Constitution, and the Bill of Rights, but probably try not to drool on the glass anyway, because like a bunch of pilgrims on spring break, or a city shining on a hill, a lot of eyes are going to be on you. So you can see it at MuseumArchives.gov, or you can just visit next time you're in DC, like Franita did.

Franita: Do I believe that I saw something that was produced at the time? Sure, I could believe that.

Alie: Was that kind of thrilling? Were you like, "Oh, hello"?

Franita: It was thrilling. Yeah, it was very thrilling. I'm always humbled in those spaces. When I go to DC, I always try to do something historical. The last time I was there, I went to the African American History Museum and that was my second time going, and I'm always just really humbled in those spaces, looking at things that are so old and so important. It's always just... it's thrilling to me.

Alie: Do you think that there's a good documentary series that anyone should just put in their brain as an American or as someone who is interested in American history? Is there a good crash course, say, in becoming more aware of our history?

Franita: Oh my god. So there's a great new documentary by Henry Gates on Reconstruction. It is totally worth watching, and it's so important, and it really does help people understand how we got here, in this moment.

Aside: Once again, Henry Louis Gates, Jr., PBS documentary, *Reconstruction: America After the Civil War*.

Franita: So that's top of my list.

Alie: Okay, good. It's on my watch list now. Malcolm Guidry wants to know: Is there anything in the Constitution preventing a former two-term president – say, Obama – from running for president again a few years after he or she leaves office?

I guess what Malcolm would like to know is, can we get Obama back?

Franita: No. [laughs]

Alie: Have you called him and asked? You're like, "Hey, it's me!"

Franita: No, I don't have his number. He probably doesn't even remember me.

Alie: I'm sure he does.

Franita: He was my constitutional law professor, but I was one of many. I'm sure he doesn't remember me.

Alie: At the time, were you like, “I think this guy’s going to be president,” or were you like, “He’s pretty good”?

Franita: He was running for the Senate at the time I took the class with him, so I knew he had political ambitions. I don’t remember being totally surprised that he ran for president, but I don’t know if in the moment I was taking his class I was like, “That’s the next president.”

Was he presidential? Sure. Very polished, very smart. It was clear he knew the case law and the doctrine like the back of his hand. But because there had never been a Black president before... [laughs] It’s hard to think of people in that space. But when he became president, it was like, “Oh, yeah, of course! *Of course* he became president!”

Alie: Well, I propose that we just have a countdown clock until AOC can run. Just like, “How many more years, how many more minutes, until she can run?”

Franita: How old is she, 28?

Alie: [anguished] *I knooowww!* How old does she have to be, like 37?

Franita: 35.

Alie: Come on. Jason Goodwin asked: What can we do about ending the slavery that’s allowed by the Bill of Rights? Prisoners are currently trying to unionize and fight for fair wages, but I believe ending the slavery at the constitutional level is the only fair way to end the injustice. Any thoughts on that?

Franita: What slavery is he referring to? Prisoners? People in prison?

Alie: I think, yeah.

Franita: I mean, that would take a Constitutional amendment, because the 13th Amendment explicitly exempts people in prison.

Aside: The 13th Amendment, passed and ratified in 1865, reads:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Now, last September, Kanye West tweeted a photo of himself on a private jet wearing a MAGA hat and calling to abolish this amendment. So when the world bellowed a collective, “What the fuck, Kanye?” he backpedaled and said, “Okay, not like *abolish*, but *amend* it,” and then he twittered, “the 13th Amendment is slavery in disguise... We are the solution that heals.”

That last sentence kinda sounds like when you let predictive text write a sentence, or maybe his publicist just took over his phone and was like, “Quick, what’s something vague I could say that sounds nice?” Anyway.

Franita: You can put people in prison and have it not violate the 13th Amendment, so that would take another constitutional amendment. And I know there is a prison abolition movement and people who are writing about this very issue and, sort of, radically rethinking our criminal justice system. But in terms of saying that states are constitutionally prohibited from imprisoning people? That would take a constitutional amendment because right now the Constitution exempts it.

Alie: Given that that’s exempt, then, forced labor can continue within the prison system, unpaid?

Franita: Unfortunately. Although, it really makes me angry, because for many years after the Civil War, convict leasing was basically slavery by another name, and people died in huge numbers, they weren't fed properly, they weren't taken care of, they succumbed to illnesses, and everything else. It was basically in slave-like conditions. That's one of the issues with reading the Constitution very formalistically. *Technically*, that's not unconstitutional. But are we okay with that if sheriffs in law enforcement and such can just arrest people on ridiculous charges and force them into convict leasing? Which is what happened for decades after the Civil War.

I just feel that we have to really think about the meaning of the document and weigh it against the realities of the life and the society that we want to create. There's no way that that should be okay. So I don't know. It's a tough situation, but I do think it's something that we have to confront because it also directly ties into felon disenfranchisement. Are we okay with disenfranchising people who have paid their debt to society? To me, that's problematic and that's also something that we should think about, to the extent that it's about being inclusive. We also build prisons in these very remote and rural, mostly white areas. They get the benefit of that when it comes to apportionment and determining how many representatives the state gets in the House of Representatives, yet those people can't vote. Why are we okay with that?

So these are all conversations that we need to have and it ties into a broader question of what society do we want to be? One of the things I've noticed is we're very comfortable with things if we can say that it's how we've always done it. And so part of changing that mindset means we have to have an electorate that is downright militant. Militant in the sense of making demands of our elected officials.

I view that as a comprehensive strategy. Once they realize that they have to actually make decisions that the electorate will hold them accountable for, then you'll start to see changes. And this is the problem with gerrymandering. A lot of our elected officials can make whatever decisions they want, but they don't fear competition because they're in safe districts. Once we get to a place where the electorate is holding elected officials responsible, then you'll start to see change on some of these issues. That, of course, requires involvement at the local, state, and federal levels. It can't just be one thing.

Alie: So keep making noise.

Franita: Keep making noise. Speak up.

Alie: I think a lot of people think that it's just so futile, but they don't realize that it's not.

Franita: They want you to think that.

Alie: Yeah. [*sighs*]

Franita: If everyone thinks that, then nothing changes.

Aside: *Ugh*, I have also daily thought about her saying this. [*Franita, repeated: "They want you to think that. If everyone thinks that, then nothing changes."*]

Also, a bunch of folks asked about this next topic, and so right now, I shall say their names with my mouth: Chelsea McKee, Meredith, Maria Kumro, Elaine Barr, Jake Dickerson, D. B. Narveson, David McWilliams, Rick Gillespie, Deanne, and Meagan White.

Alie: Haley Yerxa and a lot of other patrons want to know: What was the original purpose of the Second Amendment and is it cited incorrectly in today's society? Or is it cited correctly?

Franita: Depends on what you believe. *[laughs]* This is so much of our constitutional discourse. In the Heller case, which was the Supreme Court's, really, first comprehensive interpretation of the Second Amendment –

Aside: If you're like, "Ward, hook me up. What was the Heller case?" I got you.

This was the 2008 ruling that said the Firearms Control Regulations Act, which banned DC residents from owning handguns, automatic firearms, high-capacity semi-automatic firearms, or unregistered firearms, was unconstitutional and that handguns are arms per the Second Amendment. This decision was upheld by a vote of 5-4. So, if you like the high-stakes rush of sports, you'll love politics!

Now, *one* judge was responsible for a decision that affects millions of lives.

Franita: Justice Stevens wrote a dissent where he advocated a view of the Second Amendment where you have a right to bear arms in connection with militia service, whereas Justice Scalia, who wrote for the majority in that case, believed that you have a right to bear arms as an individual right, not connected to militia service. Both opinions extensively cited history.

So it really depends. One might say, "Well, five Justices think" –or thought, because Justice Scalia is no longer with us – "five Justices thought that the Second Amendment was an individual right."

This is a problem I often run into in my own work, just in terms of the Constitution, what it says, and what the court says that it means. Our society has evolved in a way where the Constitution means what the court says it means, as opposed to us looking at the words and trying to make a determination for ourselves as to what it means. And things have not always been like that. The court may have a view on constitutional interpretation, but so does Congress, and so does the people.

Aside: So, your voice is important. Now, here's a wonky fact.

Franita: The right to vote is largely defined by state law, not federal.

Alie: Oh, I didn't know that.

Franita: Yeah. There are 50 different state constitutions that define the right to vote. And every state gives the right to vote more protection than the federal Constitution.

Alie: *Really?*

Franita: Yes.

Alie: *[gasps]* Wow. I didn't realize that. I thought it was just a blanket... There you go.

Franita: So Article I Section 2 ties the right to vote in federal elections to the right to vote in state elections, so however states define the right to vote in state elections, that also determines federal electors. But most people don't realize, really, the promise of state constitutions. They are a great avenue to protect rights in addition to the federal Constitution. We can make demands about what Congress should do and what the Supreme Court should do, but let's not forget the state legislatures and the state governments, broadly defined.

For example, almost every state Constitution provides for free and fair elections. But what does that mean, exactly? In Pennsylvania, it means that the state legislature cannot gerrymander in a way that runs afoul of the state constitution because it violates the promise of free and fair elections. In Texas, it would not mean that. And so it just really depends.

And this is one of the things that fascinates me about our government. You have all of these different moving pieces that you have to think about, and elections really bring that together nicely because you have to think about state courts, you have to think about the federal courts, you have to think about the US Constitution, and you have to think about state constitutions, and thinking about what it means to have a right to vote.

Alie: What do you think about countries like Australia that have mandated voting?

Franita: I love it.

Alie: Yeah? *[both laugh]*

Franita: But I could see why it wouldn't work here. Because Americans don't like it when people tell them what to do. Interesting fact, Georgia used to have compulsory voting. *[laughs]*

Alie: Really?

Franita: Most people don't realize that. I ran across it in my research, I was like, "Wow, that would never fly today."

Alie: When was that?

Franita: Seventeen-something. It was like the 1770s. Georgia had compulsory voting, and it's just very interesting because Georgia was the outlier in that respect. But it's hard to see something like that working here. I think, as a general matter, the population will be open to voting reforms and make it easier to vote, but I think they will push back against any reforms that force them to vote.

Alie: Yeah. I mean... I was so impressed. I was like, "Australia! You're really getting to the polls!" And then I realized, "Oh, they have to."

Okay, Lauren Zino wants to know: Have you seen *Hamilton* or are you familiar with the music? Do you feel that there's been a rise in interest in law and the Constitution since the show came out?

Franita: I've seen *Hamilton* three times.

Alie: Nice!

Franita: Two in Chicago, one in LA. *[clip from Hamilton: Jonathan Groff as George III singing, "You'll be back. Time will tell..."]*

Franita: I did not see the original cast and I'm still sad about that.

Alie: *[laughs]* Let's all tweet at Lin and just...

Franita: Oh my gosh, it's my favorite show, it's just amazing.

Has there been more interest in law? Not necessarily. There has been more interest in the founding fathers and the founding generation because Hamilton played such a huge role and most people did not realize the fact that he created our financial system. He played a *huge* role and died so young and in a really unfortunate way. So I think it increased interest in that way, just in the sense of the founding fathers and the underlying history.

And law... I don't know if it's translated to law. I don't think people go see *Hamilton* and are like, "I wanna go to law school!" I wish. But no, I don't think it's happened.

Alie: I don't know, maybe we'll have to see if there's a sociology study on how many people...

Franita: I would welcome that!

Alie: I saw it once, I got a ticket way up in the nosebleeds, and it wasn't the original cast, but I just *cried*.

Franita: Oh my god, the Chicago show, Wayne Brady played Aaron Burr and that and... I cried on that one. I mean, he was phenomenal. Just completely fantastic. I also like LA because it's different. Going to a different city, it made me realize each city is trying to make it their own, and so it's like sitting through the same show, but it's different in important ways. So I'm using that as a justification to go see it in other cities.

Alie: [laughs] I think you could make it a tax write-off, just, "Research!"

Franita: "Research!" [laughs]

Aside: Neither one of us is a tax lawyer, but I'm sure she can figure it out.

Alie: The last questions I always ask: What is one thing about your job or about the Constitution that *sucks*, that you just hate? And then I always ask your favorite thing. But what is one thing that is just... *Ehhh?*

Franita: The one thing I hate about my job – and probably the only thing, if we're going to use a strong word, hate – grading exams. Grading exams. I get paid to grade exams, I don't get paid to teach, I don't get paid to write, I get paid to grade exams. [*"I didn't pass, did I?"*]

The one thing I hate about the Constitution was the initial compromises with the slave powers. I feel like we're still dealing with that today, that we have not overcome, and that's a legacy that I don't know that we'll ever be able to overcome it. But it also reminds me about why it's so important to fight. The fact that our founding documents made accommodations for chattel slavery is the thing I hate the most about it. But it also motivates me to fight to make it better.

Alie: I think looking at the flaws of the past really does empower us to speak up about the flaws we see today.

Franita: Can't be complacent. Because, if anything, I think President Trump's election, regardless if one supports him or not, one of the things it revealed is how precarious our society is, with respect to one's view of what the Constitution means. I would say that the Constitution as it has been interpreted in the last few years is totally different than how it was interpreted 30 years ago, 20 years ago, even a decade ago. So, functionally what that means is that at any given time, the life that you know can change radically. There's nothing that mandates consistency. We have to demand it, because basically we live in a constitutional order that is not set in stone. It is very precarious. And you have to fight for it. Speak up.

Alie: And your favorite thing about your job, or the Constitution, or law?

Franita: My favorite thing about my job is my students.

Alie: Yeah?

Franita: My students. In some way, they always manage to remind me that I have the best job in the world. They are just incredibly bright, incredibly inquisitive. I don't think that they

realize the responsibility that they give us, and how much of an honor it is, because they're basically inviting me in their head and allowing me to teach them how to think differently. That is an incredible responsibility and I am humbled by it every day.

The thing I love most about the Constitution is the potential. There's so much potential there to be a great society, one that's inclusive, and representative, and fair, and one that really makes us worthy of the country that we think we are. People always say, "America is the greatest country in the world." We can be. And I say that as a proud American who would never want to live anywhere else. It is the fact that we have the potential of greatness. But we have to demand it. Power concedes nothing without a demand. I forgot who said that. In your little narration, attribute that quote to somebody.

Alie: [laughs] I will, indeed!

Aside: Okay, so the full passage is:

Power concedes nothing without a demand. It never did and it never will. Find out just what any people will submit to and you have found out the exact amount of injustice and wrong which will be imposed upon them, and these will continue till they're resisted with either words or blows, or with both. The limits of tyrants are prescribed by the endurance of those whom they oppress.

This was said by escaped slave, statesman, abolitionist, and orator Frederick Douglass, 1857. So we have more power than we realize. We just have to claim it and we have to demand it.

Franita: I really love the potential. Even the provision I talked about earlier, Section 2 of the 14th Amendment, it has never been enforced. Congress has never enforced it. But there's so much potential there. There's so much potential to hold states responsible for making sure that the people who are eligible to vote should be voting, but we have to demand it.

Alie: I think the 2020 election, hopefully, will break some records.

Aside: Side note. We recorded this episode on June 20. Now, this is the day after Juneteenth, and that date commemorates the freeing of slaves in the Confederate states. So I told Franita that I think every year people of color should get this day off, the rest of us should just watch documentaries made by people of color. I mean, someone just tweet at Hallmark for me. Let's get this going. Is a day of national reflection and education too much to ask?

Franita: It would be nice because I do think it would help change the narrative in a sense of... One of the things that came out with the reparations debate is that Majority Leader McConnell, he made this point that reparations should not be given to people because no one is alive now who was alive at the time of slavery.

The oldest slave died in 1971. My sister was born in 1969. My parents lived in the Jim Crow South. So to hear that cognitive dissonance about the effects of slavery and how it really has gone well into the 21st century, and it's something that we're still dealing with, it's hard.

Now that does not mean... Just because people are resistant to change, you can't let that deter you. You can't let that stop you from making demands that they be better and that they honor this nation's promises. And so I didn't get mad at that, I didn't get frustrated by it. It just made me want to go write, because I realized that my pen is one way that I do make the demand, and I think we all have to figure out what it is that we can do in order

to hold the government responsible for its obligations to us. I use it through my teaching and my writing, so whatever your gift is, you have to do the same.

Alie: Find your voice.

Franita: Find your voice. [*clip from Hamilton mixtape: "Picked up a pen and I wrote my way out."*]

Alie: Thank you so much for letting me ask you so many questions.

Franita: Of course! This was fun.

Alie: Such an honor to be here – twice! [*both laugh*] You're the best, *Dean*.

So show up, sometimes twice if you have to, and ask brilliant people simple questions. You don't have to know everything; you just have to care.

So to follow Dean Tolson, she is [@ProfTolson](#) on Twitter. We're @Ologies on [Twitter](#) and [Instagram](#), I'm [@AlieWard](#) on [both](#), and there are links to those in the show notes, as well as a link to my website. Every episode I've done is at [AlieWard.com/Ologies](#) (slash, the ology). So this one is [AlieWard.com/Ologies/Nomology](#), and I'll put a bunch of links to papers and videos we talked about. *Ologies* merch is at [OlogiesMerch.com](#), in case you need to get yourself a shirt, or a hat, or a tote, or a bathing suit, even, if you would like. And thank you to Shannon Feltus and Boni Dutch of the awesome podcast *You Are That* for managing that.

Thank you to civil rights lawyer and amazing friend Hannah Lipow and Erin Talbert, my forever friend from kindergarten, for managing the [Ologies Facebook group](#). Thank you to beefed-up chicken slinger, Jarrett Sleeper, for the help researching and for assistant editing. And of course to the rock, Steven Ray Morris, for stitching all these clips together for me each week. The theme song was written and performed by Nick Thorburn of the band Islands.

Now, if you stick around to the end of the show, you know I tell you a secret. And this week... Okay. So I just got to go on a science expedition in Hawaii with *Atlas Obscura* and Teuthology episode squid hero Sarah McAnulty – [@SarahMackAttack](#) on Twitter – and the whole time I was trying to pick up litter on the side of the road and in the ocean. I was just very aware of how me being alive on the island of Hawaii was a burden, ecologically. And I went snorkeling, and I was looking at fish, and I was like, "Oh my gosh, fish," and then I lost my snorkel in the ocean.

So here I was, picking up actual garbage with my bare hands, and then I just straight-up fed the sea a chunk of spitty plastic, and I was like, "*What do I dooooo?* Do I tell the group? It's gone. It's halfway to Guam right now. Like, do I bum everyone out and tell them, like, 'Hey... totally littered.?'"

So I didn't say anything, and then about 45 minutes later, another lovely person on the trip – Shawn, who we also called Kent, for fun – came out of the ocean with a chunk of plastic, was like, "Ugh, I just found a *snorkel* out there," and then I had to 'fess up and tell everyone it was my snorkel.

Also, I peed out there. But I think everyone did. I mean, swimming pools? *Never*. Never pee in a pool. That's malicious. But Sarah Mac and I agreed that if a whale has peed in the same body of water, it's a green light. But if not, hold it for later. Them's the rules.

Okay. Use your voice. I'm sorry I told you all that. Go fight for what you believe in.

Okay. Berbye.

Transcribed by Katie, your friendly neighborhood Spider-Man.

Some links which may be of use:

Read more about Franita's work [here](#)

A donation went to the American Civil Liberties Union. Learn more at www.aclu.org

[Take a gander at The Constitution](#)

[Constitution transcript](#)

[Bill of Rights breakdown](#)

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[Grandfather Clause](#)

[Civil rights footage with Dr. King](#)

["It's rigged" clip](#)

["I wrote my way out"](#)

Henry Louis Gates Jr. PBS documentary "[Reconstruction: America After the Civil War](#)"

[13th Amendment](#)

[National Popular Vote](#)

[Frederick Douglas 1857 speech](#)

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