

Forum

THE CONSTITUTION VERSUS THE COURT: SOME THOUGHTS ON HILLS ON AMAR

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Professor Roderick M. Hills, Jr. enjoys a well-deserved reputation for brilliance and generosity, and both traits are prominently displayed in his recent review of my book, *The Bill of Rights: Creation and Reconstruction*,¹ in the pages of the *Northwestern University Law Review*.² Hills's review essay bristles with interesting, important, and imaginative insights across a broad range of issues. He blends these brilliant insights with a very generous attitude towards the book and its author. In particular, his detailed account of the book's central argument is as sympathetic and charitable as I could have ever hoped for. For that generosity, I am truly grateful. Hills's essay is also very generous towards the Supreme Court. But I wonder whether it may be *too* generous. For Hills's generosity towards the Court requires Hills to be less than generous—and at times less than correct—towards the Constitution itself. Hills suggests that to the extent the Court has deviated from the Constitution, the deviations may have been necessary to correct defects in the Constitution itself. It seems to me, however, that the Constitution is more attractive than Hills admits, and the caselaw less attractive—at least in the three areas that Hills highlights: voting rights, jury rights, and expression rights.

I. THE CONSTITUTION VERSUS THE COURT: IN GENERAL

Before turning to the three specific domains Hills identifies, let us briefly review a few of his general claims. According to Hills: my book tends to emphasize “text, structure, and original understanding” while paying less attention to “judicial precedent.” As a result, I “cannot account for” certain important Supreme Court cases, including cases dealing with the right to vote and the right to be free from racially stacked juries. I lack a “meta-theory” to resolve the question of how much weight text, history, and structure deserve when they conflict with judicial precedent. And in par-

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¹ AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998).

² Roderick M. Hills, Jr., *Back to the Future? How the Bill of Rights Might Be About Structure After All*, 93 NW. U. L. REV. 977 (1999).

ticular, I do not fully acknowledge the degree to which the “reconstruction’ of the Bill of Rights by the framers of the Fourteenth Amendment was a failure as a matter of policy.”³

Hills himself thinks that caselaw—even (or especially) when it departs from constitutional text and enactment history—deserves more credit than I give it:

Precedents, judicial and political, represent our collective experience of trying to apply constitutional rules handed down to us. If those precedents depart from the values and beliefs underlying the rules, then this might be a sign that the beliefs and values of the framers were internally inconsistent or practically unworkable. It is possible that courts have had to disregard (parts of) the ideology underlying the rules in order to make the rules themselves practically effective or intellectually coherent.⁴

I plead guilty to some of Hills’s charges. My book does indeed focus considerable attention on, and is largely organized around, constitutional text. For example, rather than discussing modern Bill of Rights cases in chronological order, I try to discuss Amendments I-X, and then XIV, in textual order. And within each discussion, I do indeed highlight textual points—small details and larger patterns—and try to place these points in the context of the political and social history surrounding the enactment of these amendments. As shall become clear below, and as I say explicitly in the Afterword to my book, I do not think that constitutional text is the only thing that matters.⁵ But I do think that constitutional textualism can be illuminating and normatively attractive, for reasons that I briefly mentioned in the book and that I shall touch on in my remarks below. (In future work, I hope to elaborate the attractions and limitations of constitutional textualism in much greater detail.)⁶

Also, I plead guilty to lacking a “meta-theory,” if by that we mean a normatively attractive and mathematically precise interpretive algorithm for interpreting the Constitution. But does any constitutional scholar now writing have such a “meta-theory”? (Does Professor Hills?) Any approach that treats one methodology as absolutely lexically prior to others—e.g., text comes first, and other things (history, precedent, practical consequences) come into play only if text is strictly in equipoise—seems hard to defend. For example, most committed textualists that I know think that if interpretation A seems ever so slightly more textually supportable than in-

³ *Id.* at 980.

⁴ *Id.* at 992.

⁵ AMAR, *supra* note 1, at 295-307.

⁶ Eventually, I hope to write a book on the topic of constitutional textualism—its attractions, its limitations, its puzzles and challenges, and its variations. For illustrations of my current thinking on this issue, see Akhil Reed Amar, *A Few Thoughts on Constitutionalism, Textualism, and Populism*, 65 *FORDHAM L. REV.* 1657 (1997); Akhil Reed Amar, *Intratextualism*, 112 *HARV. L. REV.* 747 (1999).

terpretation B, B might still be a better reading overall if strongly supported by the weight of history, precedent, common sense, and so on. And any effort short of lexical ordering that seeks to assign precise weights to various modes of interpretation—text counts forty percent, enactment history twenty percent, precedent twenty percent, and so on—seems obviously doomed by the lack of standard weights and measures. (How do we decide whether reading A is ten percent or thirty percent more textually plausible than reading B, which is seventeen percent—or is twenty-seven percent?—more historically sound?) More generally, good interpretation tries to achieve a kind of reflective equilibrium among the initial readings generated by different interpretive methodologies. If my textual argument seems dramatically contrary to my historical evidence, this may be a sign that perhaps I have gone wrong somewhere along the road, that I need to take another look at the text, or reinvestigate the history. The relationship among modalities is not additive but synergistic—each helps me to see the others in a fresh light. Sound interpretation does not merely tote up text, history, precedent, and so on, but tries to make these fit together in some coherent and holistic way.

In my book, I aimed to offer an interpretation of the Constitution's text and history that, in general, cohered with modern judicial caselaw. Because I thought I had generally succeeded in this ambition, I did not discuss in detail what should give when text and precedent were wholly at odds. But I did suggest in the Afterword to my book that—at least where the Bill of Rights was concerned—the text and history were often more normatively attractive than the corresponding caselaw over the years. If incorporation of the Bill of Rights is textually and historically sound, as I suggest, then current caselaw is indeed right—and so I am not forced to choose between them. But if current caselaw is right, then *older* caselaw rejecting incorporation is wrong. This is an inescapable implication of modern caselaw, although a lesson that modern judges have, for understandable reasons, chosen not to shout from the rooftops.⁷ The Court gave us incorporation over the course of the twentieth century, whereas constitutional text and history (on my account—and on the modern Court's too!) gave us incorporation in 1868. If incorporation is right and good, as the modern Court insists (and I agree), then the Justices owe Americans an apology for not enforcing the true meaning of the Fourteenth Amendment for so many years.

⁷ Modern judges have *overruled* earlier cases, and have based their modern rulings on the Fourteenth Amendment itself. They have not argued, à la Bruce Ackerman, that some unwritten amendment occurred in 1925 that made expression rights thenceforth applicable against states, or that in 1963 the Constitution was again silently amended so as to incorporate criminal procedure rights thereafter. Instead, the Court has based incorporation on the Fourteenth Amendment itself, and the clear logic is thus that the Court should have enforced these rights beginning in 1868 (even though in actual fact the Court did not do so).

On my reading, *Brown*⁸ and *Bolling*⁹ were right in 1954, but *Plessy*¹⁰ was wrong in 1896—and here, too, the Court was less normatively attractive than the Constitution's text and enactment history. If *New York Times v. Sullivan's*¹¹ vision of robust free speech for anti-governmental dissenters is right—as the modern Court insists, and I agree—then Supreme Court Justices and lower federal judges were wrong to uphold the infamous Sedition Act of 1798. Another example: due process at its (textual and historical) core means fair courtroom procedures, and the infamous Fugitive Slave Law of 1850 lacked such fair procedures. Yet the Taney Court upheld rigged trials for alleged fugitive slaves at the same time that the Justices proclaimed—ludicrously, from the perspective of text and enactment history—that free-soil laws like the Northwest Ordinance and the Missouri Compromise were themselves unconstitutional infringements on the property rights of slaveholders. One final example: the Fourteenth Amendment was centrally drafted to protect underdogs like Southern blacks and dissenting speakers, but for much if not most of its existence, the Court used the Amendment far more to protect overdogs like corporations and propertied folk while offering less help to the core group of underdogs.

To summarize: on my view, the Constitution is more attractive, and the Court less attractive, than many people (including Hills) seem to think. Granted, this general statement is a bit too pat. The Constitution does not speak for itself, and must be interpreted. But there is, I think, a well recognized difference between interpretations that focus more on the document, and interpretations that focus more on the evolving gloss of subsequent caselaw. Those pursuing the first kind of constitutional interpretation—call them “documentarians”—place special weight on the Constitution's words (clause by clause and more holistically, with attention to word patterns, organization of articles and sections, and so on) and its enactment history (read narrowly or understood more broadly). Those practicing the second kind of constitutional interpretation—call them “caselawyers”—place more weight on what the current Court is saying and what past Courts have said. I tend to think that on the topics that I have studied, the Constitution as read through a “documentarian” lens is more attractive than when read through a “caselawyer” lens.

This is too large a claim to be defended in this small space; but Professor Hills offers a few useful test cases, involving voting rights, jury service, and free expression. On each of these topics, I shall argue that the gap between my “documentarian” approach and a “caselawyer” approach is smaller than Hills suggests. In general, my approach does account for the great weight of current caselaw. But to the extent that the two approaches

⁸ *Brown v. Board of Educ.*, 347 U.S. 483 (1952).

⁹ *Bolling v. Sharpe*, 347 U.S. 497 (1952).

¹⁰ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

¹¹ *New York Times v. Sullivan*, 376 U.S. 254 (1964).

diverge, I will suggest that the document may be better than the caselaw. Or to be more personal and less anthropomorphic: the framers Hills disparages may have been better than the judges he defends.

II. THE CONSTITUTION VERSUS THE COURT: IN PARTICULAR

A. Voting Rights

Let's start with Hills's discussion of voting rights. He notes that I (along with many other scholars) emphasize that "the framers of the Fourteenth Amendment argued repeatedly that Section 1 of the Fourteenth Amendment would not protect political rights such as the right to vote."¹² Thus, Hills argues, the Court's voting jurisprudence based on the Equal Protection Clause—a jurisprudence that he generally applauds—cannot be justified by documentarians. And, he observes, all this suggests the wisdom of modern judges and the folly of Reconstruction framers. The Reconstructors' "command not to enforce citizens' political rights,"¹³ had it been faithfully followed by documentarian judges, would have undermined the Reconstructors' own desired enforcement of other, nonpolitical rights. In other words, truly effective civil rights often require political muscle, which in turn may require direct protection of political rights like voting. The Reconstructors' vision of rights was, in Hills's words, "institutionally anemic, relying on a handful of institutions—Article III courts, the Union Army, and the Freedmen's Bureau—to enforce national rights."¹⁴ And so, Hills concludes, "[i]f the Reconstruction generation would not have endorsed *Reynolds v. Sims*, then so much the worse for them."¹⁵ And, presumably, so much the better for wise modern judges!

I think Hills may have things backward. First, let's distinguish between "Section 1" of the Fourteenth Amendment and (in increasing order of generality) the Fourteenth Amendment in its entirety, the Reconstruction Amendments in their entirety, and the Constitutional text in its entirety. Yes, Section 1 was not about political rights—but Section 2 of the Amendment was. And this section would have enforced rights *structurally* and in an institutionally savvy way—by reducing congressional representation for any states that disenfranchised blacks directly or used some subterfuge to keep blacks from voting in large numbers. Yet Section 2 was basically ignored by later generations. And the Supreme Court should bear some of the blame, for not making vigorous efforts to take this part of the document seriously.

Now focus on another part of the Fourteenth Amendment where the Supreme Court has even more blood on its hands: Section 5. Contrary to

¹² Hills, *supra* note 2, at 993.

¹³ *Id.* at 1000.

¹⁴ *Id.* at 997.

¹⁵ *Id.* at 996.

Hills's suggestion, the framers of the Amendment did not merely rely on the (presumably weak) federal judiciary, and the (presumably temporary) Union Army and Freedmen's Bureau. The Reconstructionists also explicitly empowered a politically powerful and permanent institution—Congress—to “enforce” the values of liberty and equality at the heart of Section 1. (And note that the Congress they sought to empower would, under Section 2, be one that emphatically would *not* give special clout to all-white Southern electorates; although this is exactly what later happened with barely a peep from the Supreme Court.) But Section 5 was basically neutered by—you guessed it—the Supreme Court itself, which has repeatedly refused to accept the broad power the document gives Congress to help vindicate the rights of blacks and other civil rights claimants. From the infamous *Civil Rights Cases* of 1883¹⁶ to the unfortunate *Boerne* decision of 1997,¹⁷ it has been the Supreme Court that has rendered the Fourteenth Amendment more institutionally anemic than its framers intended.¹⁸ So here Hills's story is upside down: the document is better than the caselaw.

So far, we have focused only on the Fourteenth Amendment. But the richness of the Reconstruction framers' vision is also evident in the Thirteenth and Fifteenth Amendments, both of which vest Congress with important enforcement powers, and the latter of which squarely addresses political rights (as we shall see in more detail below).

Also, let's not forget the Republican Government Clause of Article IV, which squarely aims to protect political rights like voting. Many of the Reconstruction Republicans who insisted that Section 1 did not protect voting rights also insisted that the Republican Government Clause *did* protect voting rights.¹⁹ And so Hills, with due respect, misstates the matter when he refers to the Fourteenth Amendment “framers' command not to enforce citizens' political rights.”²⁰ There was no such command. Likewise he errs when he alludes to “the framers' specific intent not to protect political rights”²¹ and “the framers' intent not to regulate political rights outside the context of the Fifteenth, Nineteenth, and Twenty-Sixth Amendments.”²² There was no such intent, as both Section 2 of the Fourteenth and the Republican Government Clause should make clear.

It remains to compare what caselawyer judges have done under the Equal Protection Clause to what documentarians might have done under the

¹⁶ The Civil Rights Cases, 109 U.S. 3 (1883).

¹⁷ *Flores v. City of Boerne*, 521 U.S. 507 (1997).

¹⁸ For sharp criticism of *Boerne*, see Amar, *Intratextualism*, *supra* note 6, and materials cited therein.

¹⁹ See Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749 (1994) (discussing the documentarian meaning of this clause).

²⁰ Hills, *supra* note 2, at 1000.

²¹ *Id.* at 998.

²² *Id.* at 1001.

Republican Government Clause. A defender of caselawyers might at first be tempted to dismiss the Republican Government Clause as nonjusticiable, but of course this ploy would backfire. If and to the extent the clause is not justiciable, this nonjusticiability has rather little to do with the text or enactment history of the clause, and rather a lot to do with caselaw that has rather weak documentarian credentials.²³ And so the failure of judges to take seriously the full meaning of this great clause is yet another strike against the caselawyer and a point in favor of the documentarian.

Let's consider how caselawyers and documentarians would think about four important modern voting cases, and one hypothetical case. First, in *Baker v. Carr*, the Court allowed an equal protection challenge to gross malapportionment occurring in Tennessee.²⁴ A documentarian would reach the same result by forthrightly relying on the Republican Government Clause. Even under the most narrow documentarian reading, this clause aims to prevent a state government from systematically flouting majority rule. That was precisely what was happening in Tennessee. An entrenched and grossly malapportioned legislature refused to reapportion itself; and the state citizenry had no fair and easy way to redress this problem of entrenched minority rule contrary to the wishes of a majority of voters: ordinary elections for state lawmakers were tainted by the very malapportionment that opponents sought to change. As Justice Clark noted in his concurring opinion, Tennessee did not allow voters to change the apportionment via a statewide initiative that would count all votes equally.²⁵

Second, consider *Reynolds v. Sims*, where the Court insisted that equal protection principles required that all votes be weighted equally, and that each district be the same size: one person, one vote.²⁶ A documentarian relying on the Republican Government Clause might not be compelled to the same result, but could easily embrace it. Indeed, some of *Reynolds'* most famous language meshes perfectly with the core principles of the Republican Government Clause:

Legislators represent people, not trees or acres Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators. To conclude differently, and to sanction minority control of state legislative bodies, would appear to deny majority rights²⁷

Admittedly, one argument for the result in *Reynolds* would be less available to the documentarian: strict equality of votes would not be textually sup-

²³ See generally AMAR, *supra* note 19.

²⁴ *Baker v. Carr*, 369 U.S. 186 (1962).

²⁵ See *id.* at 259.

²⁶ *Reynolds v. Sims*, 377 U.S. 533 (1964).

²⁷ *Id.* at 562, 565.

ported by the word "equal" in "equal protection" because the relevant clause (for a documentarian) would not derive from Section 1 of the Fourteenth Amendment at all.²⁸ But another argument for the result in *Reynolds* would have sufficed: plenary legislative power to create unequally sized districts can lead to the kinds of systemic frustrations of majority will evident in *Baker*, and judges properly seeking to limit this plenary power should use the clean rule of one-person, one-vote, a rule that is far more judicially manageable than most other conceivable tests.

One of *Reynolds*'s companion cases, *Lucas v. Forty-Fourth General Assembly*, is also relevant here.²⁹ In *Lucas*, the state electorate itself had approved the malapportionment that the Court nevertheless invalidated. A documentarian approach might well diverge here—although not necessarily. On one view, the electorate's endorsement should suffice to reassure judges that no systemic frustration of majority rule was taking place in Colorado so as to violate the Republican Government Clause (read in documentarian fashion). On the other hand, what happens if the state electorate changes its mind? Must voters affirmatively reauthorize the malapportionment every so often? If so, how often? What happens if voters in some parts of the state vote themselves more than their fair share of apportionment, and voters in less favored parts of the state object? (On the facts of *Lucas*, it seems that a majority of every district supported the malapportionment. But perhaps some residents of disfavored areas ended up not voting because they knew that they lacked enough votes statewide, and Colorado never made clear to them that their district alone had the authority to veto the malapportionment.) The Court's ruling in *Lucas* sidestepped some of these devilish questions, and it is possible to imagine a documentarian concurring in this judgment for reasons of judicial manageability. But even if my documentarian approach "cannot account" for *Lucas*, this is hardly a major defect for my approach. *Lucas* is a rather small wrinkle in the *Baker-Reynolds* line of cases. And more dramatic still, Hills's own previous work suggests that he may think that *Lucas* is indeed wrong! The very reasons that a documentarian might dissent in *Lucas* are the reasons that Hills himself has offered in his brilliant analysis, in an earlier article, of statewide initiatives seeking to impose term limits on federal representatives.³⁰ So if Hills, in citing *Lucas*, has indeed identified a place where my documentarian approach diverges from current caselaw, perhaps he should be the first to applaud the superior wisdom of the document as compared to the Court.

²⁸ Cf. Hills, *supra* note 2, at 995 n.64 ("I tend to agree with Professor Donald Regan that the textual hook on which one hangs a judicial doctrine does not much matter, except to the extent that different textual hooks may be shorthand for different bundles of constitutional doctrine.").

²⁹ *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713 (1964).

³⁰ See generally Roderick M. Hills, Jr., *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U. PITT. L. REV. 97 (1991).

Finally, consider another voting rights case that Hills mentions, *Kramer v. Union Free School District*.³¹ The Court invalidated a state law under which Mr. Kramer was ineligible to vote for local school board members because he was not a parent, and he did not own or rent real property in the school district. But Kramer did get to vote in New York *state* elections on a fair and equal basis, and it was the state legislature's rules that he was challenging. How, Hills asks, was the treatment of Kramer a violation of the basic ethos of the Republican Government Clause? One answer is that the local voting rule was arguably wealth-based: had Kramer bought a house he could have voted. And the egalitarian ideals underlying the Republican Government Clause—to say nothing of the Twenty-fourth Amendment—are arguably offended when voting power is so explicitly linked to wealth. On this documentarian analysis, however, the following hypothetical New York law should be seen as very different from the law struck down in *Kramer*. Imagine that New York lawmakers believe that public schools should be well funded. State lawmakers have the power to impose school taxes themselves, but they also believe in localism (and may want to avoid being too openly linked with high taxes). State lawmakers thus adopt a state law that only parents can vote for school boards and school taxes. Parents, they hope and expect, will more likely vote for generous funding than would others. This law does not have the vicious class feature of the law in *Kramer*. And because it came from the state itself, and everyone—parent and nonparent—was eligible to vote in statewide elections, it should not be seen as violative of Republican Government principles. Thus this law might pass documentarian muster, even though it would be struck down by a caselawyer judge following the literal language and logic of *Kramer*. But—once again—to the extent that my (documentarian) approach might diverge from the current Court's on a minor wrinkle, I suspect that Hills should find my approach more attractive, not less, given what he has written elsewhere.

B. Jury Rights

A similar story can be told about jury rights. Just as Section 1 of the Fourteenth Amendment did not encompass voting rights, neither was it drafted to encompass the right to jury service; this too, I suggest in my book,³² was a political right widely understood as beyond the scope of Section 1. The language of “privileges” and “immunities” of “citizens” tracked the language of Article IV, which had never been read to give, say, a Massachusetts citizen traveling through Virginia the right to vote in Virginia elections or serve on Virginia juries. And the language of “equal protection” focused on “persons” as opposed to “citizens”—paradigmatically nonvoting aliens. Section 1, on a documentarian reading, thus sought to

³¹ *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969).

³² AMAR, *supra* note 1, at 216-18 & n.*, 260-61, 271.

guarantee the civil rights of all citizens—including women—such as the rights to speak, worship, hold property, and be tried by properly composed juries. But not the political right to serve on juries.

How, then, to explain a landmark case like *Strauder v. West Virginia* that in some ways implicitly traded on the right of black men to serve on juries?³³ On my account, this case is best understood as implicating not merely a Fourteenth Amendment right to be tried by a fair jury, but also a Fifteenth Amendment right of blacks to serve on juries. The Fifteenth Amendment, I suggest, protects the rights of blacks to vote on juries, just as it protects their rights to vote for and in legislatures.³⁴ Hills worries that this reading “can distort precedent. *Strauder* is, not, after all, a Fifteenth Amendment decision: it is rooted in the Equal Protection Clause of the Fourteenth Amendment.”³⁵

But *Strauder* itself is a rather confused opinion, wavering between language that emphasizes the right of the defendant and language that emphasizes the rights of excluded jurors. The most coherent way to understand the case—especially in light of more recent caselaw developments—is, I suggest, my way. If, because of the Fifteenth Amendment, the twelve men who heard *Strauder*’s case were not a constitutionally proper jury, then their verdict obviously also violated his own Fourteenth Amendment right to be tried by a proper jury (just as if he had been tried by five ordinary citizens calling themselves a lawful jury, or a panel of twelve permanent government bureaucrats calling themselves a jury). The Fifteenth Amendment is necessary to the analysis but not the end of it. And a Fifteenth Amendment analysis beautifully coheres with the language of more recent cases. For example, in one of its most recent decisions, the Court has written the following:

[W]ith the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process “Whether jury service be deemed a right, or a privilege, or a duty, the State may no more extend it to some citizens and deny it to others on racial grounds than it may invidiously discriminate in the offering and withholding of the elective franchise.”³⁶

³³ *Strauder v. West Virginia*, 100 U.S. 303 (1880).

³⁴ In this argument, I follow Vikram David Amar, *Jury Service as a Political Right Akin to Voting*, 80 CORNELL L. REV. 203 (1995).

³⁵ Hills, *supra* note 2, at 998. Cf. *id.* at 995 n.64 (suggesting that ordinarily “the textual hook on which one hangs a judicial doctrine does not much matter”).

³⁶ *Powers v. Ohio*, 499 U.S. 400, 407-08 (1991) (quoting *Carter v. Commission of Greene County*, 396 U.S. 320, 330 (1970)). See Vikram David Amar, *supra* note 34 (discussing how modern caselaw meshes with a Fifteenth Amendment approach).

Although the Court did not explicitly cite the Fifteenth Amendment here, such a citation would not have undercut the analysis in any way. It would merely have added a bit more documentarian clarity and force to the point.³⁷

On the issue of juries and race, a Fifteenth Amendment approach is far superior to what the caselawyer's caselaw in fact gave us. *Strauder* did not guarantee that blacks would have equal rights to sit on juries where whites were defendants. But the Fifteenth Amendment *did* guarantee this, as did Congress in an 1875 statute that I quoted³⁸ and that *Strauder* ignored. If we are truly serious about protecting the civil rights of blacks in nonanemic ways, we must insist that states may not exclude blacks from juries (or from the bench or the legislature for that matter) in cases where nonblacks are defendants. (Imagine for example a case charging a white Klansman with the murder of a black.) Today's caselaw protects the right of blacks to serve on juries regardless of the race of the defendant—and indeed, over the objections of the defendant.³⁹ But *Strauder*—with its confused language and strong accent on the race of the defendant—does not unambiguously support this modern development. And so here, too, my documentarian reading coheres perfectly with modern caselaw. And here, too, a documentarian approach is more normatively attractive than a caselaw approach: the full loaf offered by the Fifteenth Amendment in 1870 and Congress in 1875 was better than the half loaf offered by the Court in *Strauder*, and only recently has the Court finally caught up to the Constitution.

And what about jury service outside the race context? Here, a documentarian emphasis on those other parts of the Constitution that do affirm rights of political participation—the Republican Government Clause, and the Nineteenth, Twenty-fourth, and Twenty-sixth Amendments—would generally cohere with modern caselaw. Here, too, the Court has, if anything, been running behind the Constitution itself. The Constitution affirmed women's equal political participation in 1919, and it took the Court a full half century before it finally caught up and affirmed women's right to vote on equal terms in juries.⁴⁰

C. Expression Rights

Hills ends his essay with an extremely interesting discussion of expression rights. In particular, Hills reminds us that even though we must protect citizens' expression rights against states, we should not ignore the expression rights of states. And sometimes, there will be a tension between these

³⁷ Cf. Hills, *supra* note 2, at 995 n.64 (quoted *supra* notes 28, 35).

³⁸ AMAR, *supra* note 1, at 273, 390 n.165.

³⁹ See, e.g., *Georgia v. McCollum*, 505 U.S. 42 (1992); *Powers*, 499 U.S. at 400; *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

⁴⁰ See *Taylor v. Louisiana*, 419 U.S. 522 (1975).

rights, Hills suggests.⁴¹ Hills's fascinating and thoughtful discussion calls to mind a case decided by the Court in early 1999, just as his review essay was being published. Perhaps I am also drawn to this case because it comes from the same state as *Lucas*—Colorado—and can in some ways be understood as raising issues similar to *Lucas*, implicating the ability of a state people to structure their own government in a certain way. But the Court—employing an overly exuberant conception of the First Amendment—seems to have missed the important issues of states' rights at stake, in just the way Hills warns against.

The facts of *Buckley v. American Constitutional Law Foundation* were simple.⁴² Colorado law provided that when enough voters signed up in support of a given state initiative proposal, it went on the statewide ballot. Colorado regulated the process in several ways, and three particular regulations came before the Court. First, the state sought to require that each signature-gatherer wear a badge identifying his or her name, and status as a "paid" or "volunteer" worker. Second, each gatherer had to be a registered voter in Colorado. Third, initiative proponents were obliged to disclose monthly how much each gatherer was getting paid. The Tenth Circuit struck down all three rules, and the Supreme Court affirmed. Justice Ginsburg wrote for a five-person majority, with Justice Thomas providing a sixth vote in a separate opinion; Chief Justice Rehnquist and Justices O'Connor and Breyer dissented.

The majority reasoned as follows. The First Amendment (as applied to states via the Fourteenth) explicitly protects the people's right to petition. The Colorado regulations were an impermissible attempt to abridge this right. "Circulating a petition is akin to distributing a handbill" and so the badge requirement was squarely governed by a 1995 case where the Court struck down an Ohio law banning the distribution of anonymous campaign literature. Indeed, on this point, the Justices were unanimous—even the dissenters conceded that the name tags triggered and flunked strict scrutiny applicable to regulations of core political expression. (The Justices also agreed that a rule that required only the "paid" or "volunteer" label without any names might present a different case.) The other two rules also flunked strict scrutiny, according to the Court. Limiting signature-gatherers to registered voters unconstitutionally constricted the number of voices in the debate; and the financial disclosure requirements in effect forced paid gatherers to surrender the anonymity enjoyed by their volunteer counterparts.

At first blush, all this might seem plausible. But a closer look suggests that the Court was way off target. The Colorado initiative process is not about "petitions." It's about state lawmaking. Strictly speaking, the state

⁴¹ Hills, *supra* note 2, at 1002-07 (discussing *Arkansas Educ. Television Program Comm'n v. Forbes*, 118 S. Ct. 1633 (1998) and *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168 (1998)).

⁴² In the discussion that follows, I borrow from an earlier essay for a nonacademic audience. See Akhil Reed Amar, *The Five-Legged Dog*, AM. LAW., Sept. 1999, at 47.

was not regulating or prohibiting “petitions” or “speech” at all. It was merely saying that unless a given signature was collected in a certain way, it would not count *for purposes of the state initiative process*. In other words, anyone in Colorado has a right to petition to his heart’s content—to do so anonymously and with no disclosure, even if he is not a registered voter. But he has no First Amendment right to insist that Colorado treat his petition as anything more than a handbill. Most importantly, Colorado was not trying to treat a nonconforming signature as anything *less* than a handbill, fully protected by the First Amendment. Colorado merely said that unless its rules were followed, any signature gathered would be treated as a petition pure and simple—as wholly protected First Amendment expression.

To see the point another way, imagine that I go to Denver next week and demand a right to vote for Mickey Mouse as governor. Surely Colorado need not count my vote in the next election because (a) I am not a registered Colorado voter, (b) Mickey Mouse is not an eligible candidate, and (c) the state may properly insist that all lawful ballots be cast on election day, or pursuant to a carefully regulated absentee ballot system. In one sense I can “vote” for Mickey—just watch me!—and the state would be wrong to punish me. But the state has a perfect right not to count my vote. The facts of *Buckley* are no different than my Mouse case. Alas, not a single Justice came close to seeing this; only Justices O’Connor and Breyer seemed to sense that the First Amendment label didn’t quite fit, but they tried to argue within the label rather than thrusting it aside.

I would argue, and I suspect Professor Hills might agree, that *Buckley* was less about censorship and more about popular sovereignty and state autonomy, than any of the Justices seemed to grasp. The Constitution, rightly read, affirms the presumptive right of a state to govern itself—to decide, for example, where to put its state capital, how to pick its judges, when to elect its governors, and whether to adopt a unicameral or bicameral legislature. And also whether to have an initiative process, and how to structure that process. It’s hard to claim Colorado’s initiative screening rules are too strict given that Colorado was free to ban initiatives altogether. Granted, having set up an initiative system, Colorado cannot impose any conditions it wants, however outrageous. It could not announce that it will count only the signatures of white voters, or of Republicans, for example. But the rules involved in *Buckley* were worlds apart from such extreme hypotheticals. Colorado citizens were just trying to maintain an initiative system true to its populist roots, as a counterweight to the money that bulks so unattractively in the war-chests of ordinary legislators.

If, as I suspect, Professor Hills might share my doubts about the analysis of *Buckley*, there is a sobering lesson here. When judges—in this case, unanimously—depart from the best understanding of the Constitution’s text and structure, it is not always because judges are smart and our document’s framers were confused. Sometimes, it is closer to the other way around.

