COLLOQUIUM

America's Constitution: A Biography
BY AKHIL REED AMAR

Revolution by Judiciary:
The Structure of American Constitutional Law
BY JED RUBENFELD
CONTENTS

I. PREFACE 1975
   Stephen G. Breyer

II. INTRODUCTIONS 1977
    Jed Rubenfeld
    Akhil Reed Amar 1997

III. DIALOGUE 2015
     Akhil Reed Amar & Jed Rubenfeld

IV. COMMENTARIES 2037
    Michael Stokes Paulsen
    H. Jefferson Powell 2067

V. REPLIES 2093
    Jed Rubenfeld
    Akhil Reed Amar 2101

1973

Imaged with the Permission of Yale Law Journal
Preface

Constitutional interpretation, like the interpretation of any legal text, involves an ongoing conversation among bench, bar, and academy. Lawyers and judges participate by applying the law to particular sets of facts in the course of arguing and deciding cases. Their work provides source material for academics, who can step back from the fray of litigation and place judicial opinions in context, discovering their implications, analyzing their reasoning, and suggesting elaboration or modification. Their work, in turn, helps lawyers and judges make better arguments and craft better decisions in the next case. And so on. From this dialogue emerges law that is better able to deal with the human problems of those whom the Constitution was written to serve.

With America’s Constitution: A Biography and Revolution by Judiciary, Akhil Amar and Jed Rubenfeld have made valuable and much needed contributions to this conversation. Each picks up a different thread of the discussion. Amar returns our attention to the text of the document. He emphasizes the relationship of each individual phrase to other phrases in the Constitution and the consequent need to read the document as a whole, lessons too often forgotten in battles over judge-made doctrines and tests. This careful reading engages historians, political scientists, and constitutional decisionmakers both inside and outside the judiciary. Rubenfeld offers a powerful and insightful theory of constitutional interpretation by the federal courts that will help judges understand constitutional history and apply that history to today’s problems of constitutional interpretation.

I am delighted that The Yale Law Journal has decided to advance this conversation—a conversation that means better law. And I recommend the careful reading of both books not only to their fellow academics, lawyers, and judges, but also to the American people, to whom (as Amar reminds us) the Constitution belongs.

Stephen G. Breyer is Associate Justice of the Supreme Court of the United States.
The Paradigm-Case Method

There are three fundamental topics in constitutional law: doctrine, interpretation, and legitimacy. Doctrine concerns the law as it is or should be in any particular constitutional field. Interpretation concerns the methods judges do or should deploy in deciding what the Constitution means. Legitimacy concerns the claims of authority that constitutional law—a body of law rendered by unelected judges supposedly on the basis of a two-hundred-year-old text—can make to justify its legal supremacy in a society that calls itself self-governing.

Most constitutional scholars devote their careers to one of these topics. Some make contributions to two of them. Remarkably, Akhil Amar has changed the way we think about all three—and he has done so again in America’s Constitution: A Biography. Popular sovereignty is Amar’s paradigm of political legitimacy; a mixture of intratextualism and originalism are his interpretive lodestars. The intriguing insights he delivers for constitutional doctrine can be found on page after page of his book.

The ideal account of American constitutional law, if there were such a thing, would integrate these three topics in a seamless whole. It would be at once, inextricably, an exercise in political theory, hermeneutics, and legal analysis. From a theory of the legitimate role of constitutional law in a democracy, an overarching methodology of interpretation would emerge, and from that methodology would follow concrete results for a wide array of hotly disputed doctrinal issues. This kind of integrated account, pipe-dream though it may be, has been the goal I have lumbered toward in my own constitutional scholarship. Revolution by Judiciary: The Structure of American Constitutional Law completes this project.

In fact, Professor Amar and I are both “popular sovereigntyists.” That is, we both take seriously the idea that the Constitution must be seen and read as a product of democratic self-lawgiving. This “must” not only purports to be a descriptively accurate reflection of what it was that Americans understood themselves to be trying to do at the various times when they made and remade their Constitution. This “must” also derives from considerations of legitimacy. Both Professor Amar and I believe that constitutional law can justify its foundational status in our legal-political order only to the extent that it can make good on its claim to being law made by the American people to govern themselves.

As a result, in many ways, Professor Amar and I are more alike than we are different. We both believe in the aspiration of popular self-government through a democratically self-given constitution. We both believe that this aspiration should suffuse the entire business of constitutional interpretation as well as every field of constitutional doctrine. And we both have been led by these commitments to take the Constitution’s text and its historical meaning much more seriously than do many other constitutional scholars.

Anyone who recognizes text and historical meaning as bearing special importance in constitutional interpretation ought to make it his business to know the Constitution’s text and history. That is what Akhil Amar has done. He has amassed over the years and now deploys a comprehensive knowledge—unsurpassed by any living scholar I know of—of the Constitution’s genesis, its historical meaning, and the complex interrelationships among its provisions.

But behind text and history there must always be an anterior account—of constitutional and democratic theory, of interpretive method—that assigns text and historical meaning their proper place in constitutional law. For myself, I have been more preoccupied with this anterior picture. At issue here are the foundational premises of the whole enterprise of constitutional self-government. How do we make sense of the peculiar conjunction of institutions we see in modern democracies, in which a seemingly undemocratic, highly judicialized body of constitutional law holds itself out as superior to the will of the governed as expressed through elections or elected representatives? This is the question with which Bickel and Ely began; it is the question with which I begin as well. From their answers to this question, Bickel and Ely sought to motivate an account of constitutional interpretation as a whole and of the broad contours of constitutional doctrine. I give a different answer to the foundational question than did either Bickel or Ely; as a result, I am led to a different picture of constitutional interpretation and of constitutional doctrine as well.

Trying to fill in this picture—trying to work out the proper theory of constitutional interpretation and draw out the implications for the great sweep
of constitutional doctrine—is the goal of Revolution by Judiciary. The twentieth century saw one revolution after another in constitutional interpretation: the rise of *Lochner*, the advent of modern free speech jurisprudence, the great triumph of *Brown*, the explosion of Congress’s commerce power, and the birth of the modern right of privacy. These revolutionary developments are sometimes revered, sometimes reviled, sometimes merely puzzled over, sometimes taken for granted. But these revolutions by judiciary have been and remain today a central part of American constitutional law; perhaps another one is taking place even now. The great problem is that constitutional law has absolutely no account explaining or justifying them. Constitutional law—I am not speaking of constitutional theorizing, but of the law itself—has no account of when judges have the legitimate authority to announce constitutional doctrines that break radically from past and present meaning alike, or of what judges should be doing when they introduce such revolutionary change in the doctrine, or of how such radical changes in constitutional meaning are to be evaluated.

This is the gap *Revolution by Judiciary* is meant to fill. The book essentially makes two big arguments about constitutional interpretation. One is purely descriptive and positive, the other theoretical and normative. The first argument concerns a surprisingly consistent pattern that runs throughout actual American constitutional doctrine; the second is about the justifiability of this pattern. In Parts I and II of this Introduction, respectively, I’ll summarize the main lines of both these arguments.

I. THE INTERPRETIVE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW

On the descriptive front, I claim to have identified a basic interpretive structure underlying all American constitutional law. The fundamental idea is pretty simple. It has to do with the role of historical meaning in constitutional law and hence with the undying topic of “judicial activism.”

Modern constitutional law is notoriously ahistorical. In field after field, on matters of considerable importance, today’s doctrine defies original understandings. This is famously true, for example, of modern equal protection law, both in its condemnation of racial segregation and in its protections against sex discrimination. *Brown v. Board of Education*, the most

---

5. *Id.*
luminous of twentieth-century constitutional cases, plainly violated original understandings—despite the Sisyphean efforts of originalists to show the contrary.7 *Miranda v. Arizona*8 is another utterly ahistorical modern case. Today’s Commerce Clause allows Congress to regulate the terms and conditions of labor wholly within states;9 this would have astounded the Framers, who thought they had kept in-state labor relations—i.e., slavery—out of Congress’s legislative jurisdiction.10 Modern regulatory takings law plainly

6. To repeat the most salient point of the well-known evidence: The very Congress that framed the Fourteenth Amendment maintained segregated public schools in the nation’s capital. John P. Frank & Robert F. Munro, *The Original Understanding of “Equal Protection of the Laws,”* 1972 WASH. U. L.Q. 421, 460-62. In addition, eight ratifying, non-Confederate states either provided for or permitted segregated public schools in 1868. See RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY 633-34 (1976). Nor should it be imagined that the original understanding was “separate but equal”: Far from providing black children with tangibly equal facilities, five more non-Confederate states excluded black children altogether from public education. Id.

7. See, e.g., ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 75-76 (1990). Here, Bork simultaneously conceded the “inescapable fact” “that those who ratified the [fourteenth] amendment did not think it outlawed segregated education or segregation in any aspect of life,” yet asserts that *Brown* “is consistent with, indeed compelled by, the original understanding.” How? As follows: “[E]quality and segregation were mutually inconsistent, though the ratifiers did not understand that”; faced with the choice, judges “must choose equality,” which was the “purpose that brought the fourteenth amendment into being . . . [and] was written into the text.” *Roe v. Wade* is un-originalist? Not any more: “equality and [banning abortion] were mutually inconsistent, though the ratifiers did not understand that” either. See JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 178-79 (2001). For another heroic attempt to make *Brown* safe for originalism, see Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995). For a careful, decisive response to McConnell, see Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995).


violates the original understanding, which saw compensable takings only when
government physically dispossessed owners or divested them of title.¹¹

Some decry (or purport to decry) the flouting of original meaning in
modern constitutional law. Others celebrate it. In the debate over originalism,
however, a peculiar fact seems to have gone unobserved: For all its ahistoricity,
constitutional law almost inviolably adheres to one particular kind of original
understanding, even while departing from original understandings that fall
outside this set. When this pattern is brought to light, an overarching approach
to constitutional interpretation as a whole also comes into view. In brief,
American constitutional law adheres systematically to one kind of original
understanding (which I call “foundational Application Understandings”),
while routinely discarding all other original understanding (which I call “No
Application Understandings”). Or so I claim in my book.

When I show this pattern to people, and bring out its underlying logic,
they usually find it surprising—and, at least at first, odd. There are two
reasons, I believe, for this. First, although constitutional theorists—originalists,
proceduralist, moralists, and so on—may have their own favored and fairly
determinate interpretive methods, constitutional law itself appears on its face
to have no such method. Modern constitutional case law essentially lacks any
articulate account of what judges are supposed to do when called on to
interpret the constitutional text. So, the idea that there is in fact a fairly
determinate interpretive structure underlying the case law comes as a surprise.

Second, the pattern I am about to describe involves the idea that some
original understandings require interpretive deference while others do not, and
this idea runs against the grain. Whether pro- or anti-originalist, nearly
everybody believes there's something wrong with judges who pick and choose
among original understandings; judges who attend to history selectively are
cheating.¹² In other words, most of us accept the premise that all original

Imagine the modern interpretation of the Commerce Clause as long as slavery existed.” Id. at 444.

11. See, e.g., John F. Hart, Land Use Law in the Early Republic and the Original Meaning of the

12. The presumed pathologies of selective exploitation of historical understandings are the nub
of every objection to “law-office history.” See, e.g., Martin S. Flaherty, History “Lite” in
Modern American Constitutionalism, 95 COLUM. L. REV. 523, 554 (1995); Alfred H. Kelly, Clio
and the Court: An Illicit Love Affair, 1965 SUP. CT. REV. 119, 122 n.13. An exception to the
usual view can be found in Michael C. Dorf, Integrating Normative and Descriptive
Constitutional Theory: The Case of Original Meaning, 85 GEO. L.J. 1765 (1997). In this
interesting and carefully reasoned article, Professor Dorf argued for an explicitly selective
“heroic originalism” that would reject original understandings “too distasteful to count.” Id.
understandings should, methodologically speaking, be treated equally. They should all be given the same interpretive weight, whether a lot or a little or none at all. On this view, judges who act as if some original meanings “tie their hands,” while ignoring others, are lying either to themselves or to the rest of us. They have obviously arrived at their decisions on other grounds, invoking history only when it suits their goals.

If I am right, however, we need to revise this conventional way of thinking. Constitutional law turns out to be structured around the idea that one species of original understanding is different from all the others. One set of historical meanings demands categorical interpretive deference; all others can be ignored without much compunction.

To make this pattern visible, I need first to distinguish between two different kinds of specific understandings that people can have about how a legal provision will or will not apply to particular sets of facts. In fact, the distinction is, precisely, between understandings that the provision will apply to particular sets of facts and understandings that the provision will not apply to particular sets of facts.

Take free speech. We can distinguish, in the simplest possible terms, between two analytically different kinds of specific understandings of the First Amendment’s prohibition against abridging the freedom of speech. On the one hand, there are particular measures—say, laws banning nonobscene pornography—that we believe to fall within the ambit of this constitutional prohibition. That is, the constitutional prohibition applies to such laws: The prohibition is triggered; the laws are prohibited. On the other hand, there are particular measures—say, perjury laws—that we believe to fall outside the ambit of the provision. The prohibition does not apply in such cases; the laws are not prohibited. I call the former “Application Understandings” and the latter “No Application Understandings.” Pretty clunky terms: I wish I had better ones, but there they are.

Now make a further distinction. For a particular constitutional provision, some Application Understandings may have played a special, central, definitive role at the time of enactment. Many of our constitutional rights were enacted with a core, specific original purpose: to abolish particular laws or practices deemed intolerable (I will name a few in a moment). In such cases, we have what I call “foundational Application Understandings”: Application Understandings that were widely shared at the time of enactment, by

at 1810. By contrast, the pattern I am about to describe does not distinguish among original understandings on their moral merits.
supporters and opponents alike, and that played a special, animating role in getting the provision enacted.

As a matter of historical fact, there are exceedingly few foundational Application Understandings. The prohibition of prior restraints was almost certainly a foundational Application Understanding for the freedom of speech (a term I use to include both the freedom of speech and of the press). The prohibition of at least some seditious libel laws was probably another. After that, it gets pretty hard to say what, specifically, the freedom of speech was definitively understood to prohibit.

By contrast, the No Application Understandings of our constitutional rights were and are virtually limitless. No Application Understandings can refer to anything the right does not prohibit. Thus, the freedom of speech was and is understood not to prohibit criminal trials without a jury, the sale of flour in ten-pound bags, and ordinary trespass laws.

My descriptive claims are founded on the distinction between Application and No Application Understandings. The initial thesis is this: Despite all the years that have passed, and despite its radical nonoriginalism on many dimensions, constitutional law today still adheres to virtually every single foundational Application Understanding. For example, freedom of speech still emphatically prohibits prior restraints and seditious libel laws; the

---

13. See William Blackstone, 4 Commentaries *151-52 ("The liberty of the press . . . consists in laying no previous restraints upon publication . . ."); Leonard W. Levy, Emergence of a Free Press, at xii-xv (1985). As late as 1907, the Supreme Court could still suggest that the freedom of speech might prohibit only prior restraints. See Patterson v. Colorado, 205 U.S. 454, 462 (1907).

14. See Zechariah Chafee, Jr., Free Speech in the United States 21 (1941) (arguing, in part on the basis of the celebrated Zenger trial, that the First Amendment was enacted to "wipe out the common law of sedition, and make further prosecutions for criticism of the government . . . forever impossible"); William T. Mayton, Seditious Libel and the Lost Guarantee of a Freedom of Expression, 84 Colum. L. Rev. 91 (1984).

15. See, e.g., Doe v. Dep't of Pub. Safety ex rel. Lee, 271 F.3d 38, 50 n.17 (2d Cir. 2001) (calling prior restraints "the most serious and the least tolerable infringement on First Amendment rights") (quoting Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976)).

16. See New York Times Co. v. Sullivan, 376 U.S. 254 (1964). New York Times overruled those early-twentieth-century cases, such as Debs v. United States, 249 U.S. 211 (1919), in which the Court upheld prosecutions under the Espionage Act of 1917 brought against persons who essentially had dared to protest the country's involvement in the First World War. A century earlier, some federal courts had upheld prosecutions under the Alien and Sedition Acts of 1798. If the understanding that the First Amendment prohibited sedition laws was not solidly established in 1798, it became so with Jefferson's presidential victory in 1800. See Levy, supra note 13, at 282-308. As I explain at greater length in my book, historical Application Understandings can become foundational even if not so held at the time of the founding. See Rubinfeld, supra note 2, at 120-24. In New York Times, the Court recognized
Establishment Clause still prohibits a national church; the Fourth Amendment still prohibits general warrants; the Fifth Amendment still prohibits uncompensated acts of eminent domain; and the Fourteenth Amendment still prohibits Black Codes.

By contrast, modern constitutional law violates a great many original No Application Understandings—some of which were, as a historical matter, extremely important. For example, as noted above, it is as certain as such things can be that the Fourteenth Amendment was originally understood not to prohibit racial segregation of public schools or of most other public facilities. Brown jettisoned that No Application Understanding. Similarly, the Equal Protection Clause was originally understood not to prohibit at least some, and perhaps most, of what we today call sex discrimination. Today, that No Application Understanding is history. The First Amendment, on the original understanding, did not prohibit blasphemy laws. Today it does. To generalize: The historical understandings rejected by modern constitutional law are, almost exclusively, No Application Understandings.

the Sedition Act of 1798 as a paradigmatic violation of the First Amendment. 376 U.S. at 273-74; see also Lee v. Weisman, 505 U.S. 577, 626 (1992) (Souter, J., concurring) (observing that the Sedition Act would be "patently unconstitutional by modern standards").

20. It does so through the rule that laws employing racial classifications are subjected to strict scrutiny, see, e.g., Gratz v. Bollinger, 539 U.S. 244 (2003), and through the principle that laws enacted to further "White Supremacy" are plainly unconstitutional, see Loving v. Virginia, 388 U.S. 1, 7-12 (1967).
22. As late as 1921, courts upheld blasphemy convictions. See, e.g., State v. Mockus, 113 A. 39 (Me. 1921). Early-nineteenth-century judges, including some of the most respected, had no difficulty rejecting challenges to blasphemy laws—even those specifically protecting Christianity from impugnment—under state constitutional guarantees. See, for example, People v. Ruggles, 8 Johns. 290, 295 (N.Y. 1811), in which Chief Judge Kent stated:

Nor are we bound, by any expressions in the constitution, as some have strangely supposed, either not to punish at all, or to punish indiscriminately the like attacks upon the religion of Mahomet or of the grand Lama; and for this plain reason, that the case assumes that we are a christian people, and the morality of the country is deeply ingrafted upon christianity, and not upon the doctrines or worship of those impostors.

This asymmetry causes peculiar, seemingly contradictory assertions to crop up in the case law on the significance of original meaning. When judges deal with a foundational Application Understanding, they unabashedly refer to and rely on historical meaning. For example, when explaining the unconstitutionality of prior restraints, modern Justices emphasize that the “elimination of prior restraints was a ‘leading purpose’ in the adoption of the First Amendment,” and that a “[p]rior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgment.” Similarly, when explaining the unconstitutionality of an insufficiently particularized search warrant, today’s judges refer without embarrassment to original understandings: “It is familiar history that . . . ‘general warrants’ were the immediate evils that motivated the framing and adoption of the Fourth Amendment.” Yet in many cases where there is a pertinent No Application Understanding—such as the understanding that the Equal Protection Clause would not prohibit racial segregation or sex discrimination—the Court has little or no compunction about ignoring historical meaning. History, in such cases, simply drops off the radar screen.

Such contrasting treatment of historical meaning can look like outcome-driven, inconsistent hypocrisy. And it may have been just that some or much of the time. But the fact remains that the Court’s inconsistent treatment of historical meaning has its own kind of consistency, with a precise logic, structure, and method. Systematically and almost without exception—with respect to both constitutional rights and constitutional powers—modern doctrine adheres to historical Application Understandings even while it frequently disregards historical No Application Understandings. I document this pattern in greater detail in Part I of my book.

If this structure holds throughout constitutional law, as I try to show it does, it is really quite remarkable. Most of us believe that historicism in constitutional law—the view that constitutional interpretation should be faithful to historical meaning—can’t be entirely right, yet most of us also believe it can’t be entirely wrong. Hence we have debated for decades the proper place of original meaning in constitutional law. But it turns out that all along, constitutional law has offered its own distinctive answer to this debate, an answer that we have failed to grasp. The original Application Understandings are binding; the No Application Understandings are not.

24. United States v. Bridges, 344 F.3d 1010, 1014 (9th Cir. 2003) (internal quotation marks omitted).
Indeed, I would argue that all Application Understandings—even those that develop long after the Founding—are in general firmer, harder to dislodge, than No Application Understandings. This is just another way of saying that it is easier for the Supreme Court to announce a new right than to take away a right already established. But the special bindingness I’ve been referring to so far belongs only to a special class of Application Understandings. For any particular constitutional provision, some Application Understandings may have played a special, central, definitive role at the time of enactment. Many of our constitutional rights were enacted with core original purposes. These foundational Application Understandings are the ones I have been referring to so far. And they not only are intact in contemporary constitutional law. They have, more significantly, served as paradigm cases, shaping the doctrine as exemplary holdings around which the rest of the case law is organized.

Consider, for example, the Self-Incrimination Clause. The core Application Understanding of this Clause is well-known: It prohibited the kind of interrogation practice found in certain seventeenth-century English courts such as the Star Chamber,25 where an individual was placed under oath, asked if he was guilty of a crime, and subject to severe punishment for refusing to answer. In seventeenth- and eighteenth-century thought, this practice put guilty defendants in a tight spot. They faced three unattractive options: incriminate themselves and go to jail; lie and condemn themselves to hell as perjurers; or, refuse to answer and go to jail anyway.26 Confirming the systematic interpretive structure described above, constitutional law today expressly adheres to this historical Application Understanding: “At its core, the privilege reflects our fierce unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt that defined the operation of the Star Chamber.”27

But the prohibition of the “cruel trilemma” is not only still in force in modern self-incrimination doctrine. To use the words just quoted, it is recognized as the “core” application of the guarantee. It serves a paradigmatic function definitive of meaning, shaping modern doctrine even as that doctrine expands far beyond the original understanding. Take Miranda. This famous case, as noted earlier, plainly violates specific original understandings.


Historically, the "cruel trilemma" was thought to exist only when the accused was under oath.\footnote{Cf. Langbein, supra note 25, at 1048-73, 1080 n.142; Eben Moglen, Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination, 92 Mich. L. Rev. 1086, 1100 (1994).} Hence, the self-incrimination guarantee, as originally understood, would not have applied to the \textit{Miranda} situation, in which an unsworn individual is questioned by the police. \textit{Miranda} therefore violates a historical No Application Understanding. At the same time, however, \textit{Miranda} builds on the historical Application Understanding. According to the Supreme Court, the \textit{Miranda} doctrine rests on the recognition that the same kind of "cruel dilemma" the Self-Incrimination Clause was enacted to prohibit can exist even when an individual is questioned outside the sworn-testimony context.\footnote{See Pennsylvania v. Muniz, 496 U.S. at 596; cf. Escobedo v. Illinois, 378 U.S. 478, 485 (1964).} In the Court's view, a guilty individual interrogated in police custody, if unwarned of his right to remain silent, will face a "modern-day analog" of the "historic trilemma."\footnote{As the Court put it in \textit{Muniz}:} We can agree or disagree with this reasoning, but it vividly demonstrates how core Application Understandings serve as paradigm cases, anchoring and shaping the development of future doctrine even as the doctrine comes to reject historical No Application Understandings.

The examples could be multiplied. Everyone knows that the concepts of "suspect class" and "suspect classification" figure centrally in modern equal protection doctrine. These concepts, in turn, draw their strength and core meaning not from an abstract philosophy or from legal definitions but from a paradigm case: the unconstitutionality of the nineteenth-century Black Codes, the abolition of which was a central purpose—perhaps the central purpose—behind the Fourteenth Amendment.\footnote{See, e.g., Eric Foner, Reconstruction: America's Unfinished Revolution, 1863-1877, at 198-205, 257 (1988); Akhil Reed Amar, The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine, 114 Harv. L. Rev. 26, 64-65 (2000).} This simple insight opens up a clear view
of *Brown's* relationship to historical meaning. As far back as 1879, the Court had begun the process of paradigm-case reasoning: of interpreting the Fourteenth Amendment in light of the paradigmatic unconstitutionality of the Black Codes. Thus, in *Strauder v. West Virginia*, the Court extrapolated from this paradigm case the principle that states could no longer pass hostile and discriminating legislation against blacks, legislation singling out blacks and branding them with a stamp of “inferiority.”³² In *Brown* and the cases that followed, the Court simply, and at long last, applied this principle to the nation's racial separation laws. Yes, *Brown* violated original No Application Understandings, but it rests plausibly and compellingly on an interpretation of the Fourteenth Amendment seeking to do justice to that amendment in light of its paradigm case.

To summarize: Modern American constitutional law may lack an articulate account of its own interpretive method, but it appears to embody such a method all the same. Generally speaking, American constitutional interpretation is structured by paradigm-case reasoning, in which the paradigm cases are given by historical Application Understandings. The law treats these understandings as definitive of core meaning and builds doctrine around them. The task of building up doctrine from paradigm cases is of course an open-ended one—quite familiar to judges in a common law system—that necessarily involves normative judgment. That is why I refer to the effort to “do justice” to a constitutional provision in light of its paradigm cases. But this much is certain: In the process of constructing doctrine around the historical Application Understandings, judges in our system frequently jettison historical No Application Understandings, including No Application Understandings fundamentally important to Americans of an earlier generation.

So much for description. Now for the theoretical claim.

**II. COMMITMENTS, INTENTIONS, AND THE PARADIGM-CASE METHOD**

The question, of course, is why. Is there any reason to distinguish Application from No Application Understandings in constitutional interpretation? My answer to this question, given in the second part of the book, is pretty long and a little complicated. It's a lot harder to summarize briefly. But in essence, I try to connect constitutional law's asymmetric

³². 100 U.S. 303, 307-08 (1879).
treatment of historical meaning to the theory of self-government over time, which I have tried to develop at length elsewhere.\textsuperscript{33}

The idea of self-government over time is to be contrasted with a widespread, conventional conception of present-oriented, or "presentist," self-government. The presentist conception holds that self-government ideally consists of government by the self's own present will. An agent is maximally self-governing, on this view, to the extent he follows his own voice, his own present will or preferences, in the here and now. Very generally speaking, governance by the self's present will is the prevailing conception of self-government throughout modern political science, economics, political philosophy, and constitutional theory.\textsuperscript{34}

The idea of self-government over time takes a different view. It holds that self-government requires an effort to hold the self to commitments—self-given ends, principles, or courses of action—over time, even when holding the self to those commitments runs contrary to present will or preference. Laurence Tribe gave this Kantian thought powerful expression thirty years ago:

\begin{quote}
To be free is not simply to follow our ever-changing wants wherever they might lead. To be free is to choose what we shall want, what we shall value, and therefore what we shall be. But to make such choices without losing the thread of continuity that integrates us over time and imparts a sense of our wholeness in history, we must be able to . . . choose in terms of commitments we have made . . . .\textsuperscript{35}
\end{quote}

Note that both the presentist and temporally extended conceptions of self-government might be logically admissible and even correct, but limited to different domains. For example, the presentist conception may correctly offer the best account of freedom for a being with no self-understanding as a temporally extended identity. The presentist conception might therefore offer the correct account of freedom for many animals. A dog is maximally free, on this view, just to the extent that it can do what it wants to do here and now.

For human beings, however, the presentist conception of self-government appears to leave out something fundamental. People have a capacity for

\begin{itemize}
\item \textsuperscript{33} See Rubenfeld, supra note 7.
\item \textsuperscript{34} See id. at 17-73 (demonstrating that this conception of self-government underlies the work of political philosophers from Rousseau to Habermas, political scientists such as Robert Dahl and Jon Elster, and American constitutional theorists from Jefferson to Alexander Bickel and John Hart Ely).
\end{itemize}
autonomy—for self-lawgiving—that most other animals do not. People have the capacity to give themselves enduring commitments—whether to institutions, to principles, to other human beings, or to some wholly trivial course of action—and to live out those commitments over time, even when doing so runs contrary to their then-present preferences.

I try to build up a conception of constitutional self-government organized around this idea of making and following commitments. I call this the “commitment-based” or “commitmentarian” conception of self-government, and I try to show that this conception makes the best sense of the project of American constitutionalism. For purposes of this summary, only one thought is crucial to this commitment-based conception of self-government: American constitutional law is to be understood as a project of temporally extended, democratic self-government. In other words, constitutional law aspires to be the institution through which this nation seeks to lay down and hold itself to its own fundamental legal and political commitments over time. Constitutional law is not a check on democracy. Nor is it merely a protector of democracy, as for example by protecting the rights necessary for democratic politics. Nor is it a vehicle of democracy, as for example by guaranteeing a set of processes through which the present will of the governed can be expressed and effectuated. No: Constitutional law is democracy—over time. Or at least it is supposed to be. That is its promise and its aspiration.

But I am not going to rehearse here the arguments I make to try to establish this view of American constitutionalism. Instead I want to move straight to the final—and, in Revolution by Judiciary, the most important—piece of the puzzle. If you assume that American constitutionalism rests on and embodies a commitment-based conception of self-government, you can actually make sense of the distinction between Application and No Application Understandings in constitutional law.

To show how, I ask readers to follow me in (1) a careful analysis of the distinction between intentions and commitments; and (2) a set of arguments designed to explicate how and why we, as individuals, will often regard the Application Understandings of our commitments as bearing a special weight that our No Application Understandings cannot claim.

A. Distinguishing Commitments from Intentions

There is a clear phenomenological distinction between commitment and intentions. Commitments oblige. Mere intentions do not.

36. See Rubinfeld, supra note 2, at 89-98; Rubinfeld, supra note 7, at 91-103, 145-77.
An intention formed at time one is not usually regarded as binding at time two. If at nine o'clock this morning, I had the intention of leaving the office today at five, this intention does not somehow impose an obligation on me to leave at five. When five o'clock comes, I may feel differently. If so, I will stay on without compunction.

To be sure, I may have had a good reason for intending to leave at five. Perhaps I have to pick up my children at that time. That reason may impose an obligation on me. But the mere fact that I formed an intention does not. My nine o'clock intention was based on my nine o'clock preferences. If my preferences have changed by five, I need no special justification to depart from my morning intention. I feel differently now, and that's the end of it. An intention does not give the agent an additional reason to act—a new reason, independent of the reasons the agent had for forming the intention in the first place.

Commitments are different. The whole point of a commitment is to impose an obligation. If I commit myself to do $X$ at some future time, I'm obliging myself to $X$ when that time comes. Thus commitments do create—or at any rate, their point is to create—new reasons to act. Say that at nine this morning, for some reason, I did not merely intend to leave the office today at five, but committed myself to doing so. Now it is a very different thing if I happen to “feel differently” when five o'clock come. I might prefer to stay on, but I committed myself to leaving. I probably anticipated that I would feel differently later; that's why I made the commitment. The point of a commitment is to impose a future obligation on the self to take (or not take) some action even if doing so runs contrary to later preferences.

It is actually a problem of considerable intricacy to explain how a commitment made at time one could in fact create new reasons to act at time two. The problem is easy to solve if we have in mind cases in which the person making the commitment at time one deploys some external mechanism—tying himself to the mast, giving to someone else the keys to his liquor cabinet, entering into a contract—that alters the feasibility, costs, or benefits of his time-two options. But I am speaking here of situations in which the agent deploys no such precommitment mechanisms. He merely commits himself; he merely gives his word—and he gives it not necessarily to others, but rather to himself. How can I "commit" myself this way? Hobbes, for one, thought it could not be done: "[H]e that is bound to himself only, is not bound." A sizeable philosophical literature exists on this problem, but I am not going to

discuss here that literature or my solution to the problem.\textsuperscript{38} Instead I am going
to take it, as most of us do, that we can make commitments, even to ourselves,
and that these commitments do impose obligations on us. The decisive
question is this: If an agent is obliged to keep his commitments, what is the
status of his No Application Understandings of those commitments? Are his
original No Application Understandings commitments in themselves and
therefore binding on him?

\textit{B. Are No Application Understandings Commitments?}

Suppose I make a commitment never again to deliberately run over small
animals with my car. At the time, I have any number of No Application
Understandings of this commitment. For example, I understand that this
commitment does not prohibit me from smuggling drugs into the country with
my car (except, perhaps, in the rare case in which I could do so only by running
over small animals). What is the status of this No Application Understanding?

Does it mean that I am committed to drug-smuggling? Of course not. My
No Application Understanding means only that my small-animal commitment
has No Application to drug-smuggling. It does not somehow commit me to
drug-smuggling. If I refused to smuggle drugs into the country, I would not
have violated my commitment

But does my No Application Understanding at least demonstrate that I am
somehow committed to my being free, insofar as my own values and
resolutions are concerned, to smuggle drugs into the country with my car? Of
course not: I may view drug-smuggling as completely forbidden, without
believing that it is forbidden by my small-animal commitment. On the day
I made my small-animal commitment, perhaps I already had another
commitment prohibiting me from smuggling drugs. Or, if not, I could later
enter into an international agreement prohibiting me from drug-smuggling,
without in any sense having violated my small-animal commitment.

In other words, it is quite obvious that my small-animal commitment, even
when combined with my No Application Understanding of it, represents no
kind of commitment at all with respect to drug-smuggling—neither a
commitment in favor of it, nor against it, nor to my being free to engage in it.

I realize I have said nothing that ought to surprise anyone. Yet what I have
said is already enough to make out the fundamental point that No Application
Understandings are not themselves commitments. They are at most mere
intentions. They are not binding.

\textsuperscript{38} \textit{See also} Rubenfeld, \textit{supra} note 2, at 71-98; Rubenfeld, \textit{supra} note 7, at 99-144.
Take the original understanding that the Equal Protection Clause would not prohibit racially segregated state public schools. Obviously, that understanding did not commit anyone or any states to racially segregating their public schools. States could of course desegregate without violating the Equal Protection Clause. But more than this, if what I said in the preceding paragraphs is right (which, I think, itcontrovertibly is), then the original No Application Understanding did not, by itself, commit anyone to leaving states free to have racially segregated public schools.

The Equal Protection Clause, as originally understood, did not prohibit racially segregated public schools. The intention, presumably, was that it would not prohibit racial segregation in public schools. But it made no commitment with respect to racially segregated state public schools. A prohibitory commitment is a commitment to prohibit certain things. Whatever the commitment does not prohibit, it makes no commitment toward. Whatever falls outside the domain of the commitment’s application is not an object of the commitment. A separate, independent commitment is required if the agent making the prohibitory commitment wishes to commit himself to the further proposition that something he understands to be permitted—to fall outside the scope of his prohibition—will remain permitted. In short, a No Application Understanding of a commitment is never itself a commitment. There may well have been an original intention that the Equal Protection Clause would not prohibit racial segregation in state schools, but intentions are not commitments.

If, therefore, we accept the idea of commitment-based constitutionalism—and with it the idea that the fundamental business of constitutional interpretation is to adhere to the nation’s constitutional commitments—we have a reason explaining why judges are not required to adhere to historical No Application Understandings. These understandings are not commitments. They are therefore not binding on judges who consider only the nation’s constitutional commitments to command adherence.

C. How Application Understandings Can Be Commitments

Turn now to foundational Application Understandings. Sometimes, when we make a commitment, we are brought to it because we underwent some episode from which we drew, as a kind of lesson, a conviction that we ought never to engage in a certain course of action again. Even if we want to. Or especially if we want to. Barring ourselves from engaging in this course of action is the very reason, the core purpose, behind our commitment.

Suppose Odette commits herself never again to deceive Swann, her husband. Shortly thereafter, the handsome Duke proposes to Odette that he
and she spend a night together. Odette wants to say yes. On the other hand, she also wants to honor her commitment. She doesn’t have to honor it, of course, but that’s what she wants to do. She means to be faithful to her commitment. So she has to decide whether spending a night with Duke would count as an act of deceiving Swann.

It occurs to Odette to reason as follows. “To deceive means affirmatively to misrepresent something, not merely to fail to tell something. Therefore, spending a night with Duke will not be an act of deceiving Swann so long as I never affirmatively lie about it.” On this basis, Odette says yes to Duke and tells herself she is not violating her commitment to Swann.

This interpretation of Odette’s commitment is not illogical or impossible. But consider the following additional fact. When Odette made her commitment, the reason she did so was that she had just spent the night with the handsome Duke, without telling Swann about it. She wanted to impose an obligation on herself never to repeat this act. That’s why she committed herself not to deceive Swann again.

In other words, Odette’s commitment had a foundational Application Understanding. And it so happens that this foundational Application Understanding dealt with the very same course of action she has now “interpreted” her commitment to permit. Once we know this additional fact, it becomes fair to say that Odette has pulled a sleight of hand with her interpretation. She has not really interpreted her commitment at all. She has violated it under the guise of interpreting it.

What allows us to say so? When we make a commitment with a foundational Application Understanding, we are actually making not one, but two commitments—one specific, and one general. Odette was committing herself never again to sleep with Duke by and through her more general commitment never again to deceive Swann. If, we might say, she was committing herself to anything, she was committing herself not to do that again. A foundational Application Understanding is thus a commitment in its own right.

I am not saying that all commitments must have specific, foundational Application Understandings of this kind. The point is only that this normative structure—in which we make a more general commitment that includes, definitively, a more specific commitment as an Application Understanding thereof—is possible and more or less familiar. In other words, foundational Application Understandings can be commitments in their own right, made by and through the more general commitment of which they are specific understandings; No Application Understandings never are.

If, therefore, American constitutional law is best understood through the lens of commitmentarianism, there is an excellent reason for judges to
THE PARADIGM-CASE METHOD

distinguish between Application and No Application Understandings. When our constitutional provisions have foundational Application Understandings, these Application Understandings are commitments, and commitment-based interpreters are bound to adhere to them. By contrast, No Application Understandings are not commitments, and judges may freely depart from them.

Observe that what I have said applies even to the most clearly established, widely held No Application Understandings, even to a No Application Understanding without which a given constitutional provision might never have been enacted. Conceivably, had the Fourteenth Amendment been originally understood to abolish racial segregation in public facilities, or to prohibit sex discrimination, it would never have been enacted. All the same, these No Application Understandings remained at most intentions, not commitments, and later judges are not required to stick to them.

But can judges claim to be faithfully interpreting a commitment if they interpret it to require something that its original makers intended it not to require? Certainly. Commitments are often like that: They turn out, if we really want to do them justice, to require considerably more of us than we may originally have thought. A person who has children, for example, or a person who resolves to become a great pianist, makes a commitment that can easily prove to require far more than he originally intended.

How does interpretation work when an interpreter finds that it applies to some action not originally considered to be within its scope? Consider another Odette, who also makes a commitment never to deceive another Swann, this time not her husband. Our new Odette also has a new foundational Application Understanding: This time, it was a lie she told Swann. At the time she makes the commitment, she specifically and clearly thinks to herself, “I’m still free to hide things from Swann, so long as I don’t affirmatively lie to him. This commitment has No Application to mere omissions.”

Shortly thereafter, Swann says something to Odette indicating that he believes she intends to marry him. In fact, she doesn’t, but she knows that if she remains silent, Swann will read her silence as assent. She wonders if she’s obliged to speak up and disabuse him. She remembers her commitment; she also remembers her No Application Understanding.

If Odette were an originalist, her job would be easy. She would invoke her original understanding, and the case would be closed. But if she takes a commitment-based view of interpretation, her task is harder.

She made a commitment not to deceive Swann. She made no commitment in favor of omissions. True, she understood her commitment not to apply to omissions, but that No Application Understanding is not itself a commitment, and is not therefore binding on her. Instead, she has to reflect, as best she can,
on what it means to deceive. In particular, she will think about her foundational Application Understanding: What was the lie she had told Swann, and what was it about this lie that made it so reprehensible? Is it possible that she would be perpetrating the very same kind of misconduct if she permits herself to remain silent after Swann's declarations, knowing that Swann will take her silence for assent? Is it possible that her original understanding was wrong—that in some situations, omissions can deceive? Of course it's possible. While she's not required to do so, it would be entirely legitimate for Odette to interpret her antideception commitment to prohibit her from remaining silent in these circumstances.

Similarly, and through precisely the same kind of reasoning, it was entirely legitimate for the Supreme Court to interpret the Fourteenth Amendment to prohibit racial segregation and sex discrimination. Honoring a commitment may well involve rejecting original No Application Understandings. This is not a prescription for ahistorical constitutional law. It is a prescription for historical anchoring. Constitutional interpretation, when it distinguishes between Application and No Application Understandings, treating the former as paradigmatic and the latter as nonbinding, remains deeply anchored in the nation's core constitutional commitments: elaborating these commitments, doing justice to them, even when that means recognizing in these commitments requirements extending beyond the confines of what was originally contemplated.

***

I have now said more than enough by way of introduction. The best way to make more concrete my approach to constitutional law, my claims about revolutions in interpretation, and the relationship of my work to Professor Amar's, will be for the two of us to engage in a more direct exchange. Before we get to that, I just want to add only one more thing: my thanks to the editors of The Yale Law Journal for their incredible dedication, patience, intelligence, and creativity in making this happen.

*Jed Rubenfeld is the Robert R. Slaughter Professor of Law, Yale Law School.*
America's Constitution and the Yale School of Constitutional Interpretation

America's Constitution: A Biography\(^1\) tries to explain how and why the supreme law of our land was enacted at the Founding and then amended over the ensuing centuries. The biography's narrative tracks the textual flow of the Constitution itself; article by article and amendment by amendment, I take my readers on an interpretive journey through the document. While I give some constitutional patches of text far more attention than others, I try to say at least something in passing—ideally, something fresh and important—about every notable constitutional provision.

The book targets a wide audience. At one end of the spectrum I aim to make the Constitution's letter and spirit understandable to members of the general public—say, high school seniors taking Advanced Placement History or Government. At the other end, I have tried to write something that even gray-haired scholars will find significant and surprising. (To put the point autobiographically, I have filled my account with facts, ideas, interpretations, and insights that I stumbled upon only in the course of researching and writing this book after nearly two decades of teaching constitutional law at Yale.)

I shall not today attempt a comprehensive summary of the book's twists and turns.\(^2\) Instead, I shall try to place America's Constitution against the backdrop of several noteworthy constitutional law books authored by my predecessors and colleagues on the Yale Law School faculty over the last half-

---


Imaged with the Permission of Yale Law Journal

1997
century. Together, these books define the core curriculum of what might be called the modern Yale School of Constitutional Interpretation.3

I. BICKEL'S LEAST DANGEROUS BRANCH

The publication of Alexander Bickel's *The Least Dangerous Branch* in 1962 marked a milestone in the history of American constitutional scholarship.4 Prior to World War II, serious books on the Constitution came mainly from high-powered judges, lawyers, political scientists, and historians—consider, for example, Joseph Story, Alexis de Tocqueville, Thomas Cooley, Woodrow Wilson, Charles Beard, Andrew C. McLaughlin, Charles Warren, and Edward S. Corwin. For much of the early twentieth century, common law courses such as contracts and property dominated law school curricula, and few law professors penned big books on broad questions of constitutional law. When one such ambitious book did appear in the 1950s—William Crosskey's epic two-volume saga, *Politics and the Constitution in the History of the United States*5—it was met with savage criticism from much of the established legal professoriate.6

A new era dawned when Yale's Charles Black (about whom I shall have much more to say presently) published a marvelous book, *The People and the Court*,7 in 1960 and his colleague Bickel responded with his own provocative book two years later. Since the publication of these two classics, the prominence of constitutional law within top law schools has risen considerably, as has the proportion of cutting-edge constitutional scholarship produced by law professors.

3. The words "books" and "core curriculum" are significant. I shall not discuss in any detail the countless important and interesting constitutional law articles authored by Yale professors. Nor shall I analyze many other interesting Yale books that are not yet part of the established or emerging constitutional law canon for the academy, the profession, or the bench.


Several of the largest questions that Black and Bickel posed remain central to constitutional discourse today. How can judicial review by unelected judges holding lifetime appointments be reconciled with democratic theory and with the commitment to popular self-government evident throughout America's Constitution? What sorts of questions are off-limits to judges? Are such limits to be drawn and enforced solely by the legislative and executive branches, or should judges themselves also develop regimens of self-restraint?

While America's Constitution: A Biography does touch on these questions, I have tried to shift and widen the focus so as to give readers a less court-centered and more panoramic account of constitutional law. Bickel took for granted the basic democratic thrust of the nonjudicial branches, but in so doing, he glided by many constitutional questions that deserve more careful study. For example: Who was allowed to vote in congressional elections at the Founding, and how and why have these rules changed over the centuries? How much, or how little, did the Three-Fifths Clause skew antebellum apportionment maps and thereby compromise the fundamental representativeness of the House of Representatives? How should we understand the Senate's equal representation of unequally populous states? How, if at all, did the Seventeenth Amendment democratize the Senate, and how did this direct-election amendment influence other branches of government? Why did the Framers eschew direct national elections of the President, and how has the electoral college system changed, both formally and informally, over the years? Can various constitutional limits on congressional and presidential eligibility be squared with democratic theory?

As for the issues at the heart of Bickel's book—issues directly concerning the judicial branch—here, too, my account differs markedly from Bickel's. For example, I try to cast light on the history and structure of the process of judicial nomination and confirmation. Bickel's book says almost nothing about this process—an odd omission for a work that seeks to analyze the Supreme Court in a broad political context. Odd, too, was Bickel's equation of the Supreme Court with the entire federal judiciary, an equation evident not only in the book's full title—The Least Dangerous Branch: The Supreme Court at the Bar of Politics—but also in its opening sentence: "The least dangerous branch of the American government is the most extraordinarily powerful court of law the world has ever known."” In my book, by contrast, I note both similarities and differences between the Supreme Court and other federal tribunals. For

8. For passing references, see, for example, BICKEL, supra note 4, at 31-32, 90. See also ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 3-4 (1978).
9. BICKEL, supra note 4, at 1 (emphasis added).
example, while the Supreme Court’s size has shifted only marginally in two hundred years—from six to nine Justices, the size of the federal judiciary as a whole has skyrocketed. Today, there are roughly fifty times as many Article III judges as at the Founding. Or to put the point another way, in the 1790s there were roughly seven House members for every lower federal court judge, whereas today there are two federal judges for every House member. My Yale Law students are far more likely to clerk for federal judges than to intern for members of Congress. With these basic facts in mind, we can begin to see some interesting aspects of the rise of the Framers’ third branch over the centuries.

Another question raised by the distinction between the Supreme Court and the third branch: Why did Article III allow lower federal courts to try various cases that were off limits to the Supreme Court when sitting in original jurisdiction? This, of course, was the technical issue underlying Marbury v. Madison. Bickel opened his book with an extended analysis of Marbury, but he said virtually nothing about various jurisdictional and procedural issues at the heart of the case. Instead, Bickel focused on the great question of judicial review. While I, too, have much to say about judicial review, I also analyze the technical issue of original jurisdiction. That issue, I argue, gives us a window onto grand historical and structural themes at work at the Founding—in particular, how certain geographic considerations drove many of the do’s and don’ts that became part of the Constitution of 1787-1788. For example, the original jurisdiction rules of Article III were, I argue, largely motivated by venue considerations and the felt need to safeguard local juries, who played a much larger role in the Founders’ world than do juries today. Because the Supreme Court would sit in the nation’s capital while other federal courts would hold trials in the hinterlands, any expansion of the Court’s original jurisdiction would threaten to cut local juries out of the loop and would compromise other important venue values.

The difference between Bickel on Marbury and Amar on Marbury telescopes larger differences of approach and interpretive style. Bickel’s book had rather little to say about the Constitution’s text, history, and structure; instead Bickel concentrated on the Court’s recent case law. My book does just the opposite. To say this is not necessarily to criticize Bickel. In a field as vast as

---

10. This is after briefly peaking at ten in the mid-nineteenth century.
11. See AMAR, supra note 1, at 216-17.
12. 5 U.S. (1 Cranch) 137 (1803).
13. See BICKEL, supra note 4, at 1-14.
14. See AMAR, supra note 1, at 231-33.
constitutional law, no single book (or author) can do everything, and methodological choices must be made. For better or worse, my own methodology places me much closer to Bickel's towering Yale colleague, Charles Black, and to his most famous Yale students—John Hart Ely and Bruce Ackerman—than to Bickel himself.

II. CHARLES BLACK'S STRUCTURE AND RELATIONSHIP

In his elegant meditations on Structure and Relationship in Constitutional Law, Charles Black powerfully reminded us that the Constitution is more than a jumble of disconnected clauses.\(^\text{15}\) Because the document forms a coherent whole, sensitive readers must go beyond individual clauses to ponder the larger constitutional systems, patterns, structures, and relationships at work. Throughout America's Constitution, I have tried to heed Black's wise counsel.

A few examples. In McCulloch v. Maryland,\(^\text{16}\) Chief Justice Marshall famously upheld Congress's power to create a national bank. The case is often read as pivoting on the words of the Necessary and Proper Clause, but Black's book correctly stresses that Marshall's opinion in fact did not place significant affirmative weight on this clause.\(^\text{17}\) Before Marshall's McCulloch opinion even began discussing this clause, the Chief Justice had already laid out his main argument for broad congressional power to create a federal bank. And though Marshall did wave in the direction of various other clauses in Article I, Section 8, his basic point was essentially structural rather than textual, resting on what Black described as the Constitution's "general implications."\(^\text{18}\) In my Biography, I seek to build upon Black's insight with the following account of McCulloch:

Reading the document through a geostrategic prism, Marshall emphasized the national need for an army able to defend a "vast republic, from the Saint Croix to the Gulph of Mexico, from the Atlantic to the Pacific." Because a national bank with branches across the continent might help in paying soldiers on-site and on time, Marshall (who had spent the winter of 1777-78 encamped at Valley Forge) held that such a bank fell within Article I's enumerations concerning "the great powers to lay and collect taxes; to borrow money;

\(^{15}\) CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).
\(^{16}\) 17 U.S. (4 Wheat.) 316 (1819).
\(^{17}\) BLACK, supra note 15, at 13-14.
\(^{18}\) Id. at 14.
to regulate commerce; to declare and conduct a war; and to raise and support armies and navies."\(^{19}\)

Thus, Marshall's was a structural argument in two easy steps. Step One: The central purpose of the Constitution was to safeguard national security across a vast continent. Step Two: The creation of a national bank fits snugly within that central purpose, given the many ways in which such a bank might facilitate continental defense measures.

Now let's take this structural insight and use it to parse a clause that has generated some noteworthy case law of late, namely the clause empowering Congress "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."\(^{20}\) Here is how I begin my discussion of this clause in my book:

Modern lawyers and judges typically refer to these words as the "commerce clause," and today's Supreme Court has moved toward reading the paragraph as applicable only to economic interactions. But "commerce" also had in 1787, and retains even now, a broader meaning referring to all forms of intercourse in the affairs of life, whether or not narrowly economic or mediated by explicit markets. Bolingbroke's famous mid-eighteenth-century tract, *The Idea of a Patriot King*, spoke of the "free and easy commerce of social life," and other contemporary texts referred to "domestic animals which have the greatest Commerce with mankind" and "our Lord's commerce with his disciples."\(^{21}\)

Note that my textual argument thus far is not that "commerce" must be read to apply beyond economic matters, but only that it may properly be read this way, if constitutional context and structure so warrant. And thus my main analysis of the issue at hand is indeed structural:

"[T]he broader reading of "Commerce" in this clause would seem to make better sense of the framers' general goals by enabling Congress to regulate all interactions (and altercations) with foreign nations and Indian tribes—interactions that, if improperly handled by a single state acting on its own, might lead to needless wars or otherwise compromise the interests of sister states. Draft language at Philadelphia had in fact empowered Congress "to regulate affairs with the Indians,"

---

21. AMAR, supra note 1, at 107 (citing entries from the *Oxford English Dictionary*).
but the word “affairs” dropped out when the delegates opted to fold the Indian clause into the general interstate and international “Commerce” provision. Without a broad reading of “Commerce” in this clause, it is not entirely clear whence the federal government would derive its needed power to deal with noneconomic international incidents—or for that matter to address the entire range of vexing nonmercantile interactions and altercations that might arise among states.22

I conclude my discussion with the following thoughts:

Under a broad reading, if a given problem genuinely spilled across state or national lines, Congress could act. Conversely, a problem would not truly be “with” foreign regimes or “among” the states, so long as it remained wholly internal to each affected state, with no spillover. On this view, legal clarity might be advanced if lawyers and judges began referring to these words not as “the commerce clause,” but rather as the “international-and-interstate clause” or the “with-and-among clause.”23

22. Id. at 107-08 (footnotes omitted). An endnote provides additional elaboration of the structural gap opened up by an unduly narrow reading of the word “commerce”:

Imagine, for example, a situation in which one state’s regulation of upstream land created adverse effects for residents of downstream states. Federal power over admiralty jurisdiction would not necessarily cover such a case if the stream were non-navigable. On the international front, imagine a transnational incident that called for a domestic federal-law solution as distinct from an international agreement, compact, or treaty.

Id. at 542 n.18.

23. Id. at 108. A footnote provides some additional historical data:

Federal power over genuinely interstate and international affairs lay at the heart of the plan approved by the Philadelphia delegates. According to the Convention’s general instructions to the midsummer Committee of Detail, which took upon itself the task of translating these instructions into the specific enumerations of Article I, Congress was to enjoy authority to “legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation.” It also bears notice that the First Congress enacted a statute regulating noneconomic interactions and altercations—“intercourse”—with Indians. Section 5 of this act dealt with crimes—whether economic or not—committed by Americans on Indian lands.

Id. at n.* (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 131-32 (Max Farrand ed., rev. ed. 1966)). In the Pennsylvania ratifying convention, the influential James Wilson drew the basic structural dividing line as follows:

Whatever object of government is confined, in its operation and effects, within the bounds of a particular state, should be considered as belonging to the
While the above passages obviously feature a smattering of textual and historical arguments, the animating impulse is structural, à la Black (and, dare I say it, Marshall). The Constitution was structured in order to create a central regime that could competently handle all affairs—whether or not economic—with Indians and foreign nations. A closely related Founding purpose was to create a central governmental structure that would handle all genuine conflicts and controversies—all intercourse and affairs—that might arise between rival states, lest the aggrieved parties be tempted to take matters into their own hands and thereby imperil continental peace and prosperity. While some clausebound textualists-originalists have mustered various snippets of history to support a purely economic reading of "commerce" in Article I, Section 8, their approach fails to give due weight to the fact that the Constitution was not ratified by the American people clause by clause, but as a whole. Each of the document's clauses must be read not in isolation, but through the prism of the Constitution's overarching structures and purposes. That is how Americans in fact ratified the so-called Commerce Clause, and that is how sensitive and sensible interpreters today should read it.

Similar structural analysis can help illuminate the basic contours of Articles II and III. The President's power to act unilaterally in a grave national emergency so as to preserve the nation as an ongoing operation can be read into the opening clause of Article II, vesting the President with a residuum of "executive power" above and beyond the specific presidential powers enumerated elsewhere in Article II. A textualist might further note that government of that state; whatever object of government extends, in its operation or effects, beyond the bounds of a particular state, should be considered as belonging to the government of the United States.


25. It also bears note that none of the leading clausebound advocates of a narrow economic reading of "commerce" has come to grips with the basic inadequacy of their reading as applied to Indian tribes, or has squarely confronted the originalist implications of the Indian Intercourse Act of 1790, in which the First Congress plainly regulated noneconomic intercourse with Indian tribes. See Act of July 22, 1790, ch. 33, 1 Stat. 137 (entitled "An Act To Regulate Trade and Intercourse with the Indian Tribes" (emphasis added)).

26. In certain situations, unilateral presidential action may need to be confirmed by a subsequent congressional statute in order to continue to be lawful after the legislature has
Article II’s opening language pointedly differs from Article I’s, which vests Congress only with various legislative powers “herein” enumerated. I make these textual arguments, but candor obliges me to admit that, once again, the animating impulse is structural: I applied the textual gloss only after I glimpsed the structural insight. And here is the structural nub, relied on by all of America’s great Presidents, especially George Washington and Abraham Lincoln: The Presidency is the only branch structured to be permanently in session, 24 hours a day, 7 days a week, 365 days a year. Also, it is the only branch whose power resides in a single, unitary figure. The evident constitutional design here is thus to enable one part of the government to act quickly and decisively, with unity, energy, vigor, dispatch, and, if need be, secrecy. When an insurrection breaks out or an invasion occurs or a foreign policy crisis erupts, Congress may not even be in session, and unless the President acts unilaterally to preserve the status quo ante, Congress may never again be able to act. Washington and Lincoln grasped these basic structural truths about executive power, and so should we.

A lower-stakes example of sensible structural analysis: The text of the Advice and Consent Clause makes no distinctions between presidential nominations to cabinet positions on the one hand and Supreme Court openings on the other. But, structurally, it makes a huge difference whether the Senate is being asked to approve an executive branch subordinate who will take orders from the President and will leave office when the President leaves, or is instead being asked to confirm a judicial officer who is independent of the President and who may linger in judicial office long after the nominator has left the White House. Ever since the Founding, the Senate has understood this obvious structural distinction and has treated the two types of nominations differently, with much more deference to a President’s cabinet picks than to his judicial nominations. Charles Black himself called attention to this distinction long ago, and I reiterate it in my book, with detailed data of actual Senate practice from the late eighteenth and early nineteenth centuries.\footnote{Compare Charles L. Black, Jr., \textit{A Note on Senatorial Consideration of Supreme Court Nominees}, 79 \textit{Yale L.J.} 657, 659-60 (1970), \textit{with AMAR, supra} note 1, at 194 & 565 n.42. Consider another set of issues implicating the Presidency, the Judiciary, and the Senate—namely, impeachment. Once again, structural analysis is helpful:}

\begin{enumerate}
\item \textit{In making Congress the pivot point, the Constitution structured impeachment as a system of national accountability. Because the president would uniquely represent the American people as a whole, the decision to oust him could come only from representatives of the entire continent. Though the Constitution did}
\end{enumerate}
Consider, finally, the issue of judicial review. Let's imagine that we deal with a constitutional principle that applies against both state and federal governments—say, the Article I rule that neither government may enact a bill of attainder. Black argued that whatever deference federal judges in a close case might properly pay to Congress as a coordinate branch elected by the entire national citizenry, no similar deference was due to a single state legislature. I offer a similar analysis, relying, once again, primarily on structural argumentation of a Blackian sort. I begin by noting that:

Although the Constitution shielded individual judges against politically motivated salary cuts or attempted removals, it left the Court as a whole open to political restructuring. For example, the political branches could detour around an obstinate Court majority by expanding the size of the Court and appointing new justices more likely to defer. I then make a key structural contrast:

Unlike Congress and the president, state governments would have no formal say in determining the Court's general contours or in making the specific decisions about whom to put on it or pull off it. A state whose laws were declared unconstitutional could detour around the existing justices only by convincing the other federal branches that its
grievance had merit. The Constitution's structure thus emboldened the Court to vindicate national values against obstreperous states even as it cautioned the justices to avoid undue provocation of Congress.

In fact, Congress had many weapons to wield or at least brandish against the justices, if it so chose. For instance, the legislature enjoyed vast discretion to grant or withhold judicial pay increases, to fund or deny judicial perks and support staff, to reshape the inferior federal judiciary, and even to strip the Court of jurisdiction in many cases.

....

Even more telling was the Judicial Article's silence on issues of judicial apportionment. The precise apportionment rules for the House, Senate, and presidential electors appeared prominently in the Legislative and Executive Articles. These rules reflected weeks of intense debate and compromise at Philadelphia and generated extensive discussion during the ratification process. Yet the Judicial Article said absolutely nothing about the how large and small states, Northerners and Southerners, Easterners and Westerners, and so on, were to be balanced on the Supreme Court. This gaping silence suggests that the Founding generation envisioned the Court chiefly as an organ enforcing federal statutes and ensuring state compliance with federal norms. Just as it made sense to give the political branches wide discretion to shape the postal service, treasury department, or any other federal agency carrying out congressional policy, so, too, it made sense to allow Congress and the president to contour the federal judiciary as they saw fit. If, conversely, Americans in 1787 conceived of the Court not as a faithful servant of the House, Senate, and president but rather as a muscular overseer regularly striking down federal laws as a fourth chamber of federal lawmaking, then it is hard to explain why the document gave the first three chambers plenary power over the fourth's apportionment.30

Of course, I cannot be sure that Charles Black himself would have agreed with every one of my attempted applications of the structural method that he so beautifully deployed and illustrated. But I would like to think that my late friend would have been happy to see that his broader methodological teachings

---

30. AMAR, supra note 1, at 213-14. For Black's meditations on Congress's powers over the Court, see BLACK, supra note 5.
continue to live on as a vital part of the twenty-first-century Yale School of Constitutional Interpretation.

III. JOHN HART ELY'S DEMOCRACY AND DISTRUST

"You don't need many heroes if you choose carefully." So wrote John Hart Ely as he memorably dedicated his great book, Democracy and Distrust, to his hero Earl Warren. Ely himself was one of my heroes and his book has been an inspiration.

Perhaps more than any other scholar of his era, Ely reminded us that political liberals no less than political conservatives may properly lay claim to be the rightful heirs of the Constitution; liberals, no less than conservatives, Ely urged, could and should aspire to be faithful interpreters of the document's text, history, and structure.

Like Professor Black before him, Professor Ely championed a particularly holistic brand of constitutional interpretation. Certain open-textured constitutional clauses, Ely famously argued, required interpreters to attend to the larger themes implicit in the Constitution as a whole. But Ely also urged interpreters to pay great heed to the document's specific words and to the original intent underlying those words—always remembering, as Ely took pains to stress (in his own italics) that "the most important datum bearing on what was intended is the constitutional language itself." Throughout my own work, I have tried to pursue a brand of interpretation closely akin to Ely's.

In his opening pages, Ely spotlighted the significance of historical baselines and vectors in a Constitution that had been framed in the eighteenth century and then repeatedly amended over the ensuing years. In a single—brilliant!—sentence, Ely helped his readers (and this reader in particular) see that the key issue was not how democratic was the original Constitution as judged by modern standards, but rather how democratic was it for its time? In the 1780s,

32. By the time that Democracy and Distrust was published, Ely had joined the Harvard Law School faculty, but the book was the product of many years of reflection, much of which occurred at the Yale Law School, where Ely studied and began his professorial career.
33. As Ely noted in his opening paragraphs, "It would be a mistake to suppose that there is any necessary correlation between an interpretivist approach to constitutional adjudication and political conservatism." Ely, supra note 31, at 1. Ely went on to draw attention to the mighty contributions of Hugo Black, a liberal lion and a confessed textualist-originalist. Id. at 2-3.
34. Id. at 16.
Ely pointed out, the Founders were the world’s leading liberal democratic reformers: “The very process of adopting the Constitution was designed to be, and in some respects it was, more democratic than any that had preceded it.”35 It turns out that Ely was even more right than he knew when he penned this profound and profoundly important sentence—as I try to show with detailed data in the opening pages of my own book documenting how at least eight states used specially inclusive voting rules during the unprecedented ratification-convention elections held in 1787-1788.36

As for subsequent amendments, Ely helped his readers see that one key question is whether amendments have essentially effected a liberalization or an anti-liberalization of the document. As it turns out, the amenders have, in general, been liberal democratic reformers in their eras just as the Founders were in theirs. Thus, according to Ely:

There have also existed throughout our history limits on the extent of the franchise and thus on government by majority. But the . . . constitutional development[.] has been continuously, even relentlessly, away from that state of affairs . . . . Excluding the Eighteenth and Twenty-First Amendments—the latter repealed the former—six of our last ten constitutional amendments have been concerned precisely with increasing popular control of our government. And five of those six . . . have extended the franchise to persons who have previously been denied it.37

And as Ely observed later in his book:

Extension of the franchise to groups previously excluded has . . . been a dominant theme of our constitutional development since the Fourteenth Amendment, and it pursues both of the broad constitutional themes we have observed from the beginning: the achievement of a political process open to all on an equal basis and a consequent enforcement of the representative’s duty of equal concern and respect to minorities and majorities alike.38

35. Id. at 5.
36. AMAR, supra note 1, at 5-7 & 503-05 nn.1-2. To my knowledge, no previous scholar has ever brought these important data to light.
37. ELY, supra note 31, at 6-7.
38. Id. at 99.
Much as Black highlighted his own distinctive brand of constitutional argument, so too did Ely. Call Ely’s approach the argument from constitutional trendline. In Ely’s words: “In judging the propriety of . . . a line of growth it is surely appropriate, indeed I should think it imperative, to look to the ways our constitutional document has developed over the . . . centuries . . . .”

As I point out in the concluding pages of my book, the textual configuration of the Constitution’s amendments—in chronological order—draws attention to the document’s general trendline. To be sure, trendline analysts must be wary of overgeneralization; history rarely travels in only one direction, and Ely himself reminded us of two amendments—Prohibition and its repeal—that in effect cancelled each other out. Indeed, after providing readers with a “brisk” tour of the entire Constitution (in rough textual order, from the Preamble to the twentieth-century amendments), Ely took care to caution that “our Constitution is too complex a document to lie still for any pat characterization.” In my own rather less brisk tour of the Constitution, I have tried to remember Ely’s warning, even as I have tried, in true Elysian fashion, to identify various larger constitutional themes and trends.

IV. HAROLD KOH’S NATIONAL SECURITY CONSTITUTION

In his 1990 book, The National Security Constitution: Sharing Power After the Iran-Contra Affair, then-Professor Harold Koh powerfully reminded us of the centrality of geostrategic and national security considerations at the Founding:

From the very beginning, our Constitution has been obsessed with the idea of national security. . . . [N]o fewer than twenty-five of the first thirty-six Federalist Papers concerned national insecurity, with most linking the young republic’s international weakness to the incapacity of the national government.

. . . .

. . . America’s geographical separation from the rest of the world, which played a crucial role in fostering its liberal political tradition,
figured equally prominently in the development of America's constitutional traditions.\textsuperscript{42}

With all this I find myself in perfect agreement, and much of my opening chapter tries to show how the basic argument of the Federalists in general (and of the Federalist Papers in particular) rested on a grand geostrategic theory: England, the argument went, was largely free because it was an island nation whose insularity freed it from dependence on a large (and likely liberty-threatening) standing army. If Americans could form a more perfect union in 1787 modeled on the union of England and Scotland some four score years earlier, they too could avoid standing armies and would thereby reap huge dividends from their geostrategic insularity. (Thus, in 1787, the key contribution to the Federalist Papers was not the now-famous No. 10, but rather the now-obscure No. 8.) More than courts, separation of powers, federalism, and rights, the most important protector of American liberty would be her oceans.

Later in my book, I do part company somewhat with my dear friend, Dean Koh. As I see it, the President enjoys a rather more robust set of constitutional powers than Dean Koh would recognize. Some of the features of the Presidency—its capacity for quick and decisive action—are not merely political science explanations of why the President is able to “get away” with some or other exercise of power, but are also (at least sometimes) legal justifications—more precisely, structural justifications—of various presidential actions.

But at a still deeper level, my book takes Dean Koh’s big idea and runs with it: Our Constitution has been profoundly shaped by national security considerations, and in all sorts of ways that have not been fully recognized, implicating issues well beyond the separation of powers debates at the center of Koh’s book. For example, why did many states at the Founding lower property qualifications for voting that had operated in the colonial period? Largely because various unpropertied militiamen were patriots who fought on the American side of the Revolution. Similarly, black men got the vote in the Fifteenth Amendment thanks in large part to their military service in the Civil War; women won passage of the Nineteenth Amendment during World War I, after President Wilson explicitly endorsed the Amendment as a “war measure” and explained how women’s suffrage would improve America’s moral standing in postwar Europe; and eighteen-year-olds won adoption of the Twenty-Sixth Amendment in large part because of their military service in Vietnam. Lincoln’s Emancipation Proclamation was emphatically a war


Imaged with the Permission of Yale Law Journal
measure designed in part to prevent the English from supporting the Confederacy; Prohibition passed as a war measure; and none of the five amendments in the 1950s and 1960s can be fully understood without appreciating the background of World War II and the Cold War. Also, many of the provisions of the Founders’ Constitution were drafted so as to encourage immigration and westward expansion for geostrategic and national security reasons; and several other provisions were designed to prevent foreign monarchies and aristocracies from undermining free and fair American elections. In a sense, then, virtually our entire Constitution could be described, à la Koh, as “The National Security Constitution.”

V. BRUCE ACKERMAN’S WE THE PEOPLE

A casual reader of my biography might think that I am a strong critic of Bruce Ackerman. What this casual reading misses, however, is that I am also in many ways a disciple.

My disagreements with Ackerman lie close to the surface of America’s Constitution. In his epic trilogy-in-progress, We the People, Ackerman has argued that the Founding itself was flagrantly illegal—most obviously, in its disregard of the Articles of Confederation’s rules for proper amendment of that document. I dispute Ackerman’s legal characterizations here, as I make clear in my opening chapter. In my view, the Articles of Confederation were a mere treaty whose repeated violations by virtually all states legally justified exit from the Articles if a supermajority of states so agreed, as provided by the Constitution’s Article VII. Ackerman also thinks that in the process of adopting the Thirteenth and Fourteenth Amendments, Reconstruction Republicans “played fast and loose” with the Founding document and acted in ways “that simply cannot be squared” with the amendment-procedure rules laid down by Article V. Here, too, I disagree, and indeed I spend several pages making the case for the Article V legality of these Amendments and giving readers lots of historical evidence and legal arguments that they will not find in We the People (or anywhere else, for that matter). As for Ackerman’s notorious third “constitutional moment”—the (nontextual) New Deal Amendment ratified

43. For more discussion of the points summarized in this paragraph, see AMAR, supra note 1, at 17, 67-70, 164-66, 271-72, 356-59, 376, 395-400, 416, 424-25, 436, 440, 446-48.
45. See AMAR, supra note 1, at 30-32 & 518-19 n.72.
46. See 2 ACKERMAN, supra note 44, at 100, 109, 111.
47. See AMAR, supra note 1, at 364-80.
(outside Article V) in the late 1930s—this amendment does not appear in my copy of the Constitution, nor does it appear in my biography of the document. Conversely, I pay a good deal of attention to various Progressive-era Amendments that Ackerman glosses over; and I also attend to the Twenty-Seventh Amendment, which Ackerman claims is invalid because it failed to comply with his own theory of constitutional change even though it did satisfy the strict letter (and, I would argue, the spirit) of Article V. Finally, my general interpretive method is far more textual and conventional and far less abstract than Ackerman’s.

So much for the major disagreements. Now for the important elements of discipleship. Whereas Bickel, Black, Ely, and Koh made good use of writings by political scientists and historians, Ackerman has distinguished himself as an accomplished political scientist and historian in his own right. *We the People* blends law, political science, and history in ways that no other Yale book had done before. I, too, aim to weave together the three disciplines in a book featuring original historical discoveries and rigorous analysis of political science data alongside standard legal analysis. Like Ackerman (and also Koh), I seek to offer a nuanced account not just of judicial review but of constitutional deliberation, contestation, and decisionmaking in all three branches of government. Following in Ackerman’s footsteps, I see the Constitution and its Amendments not just as texts to be parsed, but as deeds to be studied and interpreted. In the 1780s, *We the People* actually did something—we ordained, we established, we constituted—and this constituting (or, if you like, this Constitution) raises important questions: Who did this? How? Under what voting procedures? With what sort of legitimacy? Similar questions arise in assessing the ways in which *We the People* have made amends over the centuries. For example, was the federal army’s prominent involvement in the process by which various southern states voted on the Fourteenth Amendment in the 1860s any part of the amendment as an embodied deed? If so, what was the meaning of this deed and how might it require sensitive interpreters to rethink Founding texts governing the military? Even if we focus only on the words of later amendments, how much or how little do these words require reinterpretation of earlier constitutional texts? As we have seen, Ely briefly touched on this question (as, indeed, he briefly touched on the idea of interpreting the Constitution of 1787 as a democratic deed and not a mere enacted text); but it has been Bruce Ackerman more than anyone else—at Yale, or elsewhere—who has stressed the need for modern interpreters to synthesize

48. See 2 Ackerman, supra note 44, at 490-91 n.1.
the meanings of different constitutional texts adopted by different generations of We the People.

Thus, even as I end up disagreeing with many of Ackerman's answers, I also find myself repeatedly pondering the questions that he has so powerfully framed.

VI. JED RUBENFELD'S FREEDOM AND TIME AND REVOLUTION BY JUDICIARY

About my colleague Jed Rubenfeld and his two books, I shall say very little in this Introduction. Some of what I have to say I have already said before: "Jed Rubenfeld is the most gifted constitutional theorist (not to mention the most elegant legal writer) of his generation." And much of what I want to say, I hope to say in the Amar-Rubenfeld (or is it the Rubenfeld-Amar?) dialogue that follows. So, dear reader, read on. The Yale School of Constitutional Interpretation remains open and in session.

Akhil Reed Amar is the Southmayd Professor of Law, Yale Law School.

49. This quotation may be found on the dust jacket of Revolution by Judiciary.
A Dialogue

I. THE ORIGINALIST CASE FOR BROWN

JED RUBENFELD: Akhil, you and I have a great deal in common, but also some fundamental differences, at least in principle. Equal protection doctrine might provide a good backdrop to make these differences clear. When it comes to *Brown v. Board of Education*, our disagreements are not of a fundamental nature. You’re inclined to be much more accepting than I of the claim that the Fourteenth Amendment was originally understood to bar racial segregation (at least of some kinds), so you don’t see *Brown* as the revolutionary case that many of us do. I take *Brown* to be a clear case of the rejection of an original No Application Understanding; you don’t. But this is not a fundamental disagreement because, if I understand you correctly, you do not object to my central thesis: Original No Application Understandings may be rejected when doing so does justice to the text and the original paradigm cases.¹

But you and I do have fundamental disagreements on other matters of equal protection law, because—again, if I understand you correctly—you believe in something I don’t. You believe in foundational No Application Understandings, whereas I say that the only foundational paradigm cases are Application Understandings. For you, the inapplicability of the Fourteenth Amendment to “political” rights such as voting was part of the original understanding and remains binding on judges today. In other words, on your view, the Fourteenth Amendment cannot today be properly read to strike down racial discrimination in cases involving “political” rights.

With respect to racial discrimination in voting cases, you will of course point out that the Fifteenth Amendment takes care of things. But doesn’t this

¹. Thus, I think you also probably accept my basic account of how the First Amendment today is properly read to strike down blasphemy laws, even if, on the original understanding, the First Amendment would have had no application to blasphemy laws.
mean that it would be perfectly constitutional for a state to deny blacks (on the basis of race) "political" rights other than voting? The Fourteenth Amendment would not apply because, on your view, you are bound by the original understanding that the Fourteenth Amendment would have no application to "political" rights. And the Fifteenth Amendment would not apply, because that Amendment only concerns the right to vote. Do I state your view correctly? If so, does this implication of your view cause you any concern? Are there any examples of other nonvoting political rights that you can think of to which this view might apply?

AKHIL AMAR: Jed, I like your idea of discussing equal protection issues as a way of illustrating the similarities and the differences of our approaches. In a nutshell, I think the Reconstruction Amendments, rightly read, plainly prohibited Jim Crow in 1896 and 1954. On the other hand, I also believe that Section 1 of the Fourteenth Amendment simply does not apply to political rights such as voting. And so many voting rights and other political rights cases that the modern Court has analyzed under the Equal Protection Clause would, I believe, be more properly considered under the Republican Government Clause of Article IV and various voting rights Amendments, beginning with the Fifteenth.

If it's okay with you, let's start with the issue of state-mandated racial segregation—Jim Crow—and then work our way forward toward voting rights. As I read the text and history of the Fourteenth Amendment, a state would clearly be prohibited from branding a person as a second-class citizen—as an inferior—simply because he was born black. (This is the principle that I believe is affirmed in the Amendment's first sentence.) Thus, a state law whose candid preamble explicitly proclaimed that black Americans are hereby declared inferior to white Americans would, I believe, violate the core meaning of the Amendment. (In this, I think I rather closely follow your paradigm case method, as you have noted.) The question as of 1896 or 1954 is thus for me a simple one: Does the regime of Jim Crow—a vast and pervasive system of racial regulation—in fact proclaim just this message in its purpose, effect, and social meaning?

My answer to this question is that Jim Crow was, in both 1896 and 1954, a rather clear case of governmental action seeking to create and reify a constitutionally impermissible caste structure, a regime of second-class citizens for those born with dark skin, a vast state program that stretched out its tentacles to keep blacks down. Jim Crow was never equal in fact or in purpose—or in how it was perceived by society, both white and black. Such a system of racial apartheid thus violated the central meaning of the Reconstruction Amendments.
Of course, I am aware that some—many, in fact—of the supporters of the Fourteenth Amendment denied that it would ban all forms of segregation. But many other framers and ratifiers disagreed. More to the point, the precise nature of the pro-segregation argument that came from the framers and ratifiers in the 1860s does not cause me to read the text of the Amendment as somehow inapplicable to segregation. Some segregationists claimed that segregation could and would in fact be equal. But Jim Crow was not equal in 1896 or 1954 and genuine civil equality is the constitutional test, as set out by the text. Other segregationists may have persuaded themselves that the Amendment did not apply to formally symmetric laws imposing restrictions on both races: Blacks over here and Whites over there. But nothing in the text signals its categorical inapplicability to symmetric laws. True, symmetric laws are not always and necessarily unequal on my view; but neither are symmetric laws categorically exempt from the equality test laid down by the text. Yet other segregationists in 1866 seemed to believe that private schools that received irregular subsidies would fall outside the ambit of state action. But Jim Crow circa 1896 and 1954 was undeniably and pervasively the product of state action. And still other segregationists apparently believed that the Amendment did not apply to the federal government (including the galleries of Congress itself). But the first sentence of the Amendment most emphatically did apply to all governments, as did the companion language of the Civil Rights Act of 1866.2

As I read the historical evidence, none of the segregationist arguments in 1866 were codified into the words of the Amendment itself in a way that supports Plessy or undercuts Brown. The Amendment’s text thus fits better with the views expressed by its many antisegregationist supporters and ratifiers. I mention all this because I think you are rather too quick in dismissing the basic originalist argument for Plessy’s wrongness and Brown’s rightness. The arguments that I have made thus far do concededly owe a large debt to your paradigm-case method—thank you!—but they do not strike me as wholly nonoriginalist. You seem to think that Brown cannot be defended on originalist grounds, but I wonder whether I haven’t just done so, if a sensible originalism focuses, as it should, on the text in light of the history (including what you would describe as No Application Understandings, but focusing on the pervasiveness and precise content of those historical understandings in relation to the constitutional text). So before we turn to voting rights, I would

be interested to know whether you find my defense of Brown nonoriginalist or whether you think it is originalism based on an implausible view of history.

JED RUBENFELD: Certainly you are making an originalist argument. The question, I suppose, is whether it is convincing—and whether what you say about racial segregation will undermine your further claim that the Fourteenth Amendment (Section 1) does not apply to political rights. If by originalism we meant that a judge should strike down a specific kind of law under a constitutional prohibition only if there is evidence showing that the framers and ratifiers specifically so understood the prohibition—or at least that a majority of them did—then it sounds as if your argument is not convincing.

I am only citing the evidence that everyone cites, but that Congress provided for racially separate schools in Washington, D.C., as well as allowed racial segregation in congressional galleries, does in my view argue against the notion that the Fourteenth Amendment's framers believed that the principles of equality and citizenship lying behind it required an abolition of racial segregation.³ As far as the public understanding goes, the maintenance of racially separate schools in such large northern cities as New York and Cincinnati (even as integration took place in, say, Chicago) has always seemed to me to speak pretty seriously against the notion of a shared, common understanding that the Fourteenth Amendment barred such schools.

Of course, you could take the view that where there was disagreement among the framers and ratifiers on an issue, and, further, that where the evidence does not convince you of a dominant, majority understanding on either side of the issue, an originalist judge is free to go either way, at least so long as the text permits it. Perhaps you feel that the applicability of the Fourteenth Amendment to racial segregation belongs in this kind of category. If that is your view about the state of the historical evidence, I am not sure I agree with it, but to me—and to you, if I read you correctly—it does not really matter in the end: Original No Application Understandings have been jettisoned in many areas of constitutional law. I think you agree with this

observation, even if you do not agree that the phenomenon is as common as I have described it.

Moreover, I think we agree about the basic idea that justifies this: Judges may override original No Application Understandings to do justice to the text in light of its paradigm cases. So even if there had been an original understanding that the Fourteenth Amendment would not bar racial segregation in public schools and other public facilities, neither you nor I would necessarily view courts as bound by that understanding. We both believe that the Fourteenth Amendment’s paradigm cases are properly read to stand (at the very core) for the principle that a state may not deliberately brand or treat blacks as inferior or second-class citizens. We both believe that “separate but equal” did just that. So we both believe that Brown is justified regardless of whether it comported with the specific understanding of the majority of the framers and ratifiers.

Let me just add that I consider this defense of Brown—the paradigm case defense of Brown—to be an originalist defense. But if I follow you, what we disagree about is this: Some No Application Understandings, on your view, are special. They are specially central to the original meaning, and, more than this, they are reflected in a special way in the text. When there exists a No Application Understanding of this kind, judges are not free to abandon it. Racial segregation of particular public facilities does not fall in this category for you. Even if there had been an original understanding that the Fourteenth Amendment did not bar racial segregation—in the senatorial gallery or perhaps even in public schools, for example—such a No Application Understanding would not have fallen into this special category. So as to racial segregation, I think you and I do not have to take issue with the history: It does not matter.

By contrast, on your view, the understanding that the Fourteenth Amendment’s prohibitions had No Application to political rights did fall into this special category. On your view, it was central to the original meaning, and it was reflected in a special way in the text of Section 1. Do I have this right?

II. VOTING RIGHTS AND THE FOURTEENTH AMENDMENT

JED RUBENFELD: I am sure you will elaborate this view in your next reply, but for now another question. If the Fourteenth Amendment, by reference to its paradigm cases, can be properly read to prohibit states “from branding a person as a second-class citizen, as an inferior, simply because he was born black,” how will you avoid recognizing that this principle is violated when a person is denied the vote merely because he was born black? Certainly this denial brands blacks as “inferior.” You will have to say that it doesn’t, however, make them “second-class citizens.” But I think you may have a problem here,
even if voting was not then considered a specific privilege or immunity of citizenship.

AKHIL AMAR: You pose a great question—and one that I have wrestled with over the years. But I think that you, too, may have a problem—as may anyone else who truly seeks to capture the text of the Constitution in a particular way. Here is one way to put the problem: If the Fourteenth Amendment applies to voting, then what exactly was all the fuss over the Fifteenth Amendment about? And how can we make sense of the Fifteenth Amendment’s text as anything more than a supremely curious and clumsy redundancy?

I will eventually try to answer these questions, but let me start—autobiographically—by tracing my own interpretive journey on these issues. My initial view was that the text of the Fourteenth Amendment demanded equality; and that at its core was a prohibition on explicit race-based inequality that privileged whites over blacks. And what could be more straightforward than saying that laws explicitly barring blacks from voting (or imposing stricter standards on black voters) were just like the Black Codes that you and I both believe were the very laws the Fourteenth Amendment clearly meant to prohibit?

Then I began to do historical research. I found that the virtually uniform, highly visible, public pronouncements of the Fourteenth Amendment’s backers—in a vast number of official places and publications—insisted that the Amendment did not apply to “political rights” such as voting, but rather encompassed only “civil rights.” These pronouncements were central to the political debate over the Amendment’s framing and ratification. Without these clear public pronouncements—which shaped the American people’s understanding of the pending Fourteenth Amendment—the Amendment would, I think, have been defeated. But even more significant (for me) was what these supporters said, and its relationship to the text of the Amendment. They said that the domain of equality affirmed by the text is limited: The Amendment extends to civil equality but not political equality. And, as I shall explain below, I now see how this near-universal explanation of the Amendment by its supporters was codified into the Amendment’s text and public meaning.

It is useful to begin by comparing various no-application-to-voting statements from the 1860s to some of the no-application-to-segregation statements from the 1870s. This is why, at one key point in my earlier comments, I used the phrase “civil equality” as an important qualification of my anti-Plessy, pro-Brown analysis.

See AMAR, THE BILL OF RIGHTS, supra note 2, at 216-17 & n.* (citing dozens of statements).

This is why, at one key point in my earlier comments, I used the phrase “civil equality” as an important qualification of my anti-Plessy, pro-Brown analysis.
A DIALOGUE

statements from the 1860s that I discussed earlier. To repeat, some 1860s segregationists simply said that separate could and would in fact be equal. But these arguments conceded that true civil equality was the textual test. Other segregationists, by contrast, seemed to think the Amendment did not apply to the federal government. But the text of the first sentence does limit all government, and so did the companion language—almost in haec verba—of the Civil Rights Act of 1866. Moreover, many framers understood this point. It’s also worth noting that the applicability of the first sentence of the Amendment to the federal government was a central feature of some of the first Justice Harlan’s landmark opinions—both for the Court and for himself. (So on this point, I capture both the text and early doctrine.)

Thus, when confronting 1866 pronouncements by the Amendment’s official supporters and sponsors that the Amendment would have No Application to voting, my initial inclination was to ask, “where does it say that in the Amendment’s text?” And then I began to see the answer—which I would not have seen but for my willingness to pay heed to paradigmatic No Application Understandings at the time of enactment (the very sort of data your approach tends to dismiss, I think.). One point—though not strictly textual—was that the Amendment was in ordinary everyday parlance referred to as “the Civil Rights Amendment.” The companion Act of 1866 was officially known as the Civil Rights Act. (Recall that the first sentence of the Fourteenth Amendment is lifted almost word for word from this Act, which was closely linked in the public mind to the Amendment itself.) And as noted above, “civil rights” was used emphatically in contrast to “political rights” such as voting.

6. Perhaps others did not, in part because the first sentence was a rather late addition to the Amendment’s text.

7. See, e.g., Gibson v. Mississippi, 162 U.S. 565, 591 (1896) (Harlan, J., majority opinion) (“[T]he Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government, or by the States, against any citizen because of his race. All citizens are equal before the law. The guarantees of life, liberty and property are for all persons, within the jurisdiction of the United States, or of any State, without discrimination against any because of their race. Those guarantees, when their violation is properly presented in the regular course of proceedings, must be enforced in the courts, both of the Nation and of the State, without reference to considerations based upon race.”). Note that in his reference to “political rights,” Harlan was of course relying on the Fifteenth Amendment. See also Plessy v. Ferguson, 163 U.S. 537, 556 (1896) (Harlan, J., dissenting) (quoting Gibson).

8. See Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1981) (officially captioned as “An Act to protect all Persons in the United States in their Civil Rights”). The phrase “civil rights” was also used in contrast to “social rights.” For me, the distinction between civil rights and social rights is reflected in two basic Fourteenth Amendment ideas. First, the Amendment does not automatically apply of its own self-
Two more—and clearly textual—points then began to crystallize for me. First, the Amendment’s opening sentence talks about the rights of all citizens born in America—women as well as men, blacks as well as whites. To be a citizen is different than being a voter. Women in 1866 were seen by Republicans as equal birthright citizens who could, for example, sue and be sued in diversity jurisdiction. The *Dred Scott* case had said that blacks could never be citizens (and thus could not invoke diversity jurisdiction). But the framers of the Fourteenth Amendment emphatically rejected *Dred Scott*’s holding and much of its reasoning; indeed, they tried to overrule it by statute in the 1866 Civil Rights Act—who whose key citizenship sentence later became the opening sentence of the Fourteenth Amendment. *Dred Scott* had said that blacks could not be citizens because they were not allowed to vote in many places. The *Dred Scott* dissenters rejected this logic: Equal citizenship rights did not entail equal voting rights. Civil rights (of blacks and of women) should not be conflated with political rights, said the *Dred Scott* dissenters. And the framers of the Fourteenth Amendment apparently agreed with this. They wrote an Amendment whose domain extended to “civil equality” but not “political equality.” They said that blacks were not improperly demeaned as citizens when not allowed to vote, just as women were not demeaned as citizens when disenfranchised. (Of course, this view of the Fourteenth Amendment must be revisited in light of the later Fifteenth and Nineteenth Amendments.)

Second, the second sentence of the Fourteenth Amendment fleshed out the first by elaborating that what it meant to be an equal birthright “citizen” was to enjoy certain “privileges” and “immunities.” Now, as a matter of ordinary language and plain meaning, the right to vote certainly can be understood as a “privilege”—and so can the related political rights of jury service, militia service, and governmental service. But this was plainly not how the supporters of the Fourteenth Amendment were using these words. (And here again, it is my focus on paradigmatic No Application Understandings that caused me to
read the text in a different way than you might.) In effect, the Fourteenth Amendment’s supporters were using the phrase “privileges or immunities of citizens” as a kind of legal term of art closely akin to the usage of a similar phrase in Article IV. The Article IV phrase promised out-of-staters equality with in-staters across a wide spectrum of civil rights—of property, speech, religion, access to courts, and so on—but not political equality in voting, military service, jury service, or governmental service. A New Yorker visiting Virginia has as much of a right to speak or to sue as does a Virginian, but the visitor has no right to vote in Virginia elections. The intratextual linkage between Article IV and the Fourteenth Amendment thus confirms that the text of the latter likewise applies to civil equality but not political equality.

These two textual points are not just my own idiosyncratic reading of the Fourteenth Amendment but in fact closely track the textual, historical, and intratextual arguments explicitly made by the Supreme Court in the 1875 case of Minor v. Happersett. So my reading captures both the text and the (early) doctrine. In Minor, no one even thought to argue that the Equal Protection Clause applied to voting. Everyone understood that the key clause of Section 1 focused on privileges and immunities of citizens. Textually, the Equal Protection Clause focused more on the equal application of laws than on the basic substance of laws. But for me, the key point is that the Equal Protection Clause is aimed at persons, not citizens, and was understood by all as paradigmatically focused on the rights of (nonvoting) aliens—a rather awkward text for voting rights. And if this text, or some other text does indeed apply to voting, then I come back to my earlier question: What is the Fifteenth Amendment about, if the Fourteenth already applied to voting?

So here are my questions for you. What do you think of my intratextual claims about Article IV and the Fourteenth Amendment? Can the Amendment be read as semantically inapplicable to voting? If it can be read this way—and also can be read more broadly—what is the role of near-universal No Application Understandings in making the interpretive choice? What is the role of the precise reasons given for the No Application claim by those who made this claim in the 1860s while the Amendment was still pending? And if the Fourteenth Amendment really can be stretched to apply to voting, notwithstanding the near-universal public understanding in 1866-1868, then just how are we to make sense of the text and enactment history of the Fifteenth? Is this Amendment, on your view, otiose?

9. **88 U.S. 162 (1874).**
Jed Rubenfeld: Your argument sounds as if it were directed to someone who refused to acknowledge that the Fourteenth Amendment, Section 1, was originally intended to have no application to racial discrimination in the suffrage. But of course I do acknowledge that. Never mind the superfluity of the Fifteenth Amendment: The framers would never have written Section 2 of the Fourteenth Amendment, imposing political penalties on states that denied black men the vote, if they thought such denials were already barred by Section 1.

The question, however, is whether it is proper today to read the Fourteenth Amendment to bar racial discrimination in voting. To me the answer to that question is obvious: Yes. On the basis of its paradigm cases, the Fourteenth Amendment is compellingly read to stand, at its core, for the principle that states cannot deliberately treat blacks as second-class citizens, and denying blacks the vote plainly violates this principle. In fact, you wrote above that “a state law whose candid preamble explicitly proclaimed that black Americans are hereby declared inferior to white Americans would . . . violate the core meaning of the [Fourteenth] Amendment.” Surely a law denying blacks the vote does just that: It proclaims that black Americans are inferior to white Americans. I don’t quite see how you avoid this conclusion.

Putting that question to you aside, I can think of three different objections you might make to this conclusion. Here are the objections and my answers to them.

First, you might say that I disregard the original understanding. If so, I plead guilty. You already know my answer: This was a No Application Understanding; modern constitutional law repudiates many original No Application Understandings; and that’s perfectly legitimate so long as judges are doing justice to the text in light of its paradigm cases. That’s how revolutions by judiciary come about.

Second, you might be making a further point about the text and the clarity with which Section 1 of the Fourteenth Amendment excludes political rights, once we really understand how that text was originally understood. In other words, on your view, once we acknowledge that for the framers, voting was not a privilege or immunity of citizenship—and that the framers chose these terms of art consciously and precisely to exclude political rights—it must follow that we cannot read the Fourteenth Amendment to ban racial discrimination in voting laws. Such a reading of the Fourteenth Amendment would violate, and make no sense of, the very language we’re purporting to interpret.

Honestly, I don’t think this objection is as strong as you believe, even on your own premises. Let me try to persuade you. I grant that the framers and ratifiers of the Fourteenth Amendment did not see voting as a privilege or immunity of citizenship. I will even grant for purposes of this argument that
these are terms of art in a special sense, so that later interpreters are somehow semantically barred from ruling that voting is a privilege or immunity of citizenship. (I don’t actually accept this idea, but I’m going to accept it here arguendo.) Does it follow from these premises that denying the vote to blacks does not make them second-class citizens?

No. Take the Yale Law School. Let’s stipulate that being Dean of the Law School is not a privilege or immunity of being a professor here. That is, if Yale Law School Professor X is denied the post, he is not denied a privilege or immunity of his professorship. Let us add further, hypothetically, that even eligibility for the deanship is not a privilege of professorship: Perhaps the Yale Law School deanship is open only to professors who were junior professors here, have been at Yale for at least twenty years, and teach constitutional law (now that’s really hypothetical). Taking all these facts as true, if Yale Law School were to enact a rule banning black professors from the deanship, the school would have made blacks second-class professors. Don’t you think?

If so, then simply because voting was not considered to be a privilege or immunity of citizenship, it does not follow that denying the vote to blacks does not make them second-class citizens. Quite the contrary: Denying blacks the vote is an extraordinarily powerful and effective way of treating them as second-class citizens, even if voting is not itself a privilege or immunity of citizenship.

If it were true, as you say, that the framers or ratifiers somehow believed that race-based denials of the vote did not “demean blacks as citizens,” this belief would be, in my view, completely irrelevant. It’s wrong, and it’s bottomed on a No Application Understanding, which later interpreters are free to reject. Once you accept, on the basis of paradigm-case reasoning, that Section 1 of the Fourteenth Amendment stands at least for the principle you and I both agree it does stand for—no deliberate treatment of blacks as second-class citizens—it is no objection to striking down a race-based denial of the vote that voting is not itself a privilege or immunity of citizenship. In other words, if the text of the Fourteenth Amendment permits the principle we agree to, then I think it must permit the result you resist—or at any rate, I think you have not yet stated a textual (as opposed to historical) argument against that result.

This is, I think, a problem for you. If the chief way you get to Brown and its progeny is through the no-second-class-citizenship principle—meaning that you need that principle to defend the wholesale eradication of “separate but equal” after Brown—then I think you’re in some difficulty, because denying blacks the vote does make blacks second-class citizens, regardless of whether voting is itself a privilege or immunity of citizenship. I understand that you want the no-second-class-citizenship principle to be limited to matters of “civil
rights”; that you want it limited to denials of rights that are in and of themselves privileges or immunities of citizens; and that you think that voting cannot today be interpreted as a privilege or immunity of citizenship. For present purposes, I’m granting that voting is not a privilege or immunity of citizenship. But if that’s the only textual argument you have for keeping voting out of the no-second-class-citizenship principle, I do not think you have made a very strong argument yet.

The framers of the Fourteenth Amendment committed themselves and the nation to more than they bargained for. They committed the nation to principles of equal citizenship and equal protection of the laws, and these principles turn out to require more than the framers thought. These principles, it turns out, plainly require a prohibition on denying blacks the vote—the right that is today the quintessential right of citizenship. Nothing in the text of the Fourteenth Amendment rules out this view. On the contrary, the text either cries out to judges to interpret the concept of citizenship and to deliver their best account of what the privileges and immunities of citizenship include—or, at a minimum, it invites precisely the principle that you and I both endorse, the principle that states cannot deliberately treat blacks as second-class citizens. This principle fully authorizes judges to strike down racial discrimination in voting, even if voting is not, in itself, a privilege or immunity of citizenship.

Both the Citizenship Clauses of the Fourteenth Amendment and the Equal Protection Clause, in my view, support this result. To stick with the Privileges or Immunities Clause for one moment longer, we might say that (1) one clear privilege or immunity of citizenship is the right not to be treated as a second-class citizen; (2) we derive this principle from the Fourteenth Amendment’s paradigm cases; (3) the framers of the Fourteenth Amendment may have held the view that treatment as second-class citizens did not occur when blacks were denied political rights, on the theory that political rights were not themselves privileges or immunities of citizenship; but (4) this view, if they indeed held it, was logically faulty, morally faulty, is not the only way to do justice to the text, and reflects a No Application Understanding not binding on subsequent interpretation.

III. TEXTS AND COMMITMENTS

JED RUBENFELD: Your final objection to my view might derive from the Fifteenth Amendment. This is a perfectly valid textual point. You are surely correct that it counts against an interpretation of Section 1 of the Fourteenth Amendment that it makes superfluous both Section 2 of that Amendment and the entirety of the Fifteenth Amendment. Although this is a good point, in the end I do not think it is anywhere near sufficient. Intratextualism is a
methodology I approve of, but our Constitution is not so perfectly wrought a
document that one provision may not be read in such a way as to make another
provision needless. The Tenth Amendment and the Necessary and Proper
Clause basically become superfluous on a certain reading of the latter Clause,
the enumerated Article I, Section 8 powers, and other constitutional
provisions. But I accept that reading, I think you do too, and I think
McCullough does as well. It is a feature of the commitment-based paradigm-
case approach that constitutional rights and powers can come to mean more
than they were originally intended to mean. If that is true, then it becomes
quite possible for constitutional right A to come to mean something that
duplicates constitutional right B. That is what has happened with the
Fourteenth and Fifteenth Amendments.

The reading of the Fourteenth Amendment that I endorse is not, however,
otiose or merely duplicative of the Fifteenth. On my view—and of course on
most people's view—the Fourteenth Amendment easily and naturally is read to
prohibit racial discrimination with respect to all "political" rights, including
those not covered by the Fifteenth. Thus for me Strauder v. West Virginia,\textsuperscript{10} in
which the Court held that the Fourteenth Amendment prohibited states from
excluding blacks from jury service, is an easy case and a strong, clear example
of the kind of paradigm-case reasoning I advocate. You, on the other hand,
have to take the view that Strauder's holding is wrong: The Fourteenth
Amendment has no application to jury service, because jury service is a
"political right."

To be sure, you will say that Strauder was rightly decided, but only because
you have some very interesting arguments to make showing that the Fifteenth
Amendment is properly read to cover jury service. But you are in the position
of having to say either that the Fifteenth Amendment covers all "political"
rights, including those that do not seem to involve voting (for example, militia
service and governmental service)—to me, a pretty doubtful proposition—or
else you will have to invoke some other clause somewhere else in the
Constitution to explain why states cannot deny blacks "political" rights. I am
not saying you cannot make these arguments, but do you not find them a little
strained—perhaps a little goal-oriented? To me, the much stronger, eminently
justified, and satisfying position is that the Fourteenth Amendment bars this
kind of blatant discrimination, the purpose of which would be to treat blacks as
inferiors and as second-class citizens. The Fourteenth Amendment's Equal
Protection and Citizenship Clauses committed the nation to eradicating such
laws, even if all the requirements of this commitment were not fully

\textsuperscript{10} 100 U.S. 303 (1880).
understood at the time of enactment, and even if the framers believed they had produced a text that did not include them.

AKHIL AMAR: Jed, your comments nicely illustrate the differences between your methodology and mine. Candidly, I do worry about how your approach seems to create a kind of bait-and-switch in the actual process of drafting and ratifying amendments: The American public agrees to one set of publicly understood rules, codified in the very words of the amendment, and then judges say, "Aha! You forgot to say 'Simon Says!'"

Let me elaborate my uneasiness with your approach by sticking with our case studies involving the Fourteenth Amendment’s application or nonapplication to segregation and voting. On segregation, I do not see the national conversation in the 1860s as one in which the Amendment’s supporters universally said, “the civil equality norm will not apply to segregation.” Rather, some supporters in effect said that “segregation does not necessarily violate civil equality” and other supporters disagreed.11 The two sides of this debate did not uniformly treat the Amendment’s text as if it said: “Civil equality—but segregation laws are categorically exempt from this command.” But in the voting context, I do think that this is how the text was almost universally defended and understood by both sides: “Civil equality—but emphatically not political equality.” Had the Amendment’s framers drafted and ratified a text that explicitly said “This amendment does not apply to political rights” then surely judges would be bound by this semantic No Application, even on your view, right? My claim is essentially a semantic one: The Amendment’s framers did say this, once one understands how they were using words. Granted, they did not use the words “no political rights” but they did use a legal term of art that, in the great national conversation of the 1860s, meant the same thing: “privileges or immunities of citizens” à la Article IV.12

As a formal matter, the Fifteenth Amendment can be read as declaratory, as can the Tenth Amendment, and (later) the Twenty-Fourth. But the Tenth was widely understood as declaratory when adopted, whereas virtually no one thought the Fifteenth was merely declaratory and redundant of the Fourteenth when both Amendments were drafted, debated, and ultimately ratified. So your approach does rather less justice to history and to the actual deeds of the

---


12. Had the Amendment explicitly declared its inapplicability to political rights, your argument about the invidious social meanings of racial disenfranchisement would, I think, be too clever by half—an evasion of the clear limits on the Amendment’s scope. For me, the same is true of your argument as applied to the Amendment as it was actually drafted and ratified.
American people in the amendment process than does a more standard originalism focusing on the text, in light of the history and how Americans in the amendment process actually used words.

On your view, should judges have properly held race-based suffrage laws unconstitutional in 1868, one day after the ratification of the Fourteenth Amendment? Given your view that such laws, with their strong message of racial inequality, violate the Fourteenth Amendment’s core principle—its central paradigm case—then surely you must believe that courts were obliged to strike down such laws from day one. And if so, shouldn’t they also have held sex-based suffrage laws unconstitutional, since these laws, too, could be said to reflect an impermissible governmental declaration of women’s inferiority as a matter of birth status?13 Of course, woman suffrage was the very issue litigated in Minor v. Happersett, in which, as I have mentioned, the Court unanimously argued that the text and history of the Fourteenth Amendment, and its intratextual echo of the language of Article IV, all made clear that the Amendment did not enfranchise women.14

As for Strauder, I believe that its result is correct and that in fact it failed to go far enough—it prohibited race discrimination in juries only in cases with black defendants. In a landmark 1875 law, Congress had already gone further, prohibiting race discrimination in all juries, state and federal, regardless of the race of the defendant. And this law explicitly echoed the language of the Fifteenth Amendment—in keeping with my view that this Amendment was indeed understood to embrace voting rights in a wide variety of political contexts—the right to vote for governmental officials, to be sure, but also the right to vote in various government bodies such as legislatures and juries.15

---

13. The Fourteenth Amendment’s text did not speak merely of race discrimination but of birth equality more generally—and was so understood by many of its framers and ratifiers, as I have argued. See AMAR, AMERICA’S CONSTITUTION, supra note 2, at 383-85, 392-95; AMAR, THE BILL OF RIGHTS, supra note 2, at 215-18, 239-41, 245-46, 260-61, 293-94.

14. The Waite Court’s logic in this case also seemed to imply that the Fourteenth Amendment likewise did not enfranchise black men.

15. Compare U.S. CONST. amend. XV (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”) (emphasis added), with Act of Mar. 1, 1875, ch. 114, 18 Stat. 335, 336 (“[N]o citizen . . . shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude . . . .”) (emphasis added). In three earlier Reconstruction statutes, Congress had likewise linked the language of the Fifteenth Amendment to the right to hold office. See Virginia Readmission Act of Jan. 26, 1870, ch. 12, 16 Stat. 62, 63 (“[I]t shall never be lawful for the said State to deprive any citizen of the United States, on account of his race, color, or previous condition of servitude, of the right to hold office”) (emphasis added); Mississippi Readmission Act of
Language is sometimes metaphoric, and legal language is no different. For example, in the Fifth Amendment, “life and limb” can be read literally—in which case double jeopardy is permitted outside cases of death and dismemberment. But “life and limb” can also be read more metaphorically, to apply to all serious criminal punishment. I think the latter reading makes more sense of the framers’ and ratifiers’ basic purposes, as I have explained elsewhere.\textsuperscript{16} In the Fifteenth Amendment context, I do indeed believe that the “right to vote” was understood—for a variety of overlapping and interlocking reasons that I shall not repeat here but that I have catalogued in both America’s Constitution\textsuperscript{17} and The Bill of Rights\textsuperscript{18} and that have been extensively documented in works by other scholars as well\textsuperscript{19}—as encompassing political rights more generally.

Once Americans agreed to the Fifteenth Amendment, then it might well be the case that good interpreters should read the Fourteenth more expansively than they would have otherwise—just as, on my view, good interpreters should read the Fourteenth more expansively once the Nineteenth Amendment was ratified. (More on this below.) But if we today should read the Fourteenth Amendment to mean far more than it meant to ratifying Americans in 1868, it is, on my view, largely because these later Amendments (the Fifteenth and Nineteenth) are doing much of the heavy lifting. As a way of sharpening this point, I return to my questions about what a good judge should have done about black suffrage and women suffrage one day after the ratification of the Fourteenth Amendment (and long before America had agreed to the letter and spirit of the later Fifteenth and Nineteenth Amendments).

\textit{Jed Rubenfeld:} On bait-and-switch: “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 . . . .” The man who wrote this sentence owned slaves, as did many of the men who signed the text in which it appears, as did the people for whom they claimed to speak. Men are capable of holding principles whose

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{16} See Akhil Reed Amar, Double Jeopardy Law Made Simple, 106 YALE L.J. 1807, 1810-12 (1997).
\item\textsuperscript{17} AMAR, AMERICA’S CONSTITUTION, supra note 2, at 400 & n.*, 612 n. 106.
\end{itemize}
\end{footnotesize}
full implications they do not want to accept. Men are capable of committing such principles to writing. Sometimes they do so in constitutions. When they do, later interpreters are not constrained to put on the blinders of the past; the blinders of the present will be quite sufficient.

If the Declaration’s most famous sentence had been written into the Constitution, it would not have been improper for a court, a century later, to hold that this language outlawed slavery. On the contrary, a court that did not so hold would fail to do justice to the text. And this would be true, on my view, no matter how often the framers of that text had made public statements that the text did not outlaw slavery, no matter how clearly they said that they had chosen these words because these words had been used before by people who didn’t believe they outlawed slavery, and no matter how widespread that No Application Understanding became in the public conversation surrounding the enactment.

This is not bait-and-switch. The framers of a constitutional text can always use narrower, less majestic, less principled language. No one stops them. Certainly it is not as if the courts lure constitution-makers into grand statements of principle, promising a narrow construction only to laugh in their faces later. By the 1860s, if not well before, the capacity of courts to interpret broad constitutional language broadly was well established. The framers knew Marbury v. Madison; they knew McCollough v. Maryland, which explicitly says that courts should construe broad constitutional language broadly; and so on. By contrast, the requirement that judges must construe constitutional provisions in accordance with specific original intentions was not then any better established than it is today.

If the framers of the Fourteenth Amendment had wanted to enshrine or entrench the states’ right to deny blacks the vote, they could have easily done so. For example, they could have added a Section 6, providing: “The enumeration of certain rights in this amendment shall not be construed to deny or disparage the power of the several states to deprive the Negro of the right to vote or of any other political right.” Why did they not do this, if they wanted to be absolutely certain that no court would ever construe the Fourteenth Amendment to cover so-called political rights? Perhaps they could not stomach it. Perhaps they actually did not want to impose that prohibition on later interpreters. We cannot know. The answer, “They didn’t think it was necessary,” is plainly insufficient. To begin with, it makes them seem like fools: See, once again, Strauder v. West Virginia, in which the Court would in fact, just twelve years later, interpret the Fourteenth Amendment to strike down a state law denying blacks what you say was originally understood as a “political” right, not a “civil” right (jury service). More importantly, an excess of caution is always possible and usually prudent when constitutional framers
are genuinely insistent on a particular construction of their text—as the Tenth Amendment illustrates. For whatever reason, the framers of the Fourteenth Amendment didn’t include a Section 6. In the absence of such a prohibition, judges have full authority to do justice to the principle committed to writing. Indeed, that is their job.

In my view, the argument we are having is not semantic. It concerns the nature of commitment. The Fourteenth Amendment makes no commitment to any state power to deny blacks the vote. To be sure, the Amendment was originally understood not to forbid that particular brand of racism. But it made no commitment to that effect. Judges are bound only by the Constitution’s commitments—which, in the case of the Fourteenth Amendment, includes a commitment to the equal protections of the laws and against the abridgment of the privileges or immunities of citizens of the United States. Judges are called on to do justice to these commitments even if that means reversing original No Application Understandings.

But in a way you agree to most of this. You are willing to read the Fifteenth Amendment broadly, perhaps even “metaphorically,” to cover all political rights. In my view, what you are doing is elaborating a broad principle from the paradigm case—the right to vote. As a matter of fact, you make the Fifteenth Amendment cover matters—like militia and governmental service—that seem to me to go further toward “switching” its text, from what it actually says to something quite different, than I am prepared to accept. (I think I’m much more of a textualist than you!) You do the same for women under the Nineteenth Amendment. I gather that you are willing to go beyond literal or plain meaning here because you think that it conforms to the framers’ and ratifiers’ own interpretation, at some level of generality, of what they were doing.

AKHIL AMAR: A few quick responses. As for what the Court said in 1880, I find it far less plausible as an accurate account of the original meaning of the Amendments that Congress proposed, and that Americans ratified, in the 1860s and 1870s than what Congress itself said and did in its landmark statute of 1875—which, to repeat, prohibited race-based jury discriminations based on language directly borrowed from the Fifteenth Amendment, not the Fourteenth. Not coincidentally, Congress thereby protected black rights more expansively than did the Strauder Court. Only three years after Strauder, the Supreme Court went on to repudiate other sections of the 1875 statute in the infamous Civil Rights Cases of 1883. I say “infamous” because much of what the majority said in this case—over a passionate and brilliant dissent by Justice Harlan—is hard to square with the Fourteenth Amendment’s text and enactment history. In general, the post-Reconstruction Court is not an
A DIALOGUE

infallible guide to the original meaning of the Reconstruction Amendments—see, for example, the Slaughterhouse Cases, the Civil Rights Cases, and Plessy. But, then again, there is Minor v. Happersett, which did in my view cohere with the Amendment’s text and enactment history.

This points up another difference between your approach and mine: You are rather more generous to the Court. I am often more skeptical, focused as I am on the original meaning of the Constitution itself as ordained and then amended. Almost none of the judges on the post-Reconstruction Court were themselves open supporters of the Fourteenth Amendment when it was pending. And history was moving at lightening speed in these years. What was politically impossible to propose as a constitutional amendment in 1866—universal race-neutral suffrage—was in fact the core of an amendment proposed only three years later. Conversely, many of the promises of the Reconstruction Amendments were simply not fulfilled by Justices hearing cases several years after the promises were in fact made.

IV. WRITERS AND INTERPRETERS OF THE CONSTITUTION

JED RUBENFELD: I wonder if you can make the same defense, though, of the quite fancy move in which you read back from the Nineteenth Amendment to reinterpret the Fourteenth Amendment in such a way as to jettison original No Application Understandings concerning sex discrimination. If I understand your view, the Nineteenth Amendment, which speaks of the right to vote, ends up not only guaranteeing women all “political” rights (including rights that only “metaphorically” involve voting), but also guaranteeing women, through a retroactive effect on the meaning of the Fourteenth Amendment, equal “civil” rights as well. Is it your claim that this is how the makers of the Nineteenth Amendment interpreted what they were doing?

On my view, their interpretation is not what counts. The words they committed to writing count; their paradigm cases count. But the writers of a constitutional text are not, in our system, its interpreters. You claim to give much more weight to the framers’ and ratifiers’ interpretation of their own texts than I. For me, their interpretation is simply irrelevant.

You ask a good question about whether, on my view, a judge the day after enactment ought to have read the Fourteenth Amendment to bar segregation or to block racist voting laws. I have two answers. First, it will usually be the case that if an original interpretation of a constitutional provision was


Imaged with the Permission of Yale Law Journal
genuinely universal, judges will share it. (Indeed, there's something suspicious for me in the claim that your no-political-rights interpretation of the Fourteenth Amendment was so “universal” in 1867 that the words of the Amendment could not “semantically” have been understood in any other way, given that all but two Justices of the Supreme Court in 1880 didn't follow that interpretation.) Second, judges probably ought in most cases to stick to genuinely widespread, clearly intended meanings in the period directly following enactment. A new constitutional enactment needs time to work its way into the real fabric of society before the nation can be described as fully committed to it. After time passes, the binding force of the commitment is no longer open to doubt, and judges will be in a better position to assess whether the intended Application Understandings are enough or whether the commitment in reality requires more than was originally understood.

**Akhil Amar:** As for the sex discrimination question, I believe that the Fourteenth Amendment as originally written was in fact far more attentive to issues of sex discrimination than is conventionally understood; and that the Nineteenth Amendment did indeed regloss the Fourteenth Amendment’s text with an additional egalitarian overlay. A great many Americans pondering the Nineteenth Amendment when it was proposed did in fact understand its relevance to issues of jury composition, legislative eligibility, and other political rights. There is rather a lot of history here that is quite revealing. And as for issues of military service, additional constitutional texts come into play—including the Second Amendment, which reflects the ideal that in a sound republic (“a free state”) the military force (“the militia”) should look like the voters (“the people”) and the voters should constitute the military. This isn’t the place to rehearse the entire argument exploring linkages between voting rights and military service—I’ve done so at length elsewhere—but the argument does reflect my desire to understand the Constitution holistically, to see how different provisions adopted at different times cohere to form one supreme law.

In your own way, I know that you, too, aspire to holism, and to textualism. Where I think we disagree is how enactment history comes into the picture, and how much we should trust, and defer to, judicial doctrine that breaks free


from that history. But these differences should not obscure our similarities. And so let me end where you began, by acknowledging that “you and I have a great deal in common.” Jed, I cannot tell how much it warms my heart to hear you describe yourself as “much more of a textualist” than I am. I am truly grateful for your company.
INTRODUCTION: IS ORIGINAL MEANING MEANINGFUL?

I am honored to have been invited to write a joint review of two fascinating new books about constitutional law by two distinguished scholars at the Yale Law School—Professor Akhil Amar and Professor Jed Rubenfeld. It is something of a daunting task: It is difficult to imagine two more sharply contrasting approaches to the Constitution than Amar’s America’s Constitution: A Biography and Rubenfeld’s Revolution by Judiciary: The Structure of American Constitutional Law. Professor Amar’s tome (628 pages) is directed to explicating the original meaning and history of the Constitution—all of it!—but does not purport to offer a theory about how to reconcile that meaning with modern practice that often departs from it. Professor Rubenfeld’s slim book (231 pages) offers a theory to justify modern practice, but it is a theory largely divorced from the Constitution’s text, structure, and history. In a real sense, these offerings are two ships passing in the constitutional night.

In this double-barreled Commentary on both books, I (generally) praise Amar’s magnificent scholarship on the Constitution’s original meaning and (generally) question the usefulness of high-theory constitutional law scholarship, like Rubenfeld’s, that slights consideration of the Constitution’s text, structure, and history. If the overall Commentary has a unifying theme, it is that questions of the Constitution’s meaning must precede theories about its application—and that the document must direct and constrain constitutional theory and practice, not the other way around.

I thus begin with the book about the Constitution’s words and phrases, and their original meaning. Part I considers America’s Constitution, embracing many of Professor Amar’s specific conclusions and championing his approach to the study of the Constitution. Part II critiques the Revolution by Judiciary advocated by Professor Rubenfeld and concludes with a prescription for
reconciling—or, perhaps more precisely, for not reconciling—the Constitution’s original meaning with modern constitutional practice that departs from that meaning. Professor Amar’s book does not truly offer such a prescription, though its implicit message is that something has got to give. My contention will be that it is the practice that must give way, not the original meaning of the Constitution. Professor Rubenfeld’s book offers a different prescription—a wrong one, in my view: the Constitution must give way to practice, at least some of the time, in the manner Rubenfeld thinks indicated by his novel grand theory of constitutional law.

Each half of the Commentary could stand on its own as a separate essay, and I have given each its own subtitle and substructure. What unites the two Parts (aside from being reviews of two recent books by two notable constitutional scholars at the Yale Law School) is a question implicit in both Amar’s project and Rubenfeld’s argument: Does the original meaning of the Constitution matter? If it does, Akhil Amar’s work is one of enormous scholarly and practical importance and Jed Rubenfeld’s borders on irrelevant. If it does not, then Amar’s massive scholarship is a massive waste of ink and brainpower, and we should spend our time pondering clever theories like Rubenfeld’s.

I. THE BEST BOOK ABOUT THE CONSTITUTION IN TWO HUNDRED YEARS

Akhil Amar’s America’s Constitution: A Biography is the second best book ever written about the U.S. Constitution.

The best, of course, is The Federalist—but this may be unfair, as it requires counting a coauthored serial work (by Alexander Hamilton, John Jay, and James Madison) that first appeared as a series of newspaper essays, later collected into a single volume. Still, The Federalist, considered as a whole, counts as the most important single exposition of the U.S. Constitution, masterfully, lucidly, and colorfully written by a marvelous composite political and constitutional theorist (“Publius”); definitive, or nearly so, in its treatment of its subject (though not without its doubtful points); unsullied by trendiness or time-bound matters of little significance; and, justifiably, of enduring influence on all subsequent understanding, interpretation, and application of the Constitution.

But America’s Constitution comes in an amazingly, almost disturbingly, close second. Many of the same things can be said of America’s Constitution as can be said of The Federalist. America’s Constitution is an absolutely spectacular, magnificent work of scholarship. It is encyclopedic in its knowledge, dazzling in its insights, definitive (or nearly so) in its treatment of topic after topic, lucid and comprehensive without being ponderous, pretentious, or tedious in the

Imaged with the Permission of Yale Law Journal
slightest. It is, other than The Federalist, the best book on the U.S. Constitution ever written, bar none, bound to become a standard reference for constitutional scholars for decades to come. It beats out for second place on the all-time constitutional hit list such distinguished rivals as Joseph Story’s three-volume Commentaries on the Constitution of the United States (1891) (#3) (comprehensive and brilliant, but often tendentious); Alexis de Tocqueville’s Democracy in America (Vol. I) (1838) (#4) (not as comprehensive in its discussion of the Constitution, but unfailingly sound); and James Kent’s four-volume Commentaries on American Law (1826-1830) (#5) (excellent but lengthy and imperfect).  

1. Rounding out my personal top-ten list are: (#6) 1-2 David Currie, The Constitution in the Supreme Court (1985-1990); and (#7) 1-5 David Currie, The Constitution in Congress (1997-2001). These works comprise the best modern systematic discussion of constitutional doctrine, as developed by the Supreme Court and by Congress, and not incidentally, some of the best analysis of the Constitution itself ever written.  

(#8) Don E. Fehrenbacher, The Dred Scott Case: Its Significance in American Law and Politics (1978). This is the best book ever written about a single Supreme Court case and, more than that, an amazing explication of ante-bellum constitutional law and legal thought, with special focus on the signal constitutional issue of the day, slavery. Though there are many books about constitutional law that are limited to specific subjects, I think this the best of the bunch, and the only one worthy of inclusion on a list of the ten best books about the Constitution.  

(#9) Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution (1996). This is an outstanding book about the ideas behind the Constitution, but less good in its framing chapters about “originalist” interpretive method, and, because of its period limitation, not as broad-gauged as America’s Constitution.  

(#10) Laurence H. Tribe, American Constitutional Law (2d ed. 1988, 3d ed. 2000). Tribe’s treatise is almost literally encyclopedic in its treatment of constitutional doctrine, an intellectual tour de force whose brilliance is somewhat counterbalanced by its decidedly leftward ideological tilt and its overly doctrinal and less textual approach. Still, whatever one’s quarrels with Tribe, and whatever one’s disappointment with his decision to give up on the second volume of his third edition (each successive edition improved on the previous), the stature and quality of this work cannot be ignored in listing the most important books about the Constitution.  

Honorable mentions include Alexander Bickel’s The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1962), which remains the most eloquent, and best liberal defense of a moderately activist role for the Supreme Court in molding the Constitution, and must be ranked a very good book about the Constitution (which stars in a supporting role only); John Hart Ely’s Democracy and Distrust: A Theory of Judicial Review (1980) is in much the same vein, less eloquent, but more charming and more concerned with the Constitution’s text (to a point); Christopher Wolfe’s The Rise of Modern Judicial Review (1994) is the best conservative critique of the rise of judicial doctrine and corresponding fall of the document and is, indirectly, an excellent book about the latter; Harry Kalven, Jr.’s A Worthy Tradition: Freedom of Speech in America (Jamie Kalven ed., 1988) is a magnificent book about First Amendment doctrine in the Supreme Court; Paul Brest and Sanford Levinson’s Processes of Constitutional Decisionmaking (2d ed. 1983) is the best of the modern casebooks in its serious treatment of constitutional text and history, and in attention to
An admission of bias, which may lead some to discount my praise a few notches: Akhil Amar is an old friend of mine. We were accidental roommates at Yale Law School during our second year of law school, a little over twenty years ago. (His scheduled roommate didn’t show up; I was transferring in and needed a room.) We talked and argued much that year and the next (Amar is a liberal Democrat; I am a conservative Republican) and have remained in touch since then. I have been a fan of his career and his scholarship—perhaps more so than many of our generation, whose views should be discounted, too, for latent envy and resentment: Amar tends to make the rest of us look like decidedly dimmer bulbs. In defense of my credibility, I have said harsh things about him in print before, and would not hesitate to do so again. Like the skunk at a picnic, nothing would give me greater pleasure than to stink him up in the pages of his home law journal, if I thought he deserved it.

But he does not—not for America’s Constitution. This is an absolutely spectacular book about the Constitution, better than any of Amar’s earlier work—more mature, more fully realized, less self-congratulatory in tone, less tendentious, less subject to the criticism of being too-clever-by-half and seeking the ingenious, but borderline-foolish, answer. None of those critiques, each of which could be leveled to some degree against certain of Amar’s earlier works, is fairly leveled against America’s Constitution: A Biography. This is the best thing Akhil Amar has ever written, by a considerable distance—and his earlier work is undeniably dazzling, if occasionally too much so. I have quipped interpretations by institutions other than the Supreme Court, though its later additions suffer from creeping doctrinalism.

I would place The Collected Works of Abraham Lincoln, edited by Roy P. Basler somewhere high on this list, if I could squeeze it into my category demands of a unified (even if multi-volume) work. I have written elsewhere that Lincoln is the most important constitutional interpreter in our nation’s history. Michael Stokes Paulsen, The Civil War as Constitutional Interpretation, 71 U. CHI. L. REV. 691, 692-93, 726 (2004). The complete works of Alexander Hamilton would also qualify, if the category were construed that broadly. But then we’d really have to count the collected judicial opinions of Chief Justice John Marshall, and suddenly we’re on a slippery slope away from true books about the Constitution.

to friends and colleagues that Akhil Amar is one-hundred-and-ten percent brilliant, but that the last ten percent is often wrong. *America’s Constitution* is only one-hundred percent brilliant. It shaves off Amar's earlier tendencies to extremeness and cleverness for its own sake. It pares down the fourth-best arguments in support of a position, leaving only things that, for the most part, make entire sense. It avoids a self-promoting tone that calls attention to itself. There is, almost, nothing wrong with this book.

A roadmap for the rest of this part of the review: Section A offers a more detailed description of Amar's project and why it generally succeeds so spectacularly. (It also contains at least one point of strong criticism.)

Section B offers some thoughts on the book's subtitle: *A Biography*. The notion that the Constitution as a document has a "life story" is a fine insight. But care should be taken that nobody misappropriate Amar's work in support of the interpretive license often associated with those who invoke the Constitution as a living, organic document whose words' meaning changes at the behest of modern interpreters. There is always a danger that a great book will be cited for its title, not studied for its content, and that a shorthand summary will displace its true words. *America’s Constitution* is originalist-textualist in its methodology, not a brief for roving interpretive updates. No one who actually reads the book will make this mistake.

Section C argues that, for a true student of the Constitution, it would be better to read Amar than to spend a year plowing through a standard law school con-law casebook. I make the case for a Great Books approach to studying the Constitution in law schools, either as a supplement to or as a replacement for the current case method of study, and for inclusion of Amar’s book as part of a Great Books and Great Cases curriculum for studying the Constitution.

**A. Amar’s Project**

Part of what makes *America’s Constitution: A Biography* distinctive is its faithfulness to the Constitution’s text. The narrative is organized by the text—by the document, not by cases. The book is about the meaning of the Constitution’s words, not about the Supreme Court or its decisions (except, from time to time, as cases help illustrate an insight into textual meaning). The first appendix is the text itself—an annotated Constitution, with margin note page number references to Amar’s discussion of the language.

Surprisingly, one can think of few books about the U.S. Constitution that focus on the document itself, other than treatises—and not all treatises even do
Most books about the Constitution are not about the Constitution, but about judicial doctrine, institutional practice, or specific constitutional issues. Thus, part of what makes it relatively easy to rank Amar's book so high on the all-time list of books about the Constitution is that there are so few of them. Amar's book is treatise-like in its organization, breadth, and comprehensiveness, but immensely superior in terms of readability and accessibility: Imagine a treatise that reads like a great historical narrative—or, as Amar's subtitle not inaccurately advertises, "a biography." The combination of excellent textual exegesis and good historical storytelling make this volume singular.

_America's Constitution_ proceeds patiently, almost effortlessly, through the text, in the text's order: The Preamble—the act of "ordainment" and constitutional creation; Article I's creation of Congress and its legislative powers; Article II's creation of a unitary executive with sweeping powers; Article III's creation of an independent and powerful judiciary, but not one that is supreme over other interpreters; Article IV's important rules of state-state and state-nation relationship; Article V's amendment process; Article VI's designation of the document as "supreme Law of the Land" and its implications; Article VII's rules of recognition for when the new system of government would come into being (the bookend to the Preamble, in the original document); the movement for and broad themes underlying the Bill of Rights; the stories of early missteps leading to the Eleventh and Twelfth Amendments; the story of Lincoln, Civil War, and Reconstruction as the Constitution came to be made more perfect (or at least less imperfect) in the Thirteenth, Fourteenth, and Fifteenth Amendments; and the "Progressive Reforms" and "Modern Moves" leading to the amendments adopted in the twentieth century. It is the story, with excellent color commentary, of the meaning of the words of the Constitution, both the original document and the words we, the people, have added to it over time.

Amar covers virtually everything of importance in the Constitution in a relatively compact book (477 pages of text, with another 180 of notes, appendices, and index). On issue after issue, Amar takes complicated, seemingly intractable issues and masterfully distills them into a few pages or even a few paragraphs. On some points he offers a sharp viewpoint, sometimes original and sometimes an encapsulation of received wisdom he accepts. On

---

3. Laurence Tribe's important treatise, _American Constitutional Law_, is primarily organized according to doctrinal themes, not according to the Constitution's text. Its focus is judicial doctrine, not constitutional text.

4. I note below some small concerns with the relative thinness of the coverage of the Bill of Rights and the Fourteenth Amendment. See _infra_ note 13 and accompanying text.
HOW TO INTERPRET THE CONSTITUTION (AND HOW NOT TO)

other points, he avoids staking out too strong a view (even where he has done so in other academic writing, which he relegates to endnote citations), framing the issues and disputes and reducing them to their critical elements but leaving to the reader the ultimate judgment as to which view is stronger. As a result, constitutional scholars of contrasting views and approaches will find support in America’s Constitution for their preferred interpretations. But Amar will only carry them eighty percent of the way—and usually for good reason.

If the book is vulnerable to one big-picture criticism, it would be that Amar sometimes does not follow through far enough with the full implications of an insight. But that is perhaps to wish that Amar had created a better brawl rather than a better book. It is hard to fault Amar for restraint and modesty. America’s Constitution is more authoritative for all that it says in part because of all that it refrains from saying. Similarly, Amar is ruthlessly disciplined—to a fault—in avoiding current events distractions from his main objective of explicating the Constitution’s text and the stories that gave rise to the meaning of its words. Even where they could appear and perhaps enhance the discussion, Amar avoids Bush v. Gore, the Clinton impeachment, and Roe v. Wade. In doing so, he sacrifices some contemporary punch for overall credibility.

But there is certainly more than enough excellent material in America’s Constitution. The list of important constitutional issues on which Amar’s discussion is definitive, or nearly so, is remarkable. Amar’s exposition of Article I’s representation formulas and their political effects brings a seemingly dull issue to life. His discussion of national legislative powers is insightful and refreshingly slim, gracefully explaining the commerce, spending, and necessary-and-proper powers and their moderate-nationalist implications without the tedium that so often accompanies law school casebook treatments.

Amar’s exposition of Article II’s grant of “the executive Power” to a single, unitary President with control over all executive subordinates, broad power as military Commander-in-Chief, and a constitutional interpretive power of “executive review,” parallel to the courts’ power of judicial review, is absolutely marvelous. This is perhaps the only rigorous, principled defense of a strong constitutional executive penned by a liberal Democrat in half a century. Amar’s insights into the President’s powers of treaty formation, termination, and application, and the status of treaties in the “supreme law of the Land” hierarchy of Article VI, are novel and interesting. Overall, Amar’s treatment of

---

5. Amar floats the proposition, briefly, that treaties may be subordinate to statutes in Article VI’s hierarchy of federal law (rather than being of equal status and governed by a last-in-time rule, as current doctrine alleges). This is a seemingly sleepy proposition with enormous implications for a vast array of important statutes and treaties. For the definitive untangling and reordering of this complicated area, one must repair to the work of one of Amar’s
the Presidency is one of the best constitutional analyses I have ever read, including Alexander Hamilton's.6

Amar's treatment of Article III, the Eleventh Amendment, and sovereign immunity is an excellent (and more accessible) summation of Amar's earliest academic work.7 His defense of the propriety of a meaningful, substantive check on judicial appointments by the Senate is tightly argued in a single paragraph.8 His rejection of judicial supremacy is brave, if understated. To be sure, its implications could have been more fully explored—he straddles the issue somewhat, but appears to accept the supremacy of judicial judgments.9

Amar offers straightforward accounts of Article IV's Full Faith and Credit, Privileges and Immunities, and Guarantee Clauses, making clear provisions of the original Constitution that have left many constitutional scholars befuddled. His treatment of the Article V amendment process, ignored in most constitutional texts, is insightful and provocative, without swinging as wildly as some of his earlier work in this area.10 He tells well the story of the Twelfth Amendment's roots in the Jefferson-Burr-Adams near-fiasco election of 1800, the Amendment's correction of one problem but simultaneous enhancement of the political power of slave states, and the irony that it enabled the election—one of an anti-slavery northern, sectional president who received less than forty percent of the popular vote and went on to free the slaves.

Amar's treatment of the Constitution's provisions concerning slavery is quite simply the best I have ever read. The three-fifths compromise, in its full

---

6. There is a small chink when Amar discusses the constitutional standard for impeachment, however: Amar wrote in defense of President Clinton during Clinton's impeachment; though he does not discuss the Clinton case specifically in this book, one senses a slight trimming of Amar's analysis to fit his earlier academic advocacy. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 198-204 (2005).


8. AMAR, supra note 6, at 220.


insidious effect on the nation's representation and politics, is laid out with unusual clarity; the Fugitive Slave Clause, the slave-importation provisions of Article I, Section 9, and Article V, Dred Scott's betrayal of the document and, finally, the Thirteenth Amendment, receive their crispest and most precise treatment of any book in history or law, trenchant and penetrating but without posturing or needless soapbox oratory. 11 Amar's analysis speaks for itself, leaving the reader enlightened, angry, moved, and inspired. One is quietly forced to wrestle with the reality, for example, that the presidency of Thomas Jefferson, and the defeat of John Adams in the election of 1800, was the product of the original Constitution's indefensible electoral reward to the South for slavery, and that the tilt of the nation's politics and law toward slavery was the predictable result of the Constitution's provisions. Amar's vision of alternative ways in which the Framers might plausibly have dealt with slavery, limiting its expansion geographically or temporally, while still forging a more perfect Union in the 1780s, provides a compelling illustration of the Framers' lack of perfect constitutional foresight, even though the solutions were right in front of them and politically attainable. Slavery, secession, and Civil War, one is left to conclude, could have been avoided with a little better constitutional craftsmanship at the outset.

Amar's accounts of the lawfulness of the process of adoption of the Constitution and, much later, of the Reconstruction Amendments, is calmly lucid and persuasive, leaving Professor Bruce Ackerman's elaborate atextual construct crushed in its wake. (Amar has few obvious ideological opponents in the book. Ackerman, Amar's colleague at Yale, is the only one prominently identified in the text. Other competing views are noted and replied to in the notes.) Amar's defense of the Fourteenth Amendment's "incorporation" of individual rights against state governments, an argument he has made before, is slimmed and refined. 12 His arguments for a broad understanding of congressional power under Section 5 of that Amendment, and for the incorrectness of The Civil Rights Cases of 1883, are set forth with care and precision, and without overstatement.

A slight disappointment is Amar's rather thin treatment of the Bill of Rights. This is attributable in part (as he notes) to the fact that he wrote an

---

11. For a fuller, definitive treatment of the constitutional issues surrounding slavery—an account so good and about issues so important that it makes my top ten roster of books about the Constitution, even though it is limited to the Constitution's treatment of slavery—see DON E. FEHRNBACKER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978).

earlier book devoted exclusively to the Bill.\textsuperscript{13} It is not that what Amar says about the Bill of Rights in \textit{America's Constitution} is of inferior quality (with one exception I discuss presently); it is simply that it receives short-shrift. What Amar says about the Bill of Rights in \textit{America's Constitution} is very good, focusing on the story behind, and reasons for, the Constitution's first ten amendments—what was included, what failed to make it—and the broad themes connecting seemingly disparate provisions: popular sovereignty, institutions, juries, militias, and states. But in the best one-volume treatment of the entire U.S. Constitution ever written, one would have liked to have seen a little more treatment of the First Amendment, rather than simply a reference to an earlier book. The same is true of the Fourth, Fifth, and Sixth amendments, which again Amar has covered in other books.\textsuperscript{14}

Any 650-plus-page narrative treatise on the Constitution will have its doubtful points.\textsuperscript{15} Amar's "Akhil"es' heel is his treatment of the Ninth Amendment. After a plausible argument that the Ninth Amendment counsels against too-grudging a reading of the breadth of specific rights granted by other provisions—a weak version of "penumbras and emanations"—Amar's usual textualist rigor completely fails him: In the only two truly bad paragraphs of the book, Amar proceeds to "ponder the existence of"—he does not explicitly embrace—"other Ninth Amendment 'rights' of 'the people'" that "might not be inferable from the Constitution's text and structure but that nevertheless might deserve constitutional status."\textsuperscript{16}

Rights not inferable from text and structure, but that might deserve "constitutional status"? This is not textualism or originalism. Amar tries, haltingly, to erect hedges against unconstrained just-desert rights-inferring, saying they must "genuinely be rights of 'the people'."\textsuperscript{17} In earlier work, Amar had suggested that the content of the Ninth Amendment's "unenumerated" rights consisted of the popular right of a deliberative majority of the people to

\begin{footnotesize}
\begin{itemize}
\item[13.] \textsc{Amar, supra} note 12. That earlier book was good but does not make my top ten list.
\item[14.] In addition to discussion in \textit{The Bill of Rights}, Amar collected his earlier academic scholarship on the criminal procedure amendments into his fine first book entitled \textit{The Constitution and Criminal Procedure: First Principles}. See Paulsen, \textit{Dirty Harry}, supra note 2.
\item[15.] Even \textit{The Federalist} gets some things wrong. Hamilton wrote that the President could not remove subordinates without Senate confirmation of the firing (No. 77), and that a Bill of Rights was unnecessary because federal powers could not plausibly be construed to reach most individual rights (No. 84). Both views were unpersuasive and wrong— as Amar shows, in getting both issues right. See \textsc{Amar, supra} note 6, at 192-95 & 565 n.40 (discussing appointments and removals and explaining Hamilton's error in \textit{The Federalist} No. 77); \textit{id.} at 119-27, 315-29 (discussing the need for a Bill of Rights).
\item[16.] \textit{Id.} at 328.
\item[17.] \textit{Id.} at 329.
\end{itemize}
\end{footnotesize}
alter or abolish their form of government—the natural right of “the people” that propelled the American Revolution. Here, however, Amar appears to embrace to-be-discovered rights beyond those of the collective people and ends up with a mushy balancing test that sounds distressingly close to modern, Harlanesque substantive due process formulations:

Modern judges (and others) seeking to discover and declare unenumerated rights of “the people” should look for rights that the people themselves have truly embraced—in the great mass of state constitutions, perhaps, or in widely celebrated lived traditions, or in broadly inclusive political reform movements. In short, judges seeking guidance on the real rights of “the people” must give due weight to the very sources and sorts of legal populism that helped generate the Bill of Rights itself.

Thus does the Ninth Amendment (rather than the Due Process Clause) become Amar’s activist Trojan Horse, a gift that, if taken in, could be the undoing of all else. Secreted in the belly of Amar’s view of the Ninth Amendment is a license for marauding judges to depart from the text as they think best—in the name of the text.

The Ninth Amendment simply will not bear Amar’s reading. The proper understanding of the Amendment—“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people”—is that it states a rule of what we today would call “nonpreemption.” The specification of federal constitutional rights, possessed by individuals or by the people generally against the federal government (and a

---

19. AMAR, supra note 6, at 329.
20. Is there any reason to believe that, under Amar’s vague rendering of the Ninth Amendment, Chief Justice Taney’s atrocious substantive due process holding in Dred Scott (a holding and reasoning that Amar rightly condemns, id. at 264-66, could not be sustained on the alternative ground of the Ninth Amendment? After all, Taney premised his decision on Amar-like criteria: entrenched state constitutional and statutory provisions (in certain regions), sustained by a constitutional tradition of protection at the national level, supported in substantial measure by the text itself (as Amar persuasively shows), building on popular understandings and movements (at least in certain regions of the nation), and sustained by popular democratic judgment, repeated over many years (and embraced as recently as the 1856 election of President Buchanan, who was inaugurated two days before the decision was announced). The problem with Amar’s reading of the Ninth Amendment (aside from its indefensibility as a matter of textual interpretation) is that it permits essentially any result a court can plausibly concoct out of whatever textual extrapolation or extratextual interpolation it chooses. Taney might well have been pleased. Armed with Amar’s pliable Ninth Amendment, who needs substantive due process?
few possessed against state governments, set forth in Article I, Section 10), was not to work a pro tanto repeal of state law rights possessed against state governments. Such a disclaimer was necessary (if at all) only to counter Federalist arguments (like Hamilton’s) that adopting a Bill of Rights might be construed to have such an effect, thereby enlarging federal power and diminishing individual rights. The text of the Amendment, its political context, and historical evidence of its meaning and purpose all confirm this reading.2

Beyond this, one could infer a general political principle that the adoption in positive constitutional law of particular rights should not be understood to supersede the natural law rights of man. There would scarcely be much need to state this, however, as no one at the time would have assumed that human law could justly abridge God-given natural rights. At the same time, no one would have mistaken the language of the Ninth Amendment as conferring, as a matter of positive law, unspecified natural law rights. At most, the Ninth Amendment could be read as stating the truism that nothing in the Constitution legitimately could take away the natural rights of all human beings—including such things as life, liberty, the pursuit of happiness, and the right of the people as a collective to alter or abolish their form of government whenever it becomes destructive of its proper ends of securing those rights. The adoption of a Bill of Rights does not somehow repeal by implication the natural rights principles embraced in the Declaration of Independence.

But the free-floating “unenumerated rights” reading, which Amar floats so freely (even if he does not quite embrace it explicitly), is simply not textually defensible. This discussion is the single major flaw in an otherwise magnificent book. But it is a major flaw, from which I invite my old friend to retreat in the second edition (or the paperback).

B. A Biography of a Written Constitution

Putting the two terrible Ninth Amendment paragraphs to one side, America’s Constitution: A Biography, considered as a whole, cannot fairly be taken as an argument for the modern “living constitution” argument that the words of the Constitution are for succeeding generations (of judges, usually) to infuse with the meanings they choose. It is A Biography in the instructive sense of being the life story of the creation, structure, nature, and meaning of a text that drew on a prior tradition, has been altered dozens of times over a period of two hundred years, and has no fixed endpoint. (The book concludes with a wry analysis of that “white space” at the end of the document—the possibility

21. For further development, see Paulsen, Paulsen, J., Dissenting, supra note 2, at 198-99.
of further amendments to be added by later generations, and the significance of ongoing creation of the document.\[^{22}\] It is the biography of a document. It consists of the stories, contexts, and linguistic antecedents that gave life to the words of the document the framers wrote, plus the sequel of stories of the epochs, incidents, and currents that gave rise to the words of the Constitution's twenty-seven amendments. It is the life-story of the text. But it is rigorously and unrelentingly textualist. No one who reads this book faithfully (as opposed to inventing their own un-read inference from its subtitle) will make the mistake of attributing a methodologically "nointerpretivist" approach to America's Constitution, just as (I submit) no one who reads the Constitution faithfully will make the mistake of attributing a methodologically "nointerpretivist" approach to America's Constitution. The central feature of the document—the first thing one notices about it, if not a dolt or a mystic—is its written-ness. America's Constitution is a written constitution, not an unwritten one. And our written Constitution directs that it is "this Constitution"—a written document—that is supposed to be the supreme Law of the Land, not anything else.\[^{23}\]

Amar's interpretive methodology is one of original-meaning textualism, of a generous but still rigorous type. His approach places him, oddly, in common cause with judicial and legal conservatives, not freewheeling liberals. Although Amar is a political liberal, he does not let his politics drive his textual interpretation. "Liberals" can learn a lesson from this. They can learn the further lesson that original-meaning textualism is no mere cover for conservative political preferences, that it can yield surprisingly liberal political results on occasion, and that the methodology cannot fairly be reduced to a caricature.\[^{24}\] Amar's book demonstrates, quite the contrary, that originalist methodology often produces a range of possible fair interpretations and that there will often be room for reasonable differences as to result as among persons purporting to be, and struggling faithfully to be, textualists. But so too "conservatives" can learn from this book the lesson that principled textualism

\[^{22}\] AMAR, supra note 6, at 458-63.

\[^{23}\] U.S. CONST. art. VI. On the Constitution's reasonably clear interpretive instruction that it is the written text that is controlling and that, for those who would purport to be applying it as law, this text controls as against any and all unwritten traditions, departures, accretions, diminutions, or linguistically anachronistic changes, see Michael Stokes Paulsen, The Irrepressible Myth of Marbury, 101 MICH. L. REV. 2706, 2709-10, 2739-43 (2003) [hereinafter Paulsen, The Irrepressible Myth of Marbury]. See also Vasan Kesavan & Michael Stokes Paulsen, The Interpretive Force of the Constitution's Secret Drafting History, 91 GEO. L.J. 1113, 1124-33 (2003) (developing at length the textual argument for original-meaning textualism).

\[^{24}\] Jed Rubenfeld's book, which I discuss below, is deeply unsatisfactory on precisely this point. See infra Part III.
THE YALE LAW JOURNAL
does not invariably support their preferred substantive outcomes either. One may recognize that originalism is frequently hijacked by its own purported adherents for their own political purposes; and one may recognize that originalism sometimes does not dictate clear answers but merely frames the legitimate bounds of disagreement, without rejecting the methodology itself. America's Constitution: A Biography is no defense of words-as-springboards "living constitution" judicial activism. It is a defense of the Constitution's text.

C. How To Teach the Constitution

Wouldn't it be better to teach "constitutional law" by teaching about the text of the Constitution, rather than focusing single-and-narrow-mindedly on Supreme Court doctrine in cases that, with alarming and increasing frequency, have precious little to do with the document itself? Wouldn't it be better to study America's Constitution: A Biography than any of the several carbon-copy casebooks that go by some variation of the name Cases and Materials on Constitutional Law?

It depends (I suppose) on what one is trying to teach and learn. If one is concerned only with Supreme Court doctrine, then one could do without Amar (and for that matter without the Constitution itself, for the most part). But surely that view—the dominant view in law schools today—is a defect with our present teaching canon of constitutional law. One can certainly respect the value of teaching important Supreme Court decisions explicating the broad themes of the Constitution and specific provisions thereof, and of studying cases that have shifted the way "constitutional law" has developed away from the document and toward changing doctrine. A course in constitutional law that ignored these developments would be deficient in important ways. But it is certainly a far greater sin for a course in constitutional law to ignore the document itself.

That is the problem with most constitutional law courses in American law schools today, and with most (if not all) casebooks used in such courses. They choose pretty much the same cases (and omit the same hugely important

25. The nearest thing to an exception is the excellent "Brest, Levinson" edited casebook, entitled Processes of Constitutional Decisionmaking: Cases and Materials, the second edition of which I list as an Honorable Mention on my list of best books about the Constitution. See supra note 1. The book is much more concerned with history and with institutions and interpreters other than the Supreme Court than other constitutional law books are. The volume is currently in its fourth edition, and has added Akhil Amar and his colleague Jack Balkin to the roster of co-editors. The book is still excellent but has (with the addition of the new co-editors?) become much more heavily doctrinal, jargon-filled, and case-heavy in its later sections.

Imaged with the Permission of Yale Law Journal
cases, like *Dred Scott*). They tend to focus only on cases—and almost exclusively recent U.S. Supreme Court decisions—as the source of constitutional law, ignoring how often, and with such great consequence, the Constitution is interpreted and applied by Congress, the executive branch, lower federal courts, and all branches of state government. They largely ignore history: The reader can find endless pages of note cases discussing the twists and turns of the Supreme Court’s most recent three-part, two-tiered doctrinal test over the course of the last twenty-odd years, but almost no history of the formation of the Constitution and historical treatment of its principles in the first 150 years of our nation’s history. And most glaringly of all, most modern constitutional law casebooks largely ignore the Constitution itself—the document that is ostensibly the subject of study and the source of “constitutional law.”

I offer a modest proposal: Throw out the casebooks altogether and teach the constitutional law course as a Great Books and Great Cases on the Constitution course. Assign *The Federalist* and Akhil Amar’s *America’s Constitution: A Biography*. Then, teach, in detail, only the fifteen or twenty most significant constitutional decisions of the Supreme Court and of the political branches, unedited, as case studies touching on most (but not all) of the more important subject matter, doctrinal, interpretive, and history-impacting developments in American constitutional law over the course of 200-plus years. But deliberately make no attempt to cover every case or teensy-weensy ripple of modern doctrine, recognizing that those cases are often here today and gone tomorrow. Emphasize how to think about constitutional issues rather than the latest judicial thinking about those issues, for that will be what is of enduring value to law students from a law school course in constitutional law.

Lopez; United States v. Morrison; Bush v. Gore; and Lawrence v. Texas. One or two big cases a week (unedited) for fifteen weeks, with corresponding assignments of The Federalist and America's Constitution: A Biography. What a fascinating way to teach constitutional law! (For those who would miss all of the "note" cases, think of how brilliant a scholar you will seem to your students by filling them in with a lecture about all the wrinkles and variations left open by the great cases, or show them what a masterful imagination you have by using them as "hypotheticals.")

For the faint of heart, I offer a more modest proposal—and a prediction: Assign America's Constitution: A Biography along with a traditional casebook, to enrich understandings, reemphasize the text, and serve as a corrective check-and-balance to the excesses of present casebook case-ism and doctrinalism-ism. The prediction is that, whatever I say, this is likely to become a popular practice over the next five to ten years. It is a tribute to Amar's book that it will, almost certainly (and quite properly), change to some degree the way the U.S. Constitution, and constitutional law, is taught and understood for many years to come.

II. STRAWMAN: JED RUBENFELD AND GRAND THEORY

Professor Jed Rubenfeld's Revolution by Judiciary presents a puzzle: How could such an obviously smart guy write such a terribly messed-up book about constitutional interpretation? The answer seems to be much like Oz's to the Scarecrow: It's not that our protagonist doesn't have a brain—he's obviously an extraordinarily bright, resourceful fellow. He's just a victim of disorganized thinking.

Revolution by Judiciary suffers not from any lack of intellectual firepower, but from poor aim. The book suffers, greatly, from disorganized thinking: It posits a problem that does not exist; offers a description of it that does not match reality; then solves it with an ingenious construct, but one that is utterly of the inventor's imagination.

26. Two confessions: First, I have never had the courage to teach constitutional law this way; I am (nearly) as trapped in the mold as everyone else. (But I may try it next fall.) Second, the above two paragraphs are loosely plagiarized from the working preface of my own casebook-in-development, co-edited with Michael McConnell, Steven Calabresi, and Vasan Kesavan: The Constitution of the United States, optimistically forthcoming in 2007 from the Foundation Press. But I think I wrote that part of the preface. We stop short of the all-out Great Cases approach but use it as a guidepost. Like Amar's book, our casebook is organized by the Constitution's text, not by Supreme Court doctrine.
HOW TO INTERPRET THE CONSTITUTION (AND HOW NOT TO)

In Section A, I critique Rubenfeld's thesis about the "problem" of constitutional law and his solution to it. In Section B, I critique the phenomenon of grand theory approaches to constitutional law as a general matter, and offer an alternative, un-grand approach to interpreting and applying the Constitution: focusing on the original linguistic meaning of the text (much as Amar's book does). Finally, in Section C, I briefly address the true problem with constitutional law: the obvious and mildly embarrassing fact that a good deal of our constitutional practice today is not true to the meaning of the Constitution, and the fact that our scholarship lacks the brains, the heart, or the courage to confront (and correct) this straightforward problem.

A. Rubenfeld's Problem and Solution

Rubenfeld's thesis is that the field of constitutional law supplies no answer to the most basic question of constitutional law: How are we to go about the enterprise of constitutional interpretation? Constitutional law thus cannot justify its controversial, or even its easy, case decisions. Says Rubenfeld:

Incredibly, American constitutional case law has almost nothing to say about what judges are supposed to be doing when they go about the business of interpreting the Constitution.

... .

In constitutional law, . . . there are no such overarching interpretive precepts or protocols. There are no official interpretive rules at all. . . .

... .

... There is no law of constitutional interpretation.

Thus is constitutional law, which speaks to so many issues today, silent on one subject: itself.27

With all due respect, this is nonsense. If there is a problem with constitutional law today, it surely is not that it has "almost nothing to say" about how to "go about the business of interpreting the Constitution." It is that it has far too much to say! Our cases, our practice, and our theorists point

---


Imaged with the Permission of Yale Law Journal
in wildly different directions, offer and illustrate competing interpretive theories, and reveal a cacophony of voices virtually screaming for attention. Constitutional law is “silent” on how to go about the business of constitutional interpretation? Surely Rubenfeld jests. We suffer not from a deficit but a surfeit of constitutional theory. Thus, we see the repeated attempts in constitutional law scholarship to offer new efforts to systematize and synthesize—grand theories to explain (or to explain away) judicial decisions that almost certainly had nothing to do with the grand theory being advanced.

But Professor Rubenfeld has rushed in to fill the gap, solving this central problem of constitutional law with a comprehensive theoretical framework. Styling his book as standing in the tradition of Alexander Bickel’s *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* and John Hart Ely’s *Democracy and Distrust: A Theory of Judicial Review*, Rubenfeld claims to succeed where Bickel and Ely failed. Rubenfeld’s proposition is that not all of the Constitution’s specific “intentions” control subsequent interpretation; only the Constitution’s “commitments” do. He derives this distinction not from the Constitution’s text, but from philosophy.28

The distinction between intentions and commitments can then explain most (but not all) of constitutional law. Judicial decisions can be divided into core “Application Understandings” of a constitutional provision and noncore “No Application Understandings.” An Application Understanding is Rubenfeld’s jargon for the agreed core of what a constitutional provision covers. Those core understandings are commitments that must be adhered to. A No Application Understanding is an understanding of what is not included within a given right or power. But these are mere intentions from which a subsequent judicial decision may depart.29

All of constitutional law can be explained by this framework, Rubenfeld argues, except for two broad areas, the Contract Clause and the Declare War Clause. The departure from the core Application Understanding of the Contract Clause, in *Home Building & Loan Ass’n v. Blaisdell,*30 however, was “a widely admired decision” and should be understood as creating a new interpretive paradigm—a new constitutional commitment, as it were.31 On the other hand, the departure from the core Application Understanding of the Declare War Clause—the original understanding that Congress, not the President, has the constitutional power of war-initiation, honored in the breach

---

28. *Id.* at 71-124.
30. 290 U.S. 398 (1934).
31. RUBENFELD, supra note 27, at 67.
by a fair amount of constitutional practice—should be stopped and reversed, and should not be treated as a new paradigm.\footnote{Id. at 68.}

In addition, a number of decisions by the Rehnquist Court since 1990, in the areas of federalism, commerce power, sovereign immunity, affirmative action, and freedom of expressive association, cannot be explained by this model, Rubenfeld explains. But this is because those decisions reflect a vicious and lawless right-wing agenda that should lead us to ask whether constitutional law has “stopped making sense” because of the nonconformity of these conservative decisions with Rubenfeld’s explanatory model.\footnote{Id. at 145-202.}

The book is devoted to explication of this general thesis. Now, it’s not a completely ridiculous idea. But it suffers from a classic Yale School problem: A really bright fellow superimposes a construct of his own invention on the corpus of constitutional law decisions, seeking to justify them (or most of them) under a newfangled rubric that explains what is otherwise inexplicable. Sure, not everything fits within the new rubric, but that just proves that what does not fit is wrong. Bickel’s The Least Dangerous Branch is the most graceful and sophisticated (and, not coincidentally, the least extravagant) book in this grand-theory Yale tradition. Ely’s Democracy and Distrust provided a valiant attempt to rationalize the Warren Court’s work, but not the 1970s’ more untenable extensions.\footnote{I count John Hart Ely as a Yale Law School product, even though Yale improvidently kicked him out by denying him tenure.} Bruce Ackerman’s We the People three-volume project is another example, with a much grander, more creative, and marvelously entertaining (if deeply vulnerable) meta-theory of his own, seeking to explain the New Deal era and other results he likes.

Jed Rubenfeld’s effort cannot quite keep up, in grandeur, eloquence, or sophistication, with these other works. But the more fundamental problem is with the genre itself— with its twin premises that there is a problem that needs solving concerning constitutional interpretation and that the solution to this problem lies in some grand new political or philosophical theory extrinsic to the Constitution itself. Is it really the case that interpreting the Constitution is so inexplicably complex that it requires a Yale professor (or several of them) to devise equally complex grand theories to explain constitutional law?\footnote{Different readers will have different assessments of the degree to which Rubenfeld’s project succeeds on its own terms. Space does not permit, and time and interest do not commend, a page-by-page discussion of the case descriptions and doctrines that Rubenfeld employs in developing his account of constitutional law today and its consistency with his construct. But readers should employ a critical eye: I found Rubenfeld to be the proverbial Unreliable Imaged with the Permission of Yale Law Journal 2055}
B. Applying Ockham’s Razor to Grand Constitutional Theory

There is, I submit, a fairly simple, nongrand answer to all of this grand theorizing about constitutional law. The Constitution does entail rules governing its own interpretation and application, and they are reasonably clear and straightforward ones (as I will explain presently). They do not answer all questions, but they answer a lot of them. As to “constitutional law” in the broader sense of judicial decisions and doctrine, the nongrand answer is that some of the Supreme Court’s major decisions in the corpus are faithful interpretations of the Constitution and some are not. Not all of the “good” ones (from any given policy-preference perspective) are faithful applications of the document; not all of the “bad” ones are unfaithful. Grand theoretical attempts to systematize constitutional law to make it all work out tidily, in favor of the theoretician’s preferred outcomes, are invariably doomed to failure. They can be interesting projects, but in the end they tell us more about the theoretician’s preferred outcomes than about the Constitution.

My un-grand but radical position (within the small world of academic constitutional theoreticians) is simply this: The enterprise of constitutional interpretation—of discerning the document’s meaning—consists of giving to the Constitution’s words and phrases the meaning they would have had, in context, to informed readers of the language at the time of their adoption as law, within the relevant political community. Contrary to Rubenfeld’s assumption, and that of many other academic theorists, this seems to be the interpretive method prescribed by the Constitution itself. The straightforward internal textual argument for original-meaning textualism is that the Constitution is a written document; that it specifies “this Constitution” as the thing that is to be considered supreme law; that the default rule for textual interpretation was, at the time of the Constitution’s adoption, the natural and original linguistic meaning of the words of the text; and that any argument for anachronistic interpretations of the text—that is, for substituting a personally idiosyncratic, nonstandard, or time-changed meaning in preference to the one that would have been understood at the time, and in the context, in which the text was adopted—ends up substituting some other words for the words chosen in “this Constitution.” In short, the Constitution is written law, and the
meaning of a written legal instrument is the original meaning of its words, not a different meaning substituted by someone else.\textsuperscript{36}

The enterprise of constitutional adjudication consists of applying the original linguistic meaning of the document to lawsuits in which a question of constitutional meaning is properly presented. This requires another step: discerning second-order rules about what to do when the Constitution supplies a rule of law that applies to the case at hand; what to do when it does not; and what to do when the answer is unclear. But it is not too hard to come up with such rules. Simply put: If the meaning of the words of the Constitution supplies a sufficiently determinate legal rule or standard applicable to the case at hand, that rule or standard must prevail over a contrary rule supplied by some other competing source of law (typically a state or federal statute, or an executive branch or agency action). That is because of the supremacy of the Constitution over other law.\textsuperscript{37} Thus, if the Constitution supplies a rule, that rule prevails. But if the meaning of the Constitution’s language fails to provide such a rule or standard—if it is actually indeterminate (or under-determinate) as to the specific question at hand—then a court has no basis for displacing the rule supplied by some other relevant source of law applicable to the case (typically, a rule supplied by political decisions made by an imperfect representative democracy).\textsuperscript{38} Folks legitimately might disagree as to when the original meaning produces a determinate answer, or what counts as sufficiently determinate to supply a constitutional rule appropriate for judges to apply to invalidate political decisions. But that should be the core of the enterprise.

This is not, of course, a description of current practice. But an account of practice is also fairly simple: Some judicial decisions are consistent with this description of the proper approach to constitutional interpretation and adjudication. Some clearly are not. (That raises certain problems of its own, which I discuss in the next Section.) And some—a good many interesting ones—are debatable. This is not surprising. Many constitutional provisions

\textsuperscript{36} This is a much-compressed version of a fuller textual, structural, and linguistic argument for original-meaning textualism as the method the Constitution itself prescribes for understanding the Constitution that Vasan Kesavan and I have set forth elsewhere. See Kesavan & Paulsen, supra note 23, at 1124-33; see also Paulsen, supra note 23, at 2709-10, 2739-43 (emphasizing, with Marbury, the intrinsic nature of written constitutionalism). The “default rule” insight comes from Saikrishna B. Prakash, Unoriginalism’s Law Without Meaning, 15 CONST. COMM. 529, 540-46 (1998).

\textsuperscript{37} This of course is the core of the argument of Marbury for the proposition we call judicial review. See Paulsen, supra note 23, at 2711-24. It is instructive that the argument for constitutional supremacy is a structural and textual one purely internal to the text.

\textsuperscript{38} For a short defense of this principle, see Paulsen, The Most Dangerous Branch, supra note 9, at 332-37.
will have core areas of agreed meaning and application, but leave legitimate room for disagreement about the periphery. The interesting and difficult cases concern the periphery.\footnote{There will be easy cases that fall within the core of agreed understanding about the original meaning of particular constitutional provisions. And there will be more difficult cases in which the document's meaning is more ambiguous or its application to a particular problem is less clear, leaving difficult questions on the margin of whether a court properly may hold that a rule or standard supplied by the text actually exists to displace the rule otherwise supplied by political action.}

But that's really pretty much all there is to it. Constitutional law, while greatly interesting, is not a deeply mysterious thing. It takes a Yale professor to make it one. Most grand theories of constitutional adjudication that seek to erect an elaborate superstructure feel like professors' attempts to justify decisions they like but that are not explainable in such conventional terms, to criticize the ones they dislike but that are not easily impeachable in such conventional terms, and to argue their preferred positions in the ones that remain up for grabs.\footnote{This general description certainly applies to Professor Rubenfeld's project. As noted, Rubenfeld deriving his construct from a long excursion into philosophy. RUBENFELD, supra note 27, at 71-141. The discussion is interesting, but its relevance in describing constitutional law is dubious. All of which suggests a philosopher Rubenfeld overlooks: William of}

\footnote{Rubenfeld's somewhat confused "Application Understandings" and "No Application Understandings" rubric seems like a garbled (and misleading) way of expressing what should be a rather simple idea: Clear constitutional rules are always controlling, but if the Constitution's meaning is not perfectly clear on a given point, different times legitimately can act on different understandings, each falling within the range of meaning admitted by the text. This might mean that judicial understandings within this range are supreme over political understandings, but legitimately may vary from time to time; or it might mean that the proper judicial approach is to defer to differing political understandings adopted at different times, within the range admitted by the text. In addition to its lack of clarity, Rubenfeld's construct suffers in two serious respects on this point. First, he offers no principled criteria for how to interpret the Constitution; he attacks a strawman version of originalism, but he does not set forth an alternative theory of constitutional meaning. Second, even if one has a stable, clear, and principled interpretive method, the "Application Understandings" versus "No Application Understandings" framework does not map well onto the reality that some texts bear a range of interpretation. Rubenfeld's rubric is unsatisfying both as a matter of theory (even within a stable and clear interpretive framework, the range of meaning of a constitutional text is not well captured by asking the binary question of whether or not it "applies," nor does Rubenfeld's construct deal with issues of unclear overlap between rights and powers, rights in conflict, and the like) and even more so as a description of practice (witness Rubenfeld's two exceptions, one of which he accepts and one of which he doesn't, and his long litany of recent "conservative" decisions of which he disapproves). An illustration of both the theoretical problem and the descriptive problem is how difficult it is for Rubenfeld to fit separation-of-powers and federalism issues—issues of division of power—into his framework. RUBENFELD, supra note 27, at 56-67.}
Rubenfeld is driven to his construct by a caricature of originalism. Rubenfeld does not understand the method as it is understood by most of its adherents today, conflating it (whether intentionally or not) with a version of crude intentionalism that focuses on the specific subjective intentions or expectations of individuals as to how a provision might be applied—that is, subjective individual interpretations of the document (of a historical period)—rather than focusing on the objective linguistic meaning of the words of a text (taken in historical context).

This distinction, subtle but central to all good understandings of originalism today (and abundantly present in the scholarly literature in the field), is essential. It is a distinction that has long been familiar in law. As then-Professor Oliver Wendell Holmes put it more than a century ago, “We do not inquire what the legislature meant; we ask only what the statute means.”

Originalist analysis, at least as practiced by most contemporary originalists, is not a search for concrete historical understandings held by specific persons. Rather, it is a hypothetical inquiry that asks how a fully informed public audience, knowing all that there is to know about the Constitution and the surrounding world, would understand a particular provision. Actual historical understandings are, of course, relevant to that inquiry, but they do not conclude or define the inquiry—nor are they even necessarily the best available evidence.

Ockham, who held that, as between two possible explanations for a phenomenon, the simpler is usually the more likely. Is it not simpler, and ultimately more plausible, to describe constitutional law as the task of discerning the original meaning of the words of the document, noting the ways in which practice departs from that meaning, and inquiring how (or whether) to reconcile the document’s meaning with that practice?

41. Oliver Wendell Holmes, The Theory of Legal Interpretation, 12 Harv. L. Rev. 417, 419 (1899). For a colorful reprise on Holmes’s aphorism, see In re Sinclair, 870 F.2d 1340, 1342 (7th Cir. 1989), in which Judge Easterbrook wrote, “the search is not for the contents of the authors’ heads but for the rules of language they used.” I have developed this point in other writing. See Paulsen, The Most Dangerous Branch, supra note 9, at 227 n.23 (“There is a logical and important difference between the content of a legal rule and the expected consequences of the rule in the minds of (some of) its drafters and advocates.”).

42. Gary Lawson, Delegation and Original Meaning, 88 Va. L. Rev. 327, 398 (2002). Rubenfeld writes: “Originalism is intention-based, holding that all the intentions formed by the relevant agents at the relevant time have equal normative status.” RUBENFELD, supra note 27, at 99. It is difficult to conceive of a more wooden and misleading formulation of original-meaning textualism. I know of no thoughtful modern originalist who would subscribe to such a position.
This distinction between objective, original linguistic meaning and subjective particular intentions—not Rubenfeld's distinction between "intentions" and "commitments"—explains most (but not all) of the cases and doctrines that Rubenfeld finds inexplicable on his strawman version of originalism. Much (but not all) of modern First Amendment doctrine makes a fair degree of sense if one is applying the original linguistic meaning of the terms "speech," "the freedom of" speech, and "no law abridging" such freedom, rather than specific subjective historical beliefs about blasphemy, vulgarity, and seditious libel. So too the result in Brown v. Board of Education, striking down government-prescribed discrimination on the basis of race (and overruling Plessy v. Ferguson to the extent of its inconsistency with Brown) makes entire sense if one focuses on the original linguistic meaning of the Fourteenth Amendment rather than on the mistaken subjective views or expectations of some individuals at the time that the Amendment's principle did not extend to segregated education.

Rubenfeld's treatment is an extreme instance of the common phenomenon of positing a strawman version of originalism, exaggerating the extent and consequences of its supposed conflict with present practice, and then setting up a false dilemma: "choose my theory or choose the unmitigated disaster of originalism." To be sure, a considerable amount of our constitutional practice is not consistent with the original meaning of the Constitution. But a
considerable amount of our practice is consistent with the Constitution, too, if one has the patience (and inclination) to read the text carefully and faithfully.\textsuperscript{46}

True, original-meaning textualism will leave some difficult cases to be decided, and reasonable originalists will sometimes disagree as to the right decision. But that does not go to the correctness of the basic methodology. Every interpretive theory has its limits, and honest disagreement as to a correct theory’s application is one of them. The limitation is not unique to originalism. Indeed, it is likely a less severe problem for originalism than for less-disciplined nonoriginalist approaches.

True, not all would-be originalists employ the method faithfully. It has its stated adherents who err, or who misuse the theory, just as stated adherents of other approaches do. But that also does not go to the correctness of the basic methodology. Moreover, it is easier to spot an errant would-be originalist interpretation than an errant nonoriginalist, or pragmatist, or Rubenfeldian.

\begin{enumerate}
\item \textbf{state of war.} Congress has this power and the President does not. \textit{See} Michael Stokes Paulsen, Youngstown\textit{ Goes to War}, 19 \textit{CONST. COMM.} 215 (2002). It is true that some of our constitutional practice does not conform to the Constitution’s allocation of power in this regard, of course. But the correct answer to that is: so much the worse for constitutional practice. When the Constitution says one thing, and precedent or practice says the contrary, the Constitution supplies the rule and the nonconforming precedent or practice must be said, straightforwardly, to be in violation of the Constitution. \textit{See} Paulsen, \textit{supra} note 23, at 2711-24, 2731-34. And violations of the Constitution, no matter how frequently repeated, do not legitimately change the meaning of the Constitution. \textit{See} id. at 2731-34; \textit{see also} Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588 (1952) (arguing that past contrary practice does not alter the Constitution’s allocation of power).

\item \textbf{Rubenfeld is scarcely the only, nor even the worst, offender in this regard.} \textit{See}, \textit{e.g.}, CASS R. SUNSTEIN, \textit{RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA} (2005) (arguing, speciously, that originalism would abolish paper money, repeal most national legislation since the New Deal, undo the application of the Bill of Rights to the states through the Fourteenth Amendment, and accomplish many other terrible things).
\end{enumerate}
interpretation. The existence of reasonably firm criteria makes it easier to check up on originalist interpretations for the soundness of their reasoning and their adherence to correct principles. Nonoriginalism, on the other hand, means never having to say you’re sorry.

The biggest problem for constitutional law, then, is not (as Rubenfeld would have it) that there are no criteria for interpreting and applying the Constitution. On the contrary, the problem is that the Constitution is reasonably easy to interpret and apply under straightforward criteria but that a fair amount of our constitutional practice is simply not consistent with the meaning of the Constitution. And it is at least plausible to believe that we, the people today, might sometimes prefer contemporary practice to the Constitution’s original meaning. What should one do with this gap between meaning and practice (whatever size one thinks it is)? And why on earth should we follow a two-hundred-plus-year-old Constitution rather than our policy preferences for today in the first place?

C. Pay No Attention to the Man Behind the Curtain

The long-dead-white-males-shouldn’t-rule-us critics have a point. There is no particularly good a priori reason why we should be governed, on important fundamentals, by a charter drafted (in the main) more than two centuries ago, by (white) men who have long since died, if we prefer a different arrangement today, in whole or in part, and make a considered deliberative choice for a new arrangement. But this is not really a problem with constitutional law. It is a political theory problem external to constitutional law—a question about whether one wishes to do constitutional law in the first place. It is a question about whether one likes what the Constitution says, and, if not, whether the people as a whole wish to displace it with something else.

The Constitution itself has very little to say about this problem. The question of whether one wishes to use the Constitution as a set of legal governing rules is not a question of constitutional law or constitutional interpretation. It is a question of political theory about constitution-making and constitution-following. As such, it is a distinct question from the question of what those legal governing rules are. One needs to know what the Constitution says before one can sensibly decide whether one likes what the Constitution says and wants to follow it. Interpretation precedes evaluation, and is distinct from it.47

47. On this big point, which is scarcely original to me, see Professor Gary Lawson’s brilliant little article, On Reading Recipes . . . and Constitutions, 85 GEO. L.J. 1823 (1997).
The Constitution does take this limited stance, however: The bare fact of being a written Constitution prescribing rules of superior authority to ordinary current political choices implies a position that a fundamental decision made in the past sometimes can and ought to be binding as against today's political—and judicial—decisions that depart from that fundamental decision. That was the first premise of Chief Justice Marshall's reasoning in *Marbury v. Madison* and of Alexander Hamilton's reconciliation of judicial review with democracy in *The Federalist* 78. In a sense, this could be said to be the background political theory behind written constitutionalism. Hear Marshall on constitution-making:

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

A decent case nonetheless can be made on political theory grounds that, whatever the Constitution says, we would be better governed by some combination of elected officials, appointed judges, and accumulated but evolving traditions, rather than (to the extent of a conflict) by the rules of law supplied by a written Constitution, much of which was written long ago with relatively few recent written amendments. But there is a simple low-political-theory answer to this: For government officials who swear an oath to support "this Constitution"—a written document—this is not a valid option. For those who do constitutional law under this written Constitution, the political-theory decision has already been made. To willfully depart from the document one is sworn to uphold is, indeed, *revolution* by judiciary, an overthrowing of the ancien regime. It may be justifiable as a matter of some political theory or another. But it is not justifiable as an account of constitutional law.

---


49. *Marbury*, 5 U.S. at 176. Rubenfeld gets this point right, with an important insight: "Treating democracy as government by present popular will severs the dimension of time from the enterprise of self-government. It offers little or no conceptual space for the authority of past acts of lawmaking." RUBENFELD, *supra* note 27, at 141, 75-98, 135-41. At some level, Rubenfeld accepts the idea of constitutionalism as a legitimate check on present political decisionmaking.
But have we not, over time, overthrown in fact what was established in theory? Do we not in fact live in a de facto different constitutional regime than that established by the written constitution, so that those who do constitutional law should be understood as swearing an oath not to the document but to the changes produced by judicial practice over the years? Marshall and Hamilton rightly cautioned, as a matter of political theory, that we, the people, should not adopt constitutional regime change lightly or accidentally. Moreover, they insisted as a matter of constitutional law that it is wrong to presume, or permit, an unauthorized power of government institutions under the Constitution to change the regime of the Constitution, in the name of the people. If there is to be an exercise of the inalienable political right of the people to alter or abolish their form of government when it fails any longer to serve their happiness, then (putting to one side amendment by the modes provided for in the document itself) such change by definition occurs outside the Constitution. In the meantime, any other departures from the Constitution by actors exercising authority under the Constitution are simply unconstitutional.

It follows that the true problem of constitutional law these days reduces to this: A fair amount of current constitutional practice cannot be reconciled with the original meaning of the Constitution and we tend to treat judicial decisions that depart from the Constitution as nonetheless authoritative, at least sometimes—a practice itself inconsistent with the original meaning of the Constitution.

50. Cf. Marbury, 5 U.S. at 177 (noting that for courts to defer to errant misinterpretation of the Constitution by subordinate authority under the Constitution would “overthrow in fact what was established in theory”).

51. The Federalist No. 78 (Alexander Hamilton), supra note 48, at 440-41 (“Though I trust the friends of the proposed Constitution will never concur with its enemies in questioning that fundamental principle of republican government which admits the right of the people to alter or abolish the established Constitution whenever they find it inconsistent with their happiness; yet it is not to be inferred from this principle that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing Constitution, would, on that account, be justifiable in a violation of those provisions; . . . . Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually . . . .” (citations omitted)).

52. For an extended argument that this is the meaning of Marbury, with many notable applications that challenge current practice, see Paulsen, The Irrepressible Myth of Marbury, supra note 23.

53. I have developed this theme in other work. See, e.g., id. at 2731-24; Michael Stokes Paulsen, Nixon Now: The Courts and the Presidency after Twenty-Five Years, 83 Minn. L. Rev. 1337, 1349-51 (1999) (arguing that the notion of judicial supremacy is inconsistent with all evidence of the original meaning of the Constitution).
But there is a straightforward low-theory answer to this riddle, too. When a prior interpretation of the Constitution, by any branch of government, including the courts, has departed from the meaning of the Constitution, one must always prefer—if one is truly interpreting and applying the Constitution—the objective, original linguistic meaning of the Constitution's words and phrases to past departures from that meaning.54

That is a bracing proposition, to be sure, because it is so much at variance with our commonly accepted constitutional culture as taught in American law schools for generations. Yet it is the only proposition that is consistent with the original meaning of the Constitution itself.55 A principled originalist must reject strong theories of stare decisis. Prior interpretations at variance with the Constitution are unconstitutional. To follow them, rather than the Constitution, is to depart from interpreting and applying the Constitution and to engage in some other political exercise.

This proposition is beyond the pale to most academic constitutional scholars today—so disruptive of their worldview and training as to be almost incapable of consideration. Instead, the dominant impulse is that the Court's decisions must be explained and justified (at least most of them). The body of decisions, not the Constitution, is the immovable object. And so the desperate need for new, creative high theory in constitutional law. In part because reconciling some of the cases to the Constitution's original linguistic meaning is not possible; in part because today's scholars often prefer the results of the decisions to the original meaning of the Constitution; and in part because it is thought off-the-table to say that, well, some of the judicial decisions are simply wrong and should not be followed, we are drowning in constitutional theory. Jed Rubenfeld's *Revolution by Judiciary* stands firmly in that genre.

But pull back the curtain and the candid observer must concede that there really is no Wizard with magical powers. There is only the Constitution and its meaning; a set of decisions and practices that does not perfectly square with it; and a reluctance to face that reality and its implications. We are not in Kansas anymore. We can either return home—which means leaving some of the magic behind—or we can continue to live in this somewhat different world, with all

---

54. For a fuller development of this proposition, see Paulsen, *The Irrepressible Myth of Marbury*, supra note 23, at 2731-34.

55. See Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1570-82 (2000) (arguing that stare decisis, in the sense of deliberate adherence to erroneous prior constitutional decisions, is clearly not constitutionally required and cannot be justified on originalist grounds by Article III's assignment of the judicial power to the courts).
its beautiful, imaginative constructs. But if we wish to live in Oz, we cannot keep pretending that it is the Constitution we are expounding.

Michael Stokes Paulsen is McKnight Presidential Professor of Law and Public Policy, Briggs and Morgan Professor of Law, and Associate Dean for Research and Scholarship, University of Minnesota.
H. JEFFERSON POWELL

Grand Visions in an Age of Conflict

INTRODUCTION

Last spring Professor Laurence H. Tribe commented that federal constitutional law is in a state of intellectual disarray: "[I]n area after area, we find ourselves at a fork in the road—a point at which it’s fair to say things could go in any of several directions" and we have "little common ground from which to build agreement."¹ No doubt fortuitously, two of our most formidable constitutional scholars, Akhil R. Amar and Jed Rubenfeld, have recently published systematic studies that implicitly challenge Tribe’s conclusion that “ours [is] a peculiarly bad time to be going out on a limb to propound a Grand Unified Theory—or anything close."² With admirable boldness, Professors Amar and Rubenfeld have done precisely that—gone out on a limb, or rather two very different limbs, to propound their own accounts of what American constitutionalism is, or should be. Amar’s America’s Constitution and Rubenfeld’s Revolution by Judiciary are alike in that each is its author’s synthesis of a remarkable effort, sustained over a number of years, to develop a comprehensive vision of the Constitution. We have much to learn from their successes as well as from the points at which they are, I believe, in error.

I. AMAR’S CONSTITUTION

A. The Constitution of Text and Structure

Readers familiar with the prolific work of Akhil Amar will find in America’s Constitution a fitting capstone to two decades of erudite and wide-ranging

² Id. at 293 (emphasis omitted).
scholarship. From his first major article, *Of Sovereignty and Federalism* (published in 1987), Amar’s work has been characterized by an unusually close attention to the text of the Constitution, to the structure of the instrument as a document, and to the Federal Republic as a system of government. An intense interest in history, backed up by exhaustive research, and an admirable willingness to think outside the confines of what passes in constitutional law for ordinary science have also been salient elements in the Amar oeuvre. His lively mind and facile pen have made his work unavoidable for anyone interested in constitutional law, including many aspects of the law of the Constitution, such as criminal procedure, that are now treated by almost everyone else as separate areas of research and writing.

*America’s Constitution* crystallizes both Amar’s general approach and his substantive themes. He comments almost at the beginning that his goal is “to reacquaint twenty-first-century Americans with the written Constitution” rather than to contribute to the endless discussion of “legal dictums and doctrines that appear nowhere in the Constitution itself.” Almost at the end of the book’s text, he comments that he “ha[s] tried to give the reader facts and figures—lots of them,” and he certainly cannot be faulted on either score. *America’s Constitution* is not exactly a line by line review of the instrument’s provisions, but I know of no other book in many years as comprehensive in its treatment of all parts of the constitutional text. It is, furthermore, full of historical information, some of it likely to surprise even the most informed reader, and all of it arranged so as to lure the reader on rather than deter her.

Amar’s interest in structural matters bears fruit repeatedly in discussions of the origins of constitutional language and of American governmental practice that are of the greatest interest. I will not stop to give details, but Amar’s treatment of the pervasive role of slavery in the Constitution of 1787, and (on that topic and others) his industry in asking—and answering—questions about the practical consequences of constitutional arrangements are excellent examples of how fascinating his work can be. Furthermore, Amar’s zest for this sort of fine-grained and imaginative consideration of structural arrangements is infectious: When he remarks at the end that he thinks a “well-

---

5. Id. at 469.
6. For specific examples, see his discussion of the 1787 Constitution’s attribution to slave states of representation based on a formula counting each slave as three-fifths of a free inhabitant, id. at 88-98, his shrewd insight into the historical significance of the Necessary and Proper Clause’s wording for separation of powers, id. at 110-13, and his observations about the Twelfth Amendment, id at 149-52, 336-47.

Imaged with the Permission of Yale Law Journal
chosen number can be every bit as interesting as a well-chosen quote,” I suspect that a great many readers will feel, as I did, that Amar chose well.

B. The Secondary Role of History

*America’s Constitution* is a learned and in some respects even a brilliant book, but it is also deeply problematic. Perhaps the briefest way to identify my concern is that I fear this is a book, and maybe an author, unsure of what the subject under discussion really is. The result, I think, is that in too many places the reader not caught up entirely by Professor Amar’s facts and figures may find herself unable to say precisely what sort of conclusions Amar is offering us.

The full title of Amar’s book is *America’s Constitution: A Biography*, and one might expect the final noun to define, even if metaphorically, the book’s genre. The 1787 text that we refer to as the (original) Constitution has a history in several senses: It is a historical document and an enormous amount can and has been said about its antecedents, the history of its drafting by the Philadelphia Framers, and the debates and political maneuvering by which it came to be accepted as the constitutive legal instrument of the American Republic. Similar enquiries can be made about the later bits of text that together with the 1787 document make up the Constitution to be found in casebooks on federal constitutional law. It would make obvious if nonliteral sense to term a historical study of some aspect of these matters “a biography.” It would be clear the author’s claims were assertions of political history (i.e., this is how Alexander Hamilton and company turned a clear Anti-Federalist majority into the losing side on the issue of ratification in New York) or intellectual history (i.e., this is what Alexander Hamilton thought the term “direct Taxes” meant). Amar gives us a considerable amount of detail about the politics behind various constitutional provisions and the constitutional opinions of various historical actors. Furthermore, in the last paragraph of the book he claims that his goal has been “to understand precisely what the document did and did not mean to those who enacted and amended it,” suggesting that he is indeed writing intellectual history. However, while it is dangerous to reject a scholar’s own explanation of his methods and goals, I believe that this statement is in reality erroneous: it is, as I shall argue, quite contrary to Amar’s actual practices in justifying claims about constitutional

---

7. *Id.* at 469.

8. *Id.* at 477.
meaning in *America's Constitution*. Despite all its historical detail, political and intellectual, *America's Constitution* is not, in the end, a book of history.

Consider, as an example, the lengthy discussion of the Constitution's Preamble to which Amar devotes the first chapter of *America's Constitution*. As in many other chapters, Amar uses his focus on a particular constitutional provision as the vehicle for a discussion of other, more broad-ranging themes. Chapter one returns to questions Amar has thought about for many years: the nature of the Union and the locus of sovereignty within that Union. Amar quickly and correctly reminds the reader that debate over such matters loomed large in the antebellum history of the United States. Hamiltonians and Jeffersonians fought over the scope of congressional power, Webster and Story squared off against the nullifiers, and Unionists and secessionists alike justified the Civil War—all in terms of an interminable debate over whether the states or the Union was originally sovereign, what the various events since independence might have done to the original arrangements, and (finally) whether individual states had the legal right to leave the Union.

There are many historical enquiries one can make into this history of debate, but to be historical enquiries they must address issues about what the individuals and groups involved meant or did, or about what the ordinary person of the time would have thought about the matter (often a hard question to answer with confidence, but not in its nature ahistorical). But Amar's real interest lies not in the history of antebellum opinion but in what he evidently thinks of as the answer to a normative or legal question. Speaking in his own voice, he tells us that "both before and after ratifying the Articles [of Confederation], the people of each state—and not the people of America as a whole—were sovereign"; 

9. Id. at 26.

"[a]lthough states would enter the Constitution as true sovereigns, they would not remain so after [a] ratification" that "would itself end each state's sovereign status and would prohibit future unilateral secession"; 

10. Id. at 33.

"it is an error to claim "that none of the thirteen original states had ever been truly sovereign."

11. Id. at 39.

 Each of these assertions was entirely familiar to antebellum constitutionalists. Thomas Jefferson and Jefferson Davis agreed with the first and last while denying the second; John Jay and Abraham Lincoln held the opposite view . . . and Professor Amar is willing to explain to us where each was wrong and each right, and why.

12. I mention Jay only because his discussion of the locus-of-sovereignty question in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which Amar never discusses on this issue, is an especially clear statement of the nationalist position at a point in time immediately after
It is rather fun to see a twenty-first-century scholar answer nineteenth-century questions and chastise nineteenth-century statesmen, but if this were meant to be history, the attempt to do so would be a category error: The views of historical figures on a question of constitutional interpretation in dispute among them cannot be right or wrong when the question at hand is what the historical meaning of the document was. They are witnesses to the question of historical meaning, whereas the issue of who was right and who wrong is a normative matter of law or politics or morality. Unless one adopts a strongly originalist approach to constitutional interpretation, the attempt to adjudicate between the opinions held by these historical figures mixes intellectual apples and oranges. The difficulty is not ameliorated even if we shift our attention to what Amar later calls "the meaning inherent in the basic acts of constitution." It is true that President Lincoln thought (and Professor Amar believes) that the inherent meaning of the ratification process of 1787-1788 entailed the merger of the states' individual sovereignties into an indivisible nation, but President Jefferson and many others have thought that inherent meaning was quite the opposite. Once again, history cannot prove the correct answer to the normative question either way, and assertions about the normative answer are not history.

I slipped in a qualification in the middle of the preceding paragraph. It is perfectly sensible to argue, for example, that the historical evidence shows that most Founding-era Americans thought Jefferson wrong and the antebellum nationalists right on the locus of sovereignty after ratification—though I personally doubt that the evidence can be marshaled either way. If one stipulates a strictly originalist view of constitutional interpretation (one formulation: the normative meaning of a constitutional provision is that which most competent interpreters would have thought it meant when it was made law), then a convincing historical argument on that question of intellectual

---

13. AMAR, supra note 4, at 470.

14. While the question of secession is, I assume, permanently off the table, one need only read Justice Clarence Thomas’s opinion for four justices in U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 845 (1995) (Thomas, J., dissenting), to see that Jefferson’s understanding of 1787-1788 as leaving the states’ individual sovereignties intact at a basic level is alive and well.

15. There have been many attempts to fine-tune a definition of constitutional originalism. I am employing the one that seems to me the most plausible, but resolving this definitional matter is irrelevant for present purposes for, as stated in the text, Professor Amar is not a strict originalist.

I am indebted to my friend and colleague Walter Dellinger for the adjective. Dellinger has long argued that the existence of a written Constitution necessarily makes a moderate
history would answer the normative question of constitutional meaning as well.

Professor Amar, however, is clearly not a strict originalist. Proofs of this in *America's Constitution* are legion: The Commerce Clause, for example, may provide a constitutional basis for federal regulation of “all forms of intercourse in the affairs of life, whether or not narrowly economic . . . if a given problem genuinely spill[s] across state or national lines”;\(^\text{16}\) Article V may not be the exclusive means of amending the Constitution;\(^\text{17}\) and there may be Ninth Amendment rights that “might not be inferable from the Constitution’s text and structure but that nevertheless might deserve constitutional status.”\(^\text{18}\)

Amar cannot explain the use of history and law in *America's Constitution* on strict-originalist grounds because he does not practice that approach to constitutional interpretation.

Professor Amar’s conclusions about sovereignty are not historical assertions, nor are they propositions of strict-originalist constitutional law. Still less are they presented as interpretations of standard legal doctrine, the usual grist for constitutional mills but an enterprise that (as we have seen) Amar expressly puts to one side in *America's Constitution*. In form and logic, they bear little resemblance to the sorts of empirical, economic, and institutional enquiries that interest most contemporary political scientists. Here, as at many other points in the book, Amar’s answers to what “the Constitution” means simply do not speak to the sorts of questions historians, lawyers, and political scientists raise. So exactly what kind of answers is Professor Amar giving us—and to what questions?\(^\text{19}\)

---

16. *AMAR*, *supra* note 4, at 107-08.
17. *Id.* at 295-99. Amar cites only James Wilson from the Founding era as possibly supporting this idea, and his earlier scholarship to the same effect points to little else relevant to an originalist. *See, e.g.*, Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994). Here, as elsewhere when he diverges radically from the more usual views, in *America's Constitution* Amar tends to avoid direct statements and to present his argument as a matter of interpretive possibility: “shouldn’t Article V . . . be read as nonexclusive?” *AMAR, supra* note 4, at 297. My point is that Amar has no a priori objection to accepting as correct constitutional arguments that cannot be defended on strict-originalist grounds.
18. *AMAR, supra* note 4, at 328.
19. Just to be clear: I am not criticizing Amar in the least for his decision not to load the text down with “quibbling qualifiers.” *AMAR, supra* note 4, at 470. He is quite clear from the beginning that *America's Constitution* is “an opinionated biography.” *Id.* at xii. The problem
C. The Textualism of Real Meaning

The answer to our conundrum, according to Professor Amar himself, is that he is “a constitutional textualist”. He is not, therefore, so much interested in what any individual, whether founder or twenty-first-century American, thought or thinks about the meaning of the written Constitution, but rather in what the Constitution means in itself. At the beginning of his discussion of the questions of national unity and state sovereignty, Amar comments that “[i]n word and deed, the Constitution yielded its own answers to these epic questions.” What Amar seeks to explain, then, is the Constitution’s own resolution of the issues that divided Hamilton and Jefferson, Lincoln and Davis. His license to adjudicate between these historical figures—to tell us when Lincoln was right and Davis wrong—stems from the Constitution itself, which has its own intrinsic meaning that is quite distinct from the views of even its most distinguished makers and interpreters. From this perspective, furthermore, concerned as it is with the written Constitution rather than with matters that “appear nowhere in the Constitution itself,” issues such as whether most people in 1788 or 1868 would have agreed with Amar’s conclusions are secondary.

Amar is not, of course, a narrow literalist—recall his invocation of “the meaning inherent in the basic acts of constitution.” He writes: “I myself do not believe that all of American constitutionalism can be deduced simply from the document.” A sophisticated textualism of the sort he intends to employ must take account of “both constitutional politics (how did the text come to be enacted?) and constitutional law (what did the enacted text mean?).” To do so fully, Amar believes, requires one to transgress the disciplinary boundaries that, he rather clearly thinks, handicap the work of most other scholars. “Law, history, and political science—these three disciplines form the legs of the stool on which this book rests.” Amar’s ambition is “to synthesize” these three disciplines in writing his account of the Constitution since “each discipline in

with the locus-of-soverainty discussion in chapter one, a problem that I believe appears recurrently in America’s Constitution, is that it is unclear what Amar is giving his opinions about.

20. Id. at 470.
21. Id. at 21.
22. Id. at xi.
23. Id. at 470.
24. Id. at 477.
25. Id. at 469.
26. Id. at 467.
isolation may be faulted\textsuperscript{27}: The lawyer's attention to the logic and normative implications of the text's provisions, the historian's knowledge of the conflicts that shaped the text, and the political scientist's interest in how political structures interact are all necessary if we are to understand in an appropriately sophisticated way the meaning of the written Constitution.

Amar is not, furthermore, an exegete of isolated clauses. Despite his deliberate focus at many points on the meaning of particular constitutional terms, Amar's practice of constitutional textualism is an enquiry into the meaning of the Constitution—including all of its amendments—as an integrated and coherent whole. Amar's textualism is not a clause-bound interpretivism but a broad enquiry into how the "various provisions . . . intermesh to form larger patterns of meaning and structures of decision making.\textsuperscript{28} Amar sometimes refers to "the larger pattern\textsuperscript{29} evidenced by distinct provisions and the "general . . . vision inform[ing] much" of the Constitution's "overall structure and many of its specific words.\textsuperscript{30} He is intensely interested in what he sees as the "multiple textual harmonies at play\textsuperscript{31} among different provisions—including provisions written and adopted at different times—and in the "keys and cues" to be found in the details of "the Founding act and text,\textsuperscript{32} which, in his judgment, reveal the underlying meaning of the Constitution viewed as a unified whole. The underlying assumption in all this, of course, is that the Constitution in fact has a coherent overall meaning, and that its individual provisions, including provisions enacted at widely separated points in time, can be put side by side to yield meanings that separately they would not have. But this is the theory: How does Amar's textualism work in practice?

Before answering that question, I need to be clear about a few matters over which Professor Amar and I have no dispute. No one doubts that specific constitutional arrangements (the structuring of the legislative process in Article I, for example) were intended to produce coherent, or at least workable, governmental procedures.\textsuperscript{33} It makes good historical sense to attempt to discern how the makers of a particular constitutional arrangement meant it to work, it is worthy political science to examine how the Constitution's

\textsuperscript{27} Id. at 466-67.
\textsuperscript{28} Id. at xii.
\textsuperscript{29} Id. at 301.
\textsuperscript{30} Id. at 51.
\textsuperscript{31} Id. at 326.
\textsuperscript{32} Id. at 472 n.*.
\textsuperscript{33} Equally, however, no one believes that the Constitution's various makers always succeeded in doing so—no one including Professor Amar. His unhappiness with the Article V amendment process is especially striking.
GRAND VISIONS IN AN AGE OF CONFLICT

governmental procedures work and have worked in practice, and it is one of
the lawyer's quintessential tasks to harmonize clashing or discordant
provisions in a binding legal instrument. But Professor Amar's theoretical
"aspiration is to holism . . . to unite law, history, and political science [and]
to view the document over its entire life span." His disciplinary tools are
meant to serve a task—the search for the actual meaning of the Constitution—
that transcends them all. As I shall suggest, this search leads to less obvious,
and less obviously correct, results than one might expect. I have space to deal at
length with only one example.

Amar criticizes "modern observers" for slighting "the significance of
geographic/geostrategic considerations that loomed large in the Federalist
vision" and regards America's Constitution as a creative and even novel
correction to this error. The implicit but unmistakable claim to novelty is
overstated: It is hard to imagine that many scholars would disagree with the
proposition that the Founders were concerned about creating a federal
government capable of addressing the foreign policy and national security
needs of the Republic. However, it is certainly the case that important aspects
of Professor Amar's presentation of this commonplace are original. In his view,
for example, the Founders' "geostrategic vision of union [was] distilled in the
Preamble," by which he means that the Preamble's words reveal that the
Constitution as a whole has as its inherent purpose the creation of "an island
nation . . . where foreign powers would be far removed and where internal
borders would be demilitarized." This is a singular assertion: There is, as far
as America's Constitution shows or I am aware, no evidence that anyone in the
Founding era thought that the Preamble did any such thing other than in the
general and almost trivial sense that it was a statement of the Constitution's
goals.

There is a similar problem with Professor Amar's "distinctive claim[]" that
the Preamble's "proper place [was] the Founders' foundation" and that other

34. Id. at 469.
35. Id. at 472-73.
36. In fact, the scholarly literature is full of attention to the role of what Amar terms
"geostrategy" in the making and early interpretation of the Constitution. For a provocative
recent example, see Robert J. Delahunty, Structuralism and the War Powers: The Army, Navy
and Militia Clauses, 19 GA. ST. U. L. REV. 1021 (2003). Our overall understanding of the role
such considerations play in the making of a constitutional order has been enormously
enriched by PHILIP BOBBIT, THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF
HISTORY (2002). Professor Amar mentions the work of neither Delahunty nor Bobbitt.
37. AMAR, supra note 4, at 106.
38. Id. at 44.

Imaged with the Permission of Yale Law Journal
scholars have ignored this fact. The claim is distinctive but unpersuasive. The Preamble's language was cast in the common idiom of American political discourse and in many respects ("Justice ... common defense ... general Welfare") that of all Western political discourse. On occasion, to be sure, constitutionalists and politicians have quoted its particular phrases but the scarcity of such usages is unsurprising: The common law treated preambular material in a legal instrument as without direct legal force, and for that and other reasons the Preamble has understandably played little role in discussion of a document universally treated as law.40 Amar's claim that the particular use of this language in the Preamble was of great importance historically, or that it sheds much light on the legal interpretation of the rest of the Constitution or on the institutional dynamics of our political system is, at best, unproven in America's Constitution.

Given Professor Amar's frequent stress on the importance of verbal parallels, it is appropriate to examine a specific instance of the manner in which he attempts to use such parallels to show the importance of the Preamble. We are told that Article I, Section 8 begins with words that show that the Preamble's "geostrategic vision" informs the Constitution's grant of powers to Congress: "section 8 began by echoing the Preamble almost verbatim, in language affirming the need to 'Provide for the common Defence and general Welfare.'"41 The "echo" is, however, no more exact than the "[s]imilar phraseology" which, as Amar properly acknowledges at once, is found in Article VIII of the Articles of Confederation. Indeed, the language of section 8 ("provide for the common Defence and general Welfare") seems to me closer as a verbal matter to that of the Articles ("incurred for the common defense or general welfare") than it is to that of the Preamble, which breaks the two nouns into separate infinitive phrases. Why then doesn't Section 8 show that it

39. Id. at 471.
40. In 1791, the first Federal Attorney General, Edmund Randolph, rejected reliance on the Preamble in constitutional argument in advising President Washington that the national bank bill was invalid:

"The Preamble to the Constitution has also been relied on as a source of power. To this, it will be here remarked, once for all, that the Preamble if it be operative is a full constitution of itself, and the body of the Constitution is useless; but that it is declarative only of the views of the convention, which they supposed would be best fulfilled by the powers delineated; and that such is the legitimate nature of preambles."

41. AMAR, supra note 4, at 106.
embodies the geostrategic vision distilled in the Articles, the language of which it echoes almost verbatim? The answer, one fears, is that America's Constitution posits a sharp contrast between the Articles and the Constitution in this and other matters, and that the inconvenient parallel in word choice between Section 8 and the Articles does not serve to advance this contrast. I agree entirely with any reader inclined to dismiss all of this as insignificant verbal quibbling—but Professor Amar cannot rightly do so because he puts great weight on such "textual harmonies."

If this were an isolated example of how Amar's textualism works, one might properly set it aside as a slip, but the passage is, I believe, exemplary of how his textualism often plays out in practice. I will give a few other examples briefly, but to gauge the fairness of my criticism the reader must read America's Constitution itself. Professor Amar assures us that the Constitution rests on "a clear commitment to people over property." Perhaps, but the observation that the expression "private property" never appears in the 1787 document and that the noun's only occurrence refers to government property4 does little to advance the claim; slavery, the importance of which to the 1787 Constitution Amar details at length, never appears as a verbal matter either. Although Article I "borrow[ed] the name of confederate America's central organ—'Congress'—it promised a quite different institution," in part (we are told) by expressly granting to the constitutional Congress "legislative Powers" and referring to its power to make "Laws";43 true enough about the Constitution's terminology, but the second provision of the Articles referred to "every power, jurisdiction, and right . . . delegated to" the Confederation Congress, and that body designated its own enactments as "ordinances." Do the verbal differences mean that much?44 That the Second, Fourth, and Seventh Amendments "aimed to protect popular rights [as opposed to sheerly individual ones] via institutions (the militia and the jury) that would embody 'the people' themselves" is indicated, Amar believes, by the occurrence of "security" in the Second, "secure" in the Fourth, and "securities" in an early draft of the Seventh

42. Id. at 17.
43. Id. at 57.
44. The first definition of "ordinance" in Dr. Johnson's dictionary is "Law, rule, precept." The Federalist describes the enactments of the Confederation Congress as "laws" and asserts, in the course of minimizing the difference between that body and the legislature proposed by the 1787 instrument, that the old Congress "have as compleat authority" as the new Congress would to make its pronouncements legally binding. See, e.g., THE FEDERALIST NO. 21 (Alexander Hamilton), Nos. 37, 45 (James Madison). The point is not that Amar is wrong to see a significant difference between the two bodies, but rather that his verbal observations, here as elsewhere, often do little to advance his conclusions.
Amendment. America's Constitution abounds in this type of ingenious but unconvincing exegesis of the Constitution's wording.

D. An Underlying Problem of Method?

When an eminent constitutionalist writes that the 1787 document's concern with protecting the territorial integrity of the United States "informed . . . its pointed Article VI language describing the Constitution as the law of 'the Land'" it is clear that something has gone wrong. How could such a learned and industrious scholar make such a claim, or the other, similarly remarkable assertions that abound in America's Constitution? I believe that at least part of the answer lies in Professor Amar's desire to craft a new and more sophisticated textualism employing the three disciplines of history, law, and political science. His goal, of course, is to reach a richer understanding of the text by melding these disciplines. All too often, unfortunately, the result is that his textualism escapes the constraints of all three, and Amar offers us readings of the text that are indefensible as history, law, or political science.

As a historical matter, the Supremacy Clause of Article VI was obviously using the familiar language of the Magna Carta. No competent lawyer would argue in a brief or opinion that the reference to "the land" in the clause sheds any light on the powers or responsibilities of the federal government (and certainly not any reference to protecting the territorial jurisdiction of the Republic), and a political scientist would be interested in the role of federal law

45. AMAR, supra note 4, at 326-27. Professor Amar points out, fairly enough, that the Second and Fourth Amendments refer to "the right of the people" and that Madison's draft of what became the Seventh has the same expression with "rights" in the plural. The problem—besides the odd reliance on a draft that was very substantially modified before it was proposed and adopted—is, as with his use of the Preamble, that these phrases are the common coin of Founding-era political discussion. Without more, their use proves only the truism that the Bill of Rights is cast in the language of the era that created it. The use of words at various points with the common root "secure" is, I think, of no interpretive significance whatever.

46. Attorney General Randolph, whom I quoted earlier, pointed out in 1791 the ironic error in putting this sort of weight on the precise wording of the constitutional text:

"Whosoever will attentively inspect the Constitution will readily perceive the force of what is expressed in the letter of the convention, 'That the Constitution was the result of a spirit of amity and mutual deference & concession.' To argue, then, from its style or arrangement, as being logically exact, is perhaps a scheme of reasoning not absolutely precise."

Dellinger & Powell, supra note 40, at 128 (quoting Randolph's unpublished opinion). Over-precision in constitutional textualism, in other words, can lead to lead to legal imprecision!

47. AMAR, supra note 4, at 51.
supremacy in enabling the Republic to safeguard the interests of the whole, not in what amounts to a pun. Other than as a joke—which he plainly does not intend it to be—Amar’s reference to the language of the Supremacy Clause fits into no obvious area of discourse.

_America’s Constitution_ would have been a more persuasive book if Amar had actually written the work that his words occasionally suggest—an encyclopedic examination of the text’s original meaning informed by his deep interest in institutional dynamics. But that would have been merely to write history, and Amar’s deep ambition goes beyond history or law or political science. The 1787 document, as he so often reminds the reader, begins with the words “We the People,” and Amar the textualist takes that bit of text with alarming seriousness. In _America’s Constitution_, the real story is not his often illuminating discussions of the political struggles that lay behind the various provisions, enacted at various times, which we collectively refer to as the Constitution. It is instead the story of a text that has a unity transcending the limits of history and chronology, a story in which the real actor, the actual creator of the Constitution, is a People whose identity is not bound by time. It is an imaginative story, told well, but the reader should take it _cum grano salis._

II. RUBENFELD’S REVOLUTION

A. The Form of the Argument

In 1989 a young lawyer then in private practice published a remarkable article entitled _The Right of Privacy_. _Roe v. Wade_ has had many defenders, but those who are academic lawyers have often acted as such with an uneasy conscience, fearing that the great John Hart Ely was right in rejecting the decision as one that “is _not_ constitutional law and gives almost no sense of an obligation to try to be.” Indeed it is arguable, as Ely himself feared, that the

48. Professor Amar’s search for echoes and harmonies in the language of constitutional provisions ranges forward and backward in time: He is as critical of “historians of the Founding” for “often fail[ing] to show much interest in the intense secession debate that occurred many decades later,” as he is of “Civil War historians [who] are not always fluent in the facts of the Founding.” _Id._ at 472 n.*.

49. See, e.g., _id._ at 10 (“The people had taken center stage and enacted their own supreme law” in 1788); _id._ at 468 (“We the People eventually abolished slavery and promised equal rights to blacks and, later, women”).


desperate wish to protect the outcome in *Roe* has led many of its proponents essentially to abandon the effort to distinguish constitutional decisions by the Supreme Court from political decisionmaking by Congress or the state legislatures.\(^5\) Jed Rubenfeld, on the other hand, made it clear in 1989, once and for all, that he will have none of that. The Court got the law of the Constitution right in *Roe* in his view, and for that reason—and only so—the Court should adhere to the decision. Rubenfeld’s article was the single most sustained and powerful legal justification for *Roe* that had ever been written, and his work since then has combined a forthright adherence as a general matter to the Court’s “liberal” decisions with an unrelenting insistence that judicial review is legitimate only as the exercise of the power to interpret and apply law and not as a simple form of political choice. In *Revolution by Judiciary*, Rubenfeld has given us his clearest account to date of how the Court ought to decide constitutional cases, and how in doing so it is interpreting the Constitution rather than imposing the political preferences of the Justices.

*Revolution by Judiciary* divides into three parts of roughly the same length. The third and final section is an incisive critique of the Rehnquist Court’s constitutional legacy, which Rubenfeld identifies as the pursuit of an unacknowledged and indefensible agenda of opposition to the anti-discrimination principles that the Court and Congress appropriately enforced in the past.\(^5\) Important and interesting as his arguments on that score are,\(^4\) I believe that Rubenfeld’s fundamental contribution to constitutional law lies in the discussion, mostly though not entirely in the book’s first section, of how constitutional decisions are and ought to be reached. In this Commentary I shall focus my attention on that discussion, although I shall conclude my consideration of *Revolution by Judiciary* with some comments on the arguments in the second section of Rubenfeld’s book, which offers a theory of why constitutional law has normative force.

### B. The Missing Law of Constitutional Interpretation

There are two background presuppositions to the argument of *Revolution by Judiciary*. The first is that the history of constitutional law is one of “radical

---


\(^4\) Among many possible examples, see his excellent, sharply critical discussion of the Court’s adoption of strict scrutiny as the proper form of review for race-based affirmative action. *Id.* at 195-201.
judicial reinterpretation" of the Constitution: the repeated episodes in which the Supreme Court has rejected established understandings of the Constitution and replaced them with novel principles and conclusions of its own devising. 55 The Court and its defenders often explain such radical reinterpretation with a "rhetoric of restoration" (what seems novel is in fact the recovery of an earlier constitutional vision that has been lost) or the claim that all that has changed are the circumstances of decision and not the constitutional principles the Court employs. In Professor Rubenfeld's opinion these are charades that serve only to obscure the truth that in such situations the Court is "creat[ing] . . . genuinely innovative constitutional law — decisions that break profoundly from both past understandings and present doctrines."56 Brown v. Board of Education didn't recover the lost truth about the meaning of the Equal Protection Clause: It introduced a new and creative understanding of equal protection into American constitutional law.

Rubenfeld's second presupposition is that American constitutional law "has no account of radical reinterpretation." He asks, "What, if anything, makes it legitimate for judges to re-read the Constitution radically . . . . What, if anything, guides or structures this power? What, if anything, limits it?"57 Even worse, if possible, lawyers and scholars cannot explain how judges are to go about making constitutional decisions even when they intend no revolutionary change. "There is no law of constitutional interpretation"; constitutional law thus "has nearly nothing to say about the connection between the Constitution and the enormous web of doctrine spun judicially around that document."58 This poses no problem, to be sure, for a self-proclaimed pragmatist like Judge Richard Posner who sees constitutional "law" as the creation of outcomes "well adapted to the country's needs" without regard to any duty to "abide by constitutional or statutory text."59 One takes the Posnerian route, however, only by giving up on the traditional understanding that constitutional law is

55. "Radical reinterpretation is, precisely, a new interpretation of the basic principles or purposes behind a constitutional provision. Through this act of reinterpretation, new constitutional purposes or principles replace the original ones." Id. at 9.
56. Id. at 8-9. "Constitutional law has utterly rejected originalism" as the limiting criterion for judicial decisionmaking. Id. at 65. I will note below the sense in which one could view Rubenfeld as a kind of originalist.
57. Id. at 3.
58. Id. at 5.
59. Id. at 10. Rubenfeld is quoting Judge Posner's denial of the existence of such a duty in Richard A. Posner, Pragmatism Versus Purposivism in First Amendment Analysis, 54 STAN. L. REV. 737, 739 (2002), surely one of the most remarkable statements ever to be made by a sitting federal judge. Rubenfeld's response to Posner is, I believe, utterly convincing. See Jed Rubenfeld, A Reply to Posner, 54 STAN. L. REV. 753, 767 (2002).
authoritative precisely because the judges who make it see their “first duty” to be “to abide by the Constitution: to deliver a just reading of that document according to interpretive criteria.”\textsuperscript{60} Pragmatism in Judge Posner’s sense is simply the abandonment of law altogether, and that Rubenfeld is unwilling to do.

Fortunately for those of us less intrepid than Judge Posner, according to Revolution by Judiciary we have no need to give up on constitutional law as law in the sense I have just quoted. Despite the existence of radical change in constitutional law, and the nonexistence of a shared explicit understanding about how to do constitutional law properly, “[t]he extraordinary fact” is that virtually all of constitutional law—including almost all the many instances in which the disparate and often political “approaches, motives, and biases” of the justices have been on display—has been worked out “within a determinate interpretive structure.”\textsuperscript{61} Although neither the courts nor anyone else has been consciously working within that structure, Rubenfeld believes that he can show the existence of an internal logic to constitutional decisionmaking, one that is continuously at work both in decisions about the Constitution’s grants of power and in ones concerning individual rights. The first part of the book is a summary and restatement of the work Rubenfeld has long been doing in uncovering and explaining what his subtitle calls “the structure of American constitutional law.”

\textbf{C. Does Constitutional Law Have an Implicit Logic?}

The key to understanding the implicit logic of constitutional law lies in what Professor Rubenfeld calls the “impossibly simple distinction”\textsuperscript{62} between the historical understanding of what a constitutional provision addresses and historical understandings about those matters that the provision does not address.

Let us say, as a shorthand, that a prohibitory [provision] \textit{applies} to those actions it prohibits, and that it does \textit{not apply} to those actions it does not prohibit. So I will call specific understandings of what a constitutional right prohibits Application Understandings, and of what it does not prohibit, No-Application Understandings.\ldots

Similarly, with respect to constitutional power-granting provisions (such as the commerce clause), which authorize certain actors to take

\textsuperscript{60} RUBENFELD, supra note 53, at 10.
\textsuperscript{61} Id. at 21.
\textsuperscript{62} Id. at 13.
certain actions, I [distinguish] specific understandings of what such a provision authorizes [from] specific understandings of what such a provision does not authorize.63

Rubenfeld's strong claim is that constitutional law has almost invariably respected the historical understanding of those issues to which a constitutional provision applies—the specific actions the Free Speech Clause historically was thought to forbid or the specific regulations the Commerce Clause historically was thought to authorize. With respect to historical understandings about the concerns a provision addresses, even the most radical judicial reinterpretations have preserved the historical understanding of the text's applications. Furthermore, the "foundational or core applications"64 of a provision—its central or most universally shared "Application Understandings"—have acted not only to anchor radical reinterpretation in a faithfulness to the text, but also to "serve as paradigm cases [that] provide the reference points for the construction of doctrinal frameworks."65 In other words, judges use the historical understanding about the issues a provision addresses to ground their reasoning in applying the provision to specific controversies. These paradigm cases thus define the conceptual universe within which constitutional law is debated and made. "The foundational paradigm cases are preinterpretive. They precede interpretation; they define its limits and its objects."66

But how then does one explain the demonstrable fact that the Supreme Court has again and again declared a principle to be the law of the Constitution when the makers and early interpreters of the provision in question would have been astounded—or shocked—to hear as much? Rubenfeld's answer is that while the Court has almost always observed Application Understandings, it has felt entirely free to reject other historical understandings addressing matters as to which the provision was originally thought to have no application. The Free Speech Clause was historically understood to prohibit government censorship and prosecutions for seditious libel, and as Application Understandings those twin prohibitions are the paradigm cases which subsequent free speech doctrine has respected and revolved around. In contrast, the Free Speech Clause was not historically thought to apply to prosecutions for blasphemy,

63. Id. at 14. The matter is complicated by the fact that a provision that is a grant of exclusive power to, say, Congress, has a prohibitory function as well: It forbids other actors such as the President from wielding what is put exclusively within Congress's sphere. Rubenfeld carefully works out this point. Id. at 48-49.
64. Id. at 14.
65. Id. at 15-16.
66. Id. at 132.
but the Court long ago repudiated that No Application Understanding as a
guide to the proper interpretation of the First Amendment.67 In a parallel
fashion, Commerce Clause doctrine has maintained its fidelity to the paradigm
cases of what the clause was historically understood to authorize Congress to
do, while the Court has repeatedly upheld exercises of the Commerce Clause to
regulate matters to which the founders would not have thought it applicable.68

Grasping the fact that constitutional law treats only understandings about a
provision's applications, not expectations about what it would not apply to, as
the controlling paradigm case(s) is the key to understanding the remarkable
combination of deep continuity and profound change that according to
Rubenfeld is the "characteristic mark of American constitutional
interpretation."69 The Court has not hesitated to reach decisions "at odds with
original No-Application Understandings,"70 while even the most radical
reinterpretations have "labor[ed] under the continuing obligation to do justice
to the paradigm cases—or, more precisely, to do justice to the text in light of its
paradigm cases."71 It therefore would be possible to call Rubenfeld's theory a
form of originalism, for he insists that what renders constitutional law a
coherent and workable form of law, an interpretation of the text of the
Constitution and not an untethered exercise of power by unelected judicial
politicians, is this obligation to build judicial doctrine and decision around
historically determined paradigm cases. But those who usually call themselves
originalists go further and insist that the Court is obliged to follow original
understandings about what constitutional provisions do not address (No
Application Understandings) as well—a practice that the Court has never
followed and that, if one truly accepted it, would render most of modern
constitutional law both erroneous and unintelligible.72 Rubenfeld, true

67. Id. at 25-29.
68. Id. at 53-56.
69. Id. at 47.
70. Id.
71. Id. at 17.
72. "What the originalists fail to see is that [the Court's] selective treatment of historical
meaning is neither arbitrary nor unusual. It is part of the basic structure of American
constitutional law." Id. at 31.

Professor Rubenfeld's position is further distinguished from that usually thought of as
originalism in that he believes that under certain circumstances a new understanding of a
provision's applications, one not actually entertained when the provision was adopted, can
become "a 'fixed star' or reference point by which future interpretations are measured." Id.
at 122. In short, a new paradigm case. He points as examples to the processes by which the
Sedition Act of 1798 became a paradigm case of what the First Amendment prohibits and by
which Brown v. Board of Education became a paradigm case of what equal protection

imaged with the permission of yale law journal
conservative that he is, declines to follow would-be originalists into this interpretive radicalism.

If Rubenfeld's description of the paradigm-case method of constitutional interpretation is persuasive, it thus solves at one and the same time the intellectual puzzles created by the existence of radical reinterpretation and the absence of a law of constitutional interpretation. Radical reinterpretation respects the true paradigm cases while treating freely other historical understandings; the Court has followed this pattern of decision with great fidelity and it is only now in a time of great intellectual disarray (I go beyond Rubenfeld's words) that Rubenfeld's articulation of our law's implicit logic has become necessary. And it does so without discarding law as interpretation altogether (Judge Posner) or delegitimizing the history of judicial decisionmaking since the founding (the originalists).

D. The Success of the Paradigm-Case Method

This claim is so bold as to be breathtaking, but has Professor Rubenfeld pulled it off? In my opinion, the answer is, bluntly, yes. The reader can properly reach her own judgment only by going through Part I of Revolution by Judiciary herself, but let me indicate why I think Rubenfeld has made good on his claim. First, while one could quibble about details and Revolution by Judiciary does not attempt a comprehensive examination of constitutional law issues, I believe that Rubenfeld is justified in his historical assertion that the Court has seldom if ever rejected what Rubenfeld calls the paradigm case(s) informing a provision of the text. The endless examples one can give of the Court clearly reaching results contrary to the expectations and intentions of the text's makers will turn out, almost invariably, to concern No Application Understandings; in other words, the discarded historical understanding concerned an issue to which the right or the grant of power was not thought to apply. Merely to have observed this apparent pattern in our constitutional law is a stunning achievement, and even those who reject Rubenfeld's overall argument are obligated to see the observation as one that they must recognize

requires. Id. at 122-23. Rubenfeld's view of such after-the-fact understandings is carefully nuanced: "[S]ubsequently developed Application Understandings . . . have a status close to that of a foundational paradigm case," but not identical, and "[n]one of them is beyond the Court's power to undo, but the Court would be under an obligation to demonstrate compelling justifications for doing so." Id. at 123.
and deal with in offering their own accounts of constitutional decisionmaking.\(^7\)

A second reason for my belief that Rubenfeld has succeeded is that his description of constitutional law as reasoning from the text's paradigm cases addresses constitutional law as the Justices and others have actually practiced it; his method, if not his terminology, is recognizable as a description of the type of basically common law reasoning that American lawyers and judges have employed in interpreting the Constitution since the founding.\(^7\) In his conclusion, Rubenfeld remarks that “[t]he purpose of constitutional theory is, and always has been, to hold the mirror up to constitutional law,” while immediately conceding that any theory will to some degree distort its subject.\(^7\) That has to be correct, at least if the term “constitutional theory” is to denote any real connection to the constitutional law that goes on in the courts. A besetting problem in much highly ambitious constitutional scholarship is its remoteness from the practice of constitutional law, and in particular the impossibility of imagining anyone other than the scholar himself being able to

---

73. Professor Rubenfeld admits the possibility of two counter-examples: the Contracts Clause, as to which the Court’s 1934 decision in *Home Building & Loan Ass’n v. Blaisdell*, 90 U.S. 398 (1934), arguably upheld a clear example of the sort of law prohibited by the clause’s paradigm case; and the use of military force by the President in the absence of a congressional declaration of war. As to *Blaisdell*, Rubenfeld suggests that if the decision did in fact violate the Contract Clause’s paradigm case the Court should overrule it; with respect to the Declare War Clause, he asserts that “American courts have never officially retreated from the principle that the President may not unilaterally declare war.” *Rubenfeld*, *supra* note 53, at 67-68. Well, no they haven’t—although that formulation of the constitutional issue is, I think, uncharacteristically imprecise and misses the point made by some scholars (me included) that there is a plausible or even persuasive original understanding that the President may make unilateral use of military force in some situations and that the courts have not erred in failing to rule otherwise. But if my doubts about Rubenfeld’s brief discussion are justified, it only supports his historical claim that the paradigm case theory explains the patterns of continuity and change by eliminating one of the two counter-examples.

74. In addition to the historical claim that he has identified what in fact the Court has been doing for the past two centuries, Professor Rubenfeld properly notes that his account of constitutional law reasoning systematizes the old common law approach to the interpretation of a normative instrument. He is also aware, of course, of the important work of other distinguished constitutional lawyers who hold somewhat similar views of constitutional law. See *Rubenfeld*, *supra* note 53, at 205 n.1 (citing the work of Philip Bobbitt and Richard H. Fallon, Jr.); see also H. Jefferson Powell, *The Moral Tradition of American Constitutionalism* 74-86 (1993) (arguing that traditional common lawyers looked to the concrete details of past controversies in interpreting the meaning of legal rules). “For classical common lawyers, rules were discovered in, debated in terms of, and decided with reference to stories of past situations and decisions.” *Powell*, *supra*, at 78.

employ the tools supposedly on offer. (How would one know what counts as a
textual harmony and what is a mere chance parallel in terminology?) Part I
(and Part III as well) of Revolution by Judiciary are strongly marked by Rubenfeld's keen interest in showing, both by reflection and by example, the
specifically legal character of constitutional interpretation.

I also think that Rubenfeld has rebutted the major criticisms of his legal argument that have been or might be made. A critic, first, might worry that the
problem with Rubenfeld's paradigm-case account of constitutional law is not
that it distorts the history or the legal character of constitutional law but that it
fails to shed much light on how constitutional law ought to be done. If this is
so, the account fails to address the questions raised by what Rubenfeld
identifies as the presuppositions of Revolution by Judiciary. As he himself
readily admits, to identify constitutional law with reasoning on the basis of
paradigm cases does not transform the enterprise into a deductive science.

Paradigm cases do not dictate unique answers to most constitutional
questions. Different judges will see the paradigm cases differently; it
will almost always be possible to capture the paradigmatic applications
of a particular constitutional right or power within more than one
interpretive paradigm. This means that five justices of the Supreme
Court can, at any given moment, redetermine the basic meaning of the
paradigm cases.

Second, and still more fundamentally, our critic might observe, there can
be disagreement over what paradigm case is embodied in a constitutional
provision—and even whether there was any foundational or core Application
Understanding at all. Third and finally, the fact that there can be good-faith
disagreement over the nature and implications of the paradigm cases means

76. My colleague Erwin Chemerinsky advanced this concern in his review of an earlier version
of Rubenfeld's account of the paradigm-case method. See Erwin Chemerinsky, A Grand
RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT
(2001)). For the reasons stated in the text, I think that Revolution by Judiciary provides a
satisfactory answer to Professor Chemerinsky's criticism.

77. RUBENFELD, supra note 53, at 17.

78. Professor Rubenfeld admits that there is "[n]o a priori necessity dictat[ing] the existence of
any specific, core, actuating, applications for the various rights and powers included in the
American Constitution." Id. at 119. In his judgment, however, "it just so happens that there
were [such actuating applications] for just about every one of the Constitution's most
important rights and powers," id., so the point is largely theoretical. In the case of a
provision with no paradigm case, the constitutional interpreter would simply be left with
applying whatever "principle or proposition [is] set forth in the text" itself. Id. at 134.

Imaged with the Permission of Yale Law Journal
that there can be bad-faith, manipulative arguments as well, which the method itself cannot distinguish on their face from intellectually honest ones.

This last, third point can be easily dealt with—as alluded to above, Revolution by Judiciary assumes from start to finish that the constitutional interpreter it is addressing acknowledges that her “first duty” as an interpreter is “to abide by the Constitution [and] to deliver a just reading of that document according to interpretive criteria.”\textsuperscript{79} The scientific method doesn’t stop researchers from falsifying their results, but it would be silly to reject the method for that reason. In just the same way it is not an interesting criticism of the interpretive criteria Rubenfeld proposes that the criteria do not in themselves prevent an unscrupulous judge from manipulating them.

The second criticism, that in some instances we may not be able to find, or at least to agree on, a paradigmatic Application Understanding for a given provision is, I think, more serious, but only modestly so. As Rubenfeld implies,\textsuperscript{80} there is in fact a lot of historical information about the perceived original purposes of most important constitutional provisions likely to come into controversy. Recall that a Rubenfeldian interpreter is interested only in specific Application Understandings, when they exist, and not in the broader question of what a provision’s original meaning in general was. This significantly reduces the difficulty of making (in an intellectually responsible manner) the historical assertions necessary to paradigm-case reasoning as compared to those required by a strict originalism: It is easier to conclude that the one thing the Fourteenth Amendment was unquestionably meant to do was to outlaw the black codes than it is to determine who is right about other, broader issues of original meaning. And—from my perspective if not (to the same extent, anyway) from Professor Rubenfeld’s—it causes no theoretical discomfort to admit that in the absence of a persuasive argument about what a provision’s paradigm case is, the provision simply doesn’t apply beyond whatever force can be given to its words.

Finally, our critic’s first worry over the indeterminacy left in place by Rubenfeld’s account of constitutional law is, I think, ultimately indistinguishable from worry over indeterminacy in the law generally. It is true, without any doubt, that at any given point in time there are a great many constitutional issues about which reasonable, good-faith interpreters can reach opposite conclusions, from identifying what the paradigm cases are and what principles they embody to determining how they apply to resolve contemporary disputes about very different issues. It is equally true, however,

\textsuperscript{79} Id. at 10.
\textsuperscript{80} Id. at 119.
that not all arguments are equally plausible, and that the very heart of Anglo-
American law rests in making contestable judgments about which arguments
are better and which worse whenever one happens to be arguing. It is a
strength, not a weakness, of Rubenfeld’s book that he avoids any suggestion
that his own arguments, using what he believes to be the implicit logic of
constitutional law, are invulnerable to contrary arguments that use the same
logic more persuasively. What he has identified for us is the way in which we
have made and should make arguments to one another in the shared task of
interpreting the Constitution. We should not expect greater precision in
executing our practices than the subject matter will allow.

E. Why Is Constitutional Law Binding? An Unnecessary Answer

In my judgment, then, Revolution by Judiciary is a tremendous contribution
to our understanding of federal constitutional law. Professor Rubenfeld has
identified a pattern in the almost infinitely complex and ever-changing
substance of constitutional law that rescues the field from the charges of
unintelligibility or sheer political choice. He has, furthermore, suggested what
I believe to be an entirely satisfactory rationale of why judges should follow the
traditional interpretive practices of our legal culture in making constitutional
decisions: Those practices define what constitutional law is,81 and those who
have undertaken as judges (or others) the obligation to make decisions
according to constitutional law have a duty to act accordingly. Consider his
2002 comment on Judge Posner’s denial that a judge has “some kind of moral
or even political duty to abide by constitutional or statutory text, or by
precedent”82:

Unless Posner intends a distinction between abiding by the
Constitution and abiding by “constitutional text” (and I don’t think he
intends this distinction), Posner’s statement could be said to amount to
an express repudiation of his oath of office. In fact, Posner’s view seems
to make the oath a kind of lark. The whole point of an oath is to create a
moral or political duty.83

No more is needed, I think, to explain the normative force for a
constitutional judge of a correct account of constitutional decisionmaking: She
is under a moral and political duty stemming from her acceptance of her public

81. See id. at 132-34.
82. Posner, supra note 59, at 739.
83. Rubenfeld, supra note 59, at 767.
office. The same is true of other citizens—legislators, executive officers, jurors—acting in public capacities. In defining for us what constitutional law is, Rubenfeld has suggested to us the reason why constitutional law has normative force.

A bit ironically, one person who would certainly dissent from my confidence in the persuasiveness and the completeness of Professor Rubenfeld’s argument (as I have restated it) is Rubenfeld himself. For him, an account of why the law of constitutional law binds judges must go deeper, to wrestle with and solve what he calls “the paradox of commitment”—the philosophical problem generated by the oddity of treating as normative our past commitments when they conflict with our present preferences.84 Most of the second section of Revolution by Judiciary builds on Rubenfeld’s earlier work employing philosophy and game theory to address the relationship between constitutional law and democracy. Rubenfeld’s work in this has led him for years to critique “presentist” understandings of democracy and to insist that self-government (whether an individual’s or a society’s) requires the making and maintenance of commitments over time.85 My sense is that Rubenfeld’s current formulation has achieved new levels of clarity and conceptual power.

And, in this context, I think, the philosophical work is unnecessary and distracting. Professor Rubenfeld forthrightly admits, at the beginning of the second section, that he is simply assuming “without ever proving, that what is true of individual commitments is true, mutatis mutandis, of constitutional commitments—that political self-government may be profitably understood by analogy to individual self-government.”86 Precisely: The theory of self-government set out in this book rests on a highly contestable analogy between the moral identity of individuals and the nature of a democratic and constitutional state. Many of his readers, myself included, will not find the analogy persuasive, and for us the attempt to ground constitutional law in the theory therefore fails to get off the ground. I think that Rubenfeld’s analysis of the role of temporally extended commitments in our individual moral lives is potentially a major contribution to philosophical ethics, and I hope that he pursues this work further, unshackled by a felt need to relate the analysis to constitutional law. But he should also free his powerful and persuasive account of constitutional law from the link to a novel, highly contestable philosophical

84. See RUBENFELD, supra note 53, at 71-79.
85. It would be impossible to summarize Professor Rubenfeld’s elegant argument in a footnote, and I will not try. But see id. at 88 (summarizing the solution to the paradox of commitment as lying in the necessity of being able to make and keep commitments to “self-government over time” if an individual or society is to enjoy autonomy).
86. Id. at 72.
theory. The law doesn’t need the theory any more than the theory benefits from being forced to accommodate the law.

Professor Rubenfeld, I can imagine, might respond that there is a serious problem with my suggestion that he disconnect his legal theory from his philosophical one. With respect to judges and others with public duties they have voluntarily undertaken, he might concede that one can point to those voluntary undertakings as the basis for holding that they have a moral and political duty to act in accordance with the norms defining the practice of constitutional decisionmaking, but such reasoning does not address the duties, or lack thereof, of the vast majority of Americans, the vast majority of the time. Most of the time, most of us have undertaken no public duty and exercise no public office. What gives the Constitution normative force for us? Why should we, for example, obey constitutional laws enacted by Congress? These are profound questions, but they are (let it be noted) simply a peculiarly American twist on the great problem of political obligation, which goes back to Socrates if not before in the Western tradition alone. Many conflicting answers have been proposed, and American society has never had—and doubtless never will reach—a consensus on what the American answer is, or rather what it ought to be. That is, furthermore, a good thing: I think (and I believe Professor Rubenfeld thinks) that one of the most attractive features of American constitutionalism is the absence of prescriptions about “what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”8 The question of what, if any, moral obligations we owe the Republic simply because we find ourselves within its jurisdiction and subject as a practical matter to the exercise of power by its public officials, is not, in the end, a matter of constitutional law at all,88 and in turn constitutional law does not depend on or need a philosophical foundation. Like the Republic it structures, the practice of constitutional law is a political reality based not in theory but in history.89 By rethinking and clarifying Rubenfeld’s account of paradigm-case reasoning,

88. There is perhaps an exception: The Thirteenth Amendment purports—or so it has been interpreted by the Court, along with the right to travel interstate—to apply to private as well as governmental action, and one might expect then that private citizens would stand in the same position with respect to the enforcement of the Amendment that public officials stand with respect to all constitutional commands. As an empirical matter, however, I think most Americans would accept, from their varying moral perspectives, the existence of a moral prohibition on enslaving someone else, so the difficulty seems hypothetical.
89. “American constitutional law begins with specific commitments, sometimes written in blood. This is not a matter of a priori or conceptual necessity; it is a matter of history.” RUBENFELD, supra note 53, at 134.
Revolution by Judiciary makes a signal and highly welcome contribution to our understanding of the law of the Constitution.

**CONCLUSION**

*America's Constitution* and *Revolution by Judiciary* are very different books, but they share a robust confidence in the possibility of writing constitutional law in a grand manner even in an era in which almost everything in the field is "passionately contested, with little common ground from which to build agreement." The books are marked by some strong similarities as well as striking differences. Both books rest on an almost medieval "realism" in talking about "We the People" that is startling to those of us of a nominalistic mindset; the reader of this Commentary will have gathered by now that I think both books are marred by misidentifying (as I see it) the language of American political discourse with a reality external to that language. Furthermore, and positively, both books take seriously the role of original understandings in American constitutionalism in ways that transcend the tired old originalism battles of the late twentieth century. Where the two books most sharply diverge is that *Revolution by Judiciary* has as its ultimate focus the actual practice of constitutional law, while *America's Constitution* is concerned with unveiling a set of textual meanings that are not finally rooted in history or law.

Perhaps most importantly, however, both these books suggest that the right response to the existing discord in constitutional law and scholarship is not to retreat to small-scale projects, but to seek with renewed zeal a grand vision of constitutional meaning. Professor Amar and Professor Rubenfeld have shown real moral courage in going out on Professor Tribe's limb to offer us broad-ranging attempts to speak about the whole of their respective, somewhat different, subjects. I have suggested some criticisms of each book out of the conviction that we honor a scholar when we take his or her work seriously enough to disagree.

H. Jefferson Powell is Professor of Law, Duke University. He is grateful to Erwin Chemerinsky and Jed Purdy for very helpful conversations on his thoughts on the books under consideration.

---

90. Tribe, *supra* note 1, at 292.
I do not know Michael Stokes Paulsen or his writings, but I will do my best to reply to his gracious and elegantly impartial review. His absolute refusal to engage in sycophancy should be a model to us all. I cannot imagine why he likens himself to "a skunk."

It is difficult, however, to respond to objections to your work when the objector repeatedly objects to the exact opposite of what you are saying. Consider, for example, what Paulsen says about *Home Building & Loan Ass’n v. Blaisdell.*

*Blaisdell* is important because it is one of the very few cases of modern constitutional law—perhaps the only one—in which the Supreme Court seems to explicitly repudiate a foundational Application Understanding. *Blaisdell* therefore stands as a counterexample to the pattern I describe as otherwise ubiquitous in constitutional law. Despite this, and even though the central thesis of my book is that courts must inviolably adhere to foundational Application Understandings, Paulsen says I “accept[]” the decision.

According to Paulsen, I say that *Blaisdell,* even though it violated a foundational Application Understanding, is a “widely admired decision’ and should be understood as creating a new interpretive paradigm—a new constitutional commitment, as it were.” My endorsement of *Blaisdell* is supposed to look bad when contrasted, as Paulsen contrasts it, with my arguing in other contexts against judges violating foundational Application

---

2. 290 U.S. 398 (1934).
4. *Id.* at 2054.
5. *Id.* at 2055.
Understandings. And I guess my endorsing *Blaisdell* would be pretty embarrassing—if I had endorsed it.

It is true that, on page sixty-seven of my book, I say that *Blaisdell* "is a widely admired decision." It is also true that on page sixty-eight, at the conclusion of the very same paragraph, I say that *Blaisdell*—if in fact it does repudiate a foundational Application Understanding—"is wrong and should be overturned."

Very few readers would view "is wrong and should be overturned" as "acceptance." For the record, nowhere in my book do I say that *Blaisdell* "creat[ed] . . . a new constitutional commitment." The whole point of my entire argument, as any minimally competent reader—without some peculiar axe to grind—would know, is that a decision abandoning a foundational Application Understanding *violates* a constitutional commitment.

Or consider the opening of Paulsen's "review," which takes issue with the opening of my book. I begin *Revolution by Judiciary* by contrasting constitutional law with statutory and administrative law, where the Supreme Court has at least in principle established legally authoritative interpretive rules and protocols that lower court judges are supposed to follow when construing statutes or regulations. By contrast, I point out, there are "no official interpretive rules" of constitutional interpretation. While there is a law of statutory and regulatory interpretation, "[t]here is no law of constitutional interpretation." I write, "Incredibly, American constitutional case law has almost nothing to say about what judges are supposed to be doing when they go about the business of interpreting the Constitution."

Paulsen, calling this "nonsense," says:

If there is a problem with constitutional law today, it surely is not that it has "almost nothing to say" about how to "go about the business of interpreting the Constitution." It is that it has far too much to say! Our cases, our practice, and our theorists point in wildly different directions, offer and illustrate competing interpretive theories, and reveal a cacophony of voices virtually screaming for attention. . . .

---

7. Id. at 68.
9. RUBENFELD, *supra* note 6, at 4-5.
10. Id. at 5.
11. Id.
12. Id. at 4.
Surely Rubenfeld jests. We suffer not from a deficit but a surfeit of constitutional theory.  

There are so many foolish errors in this paragraph it’s hard to know where to begin. I will focus on the two most important.

First, the subject of my sentence was “American constitutional case law.” When Paulsen reads the term “case law,” he evidently thinks it includes “theorists.” It does not. Everyone knows that constitutional theorists have a great deal to say about how judges should interpret the Constitution. But when I say “case law,” I mean case law. There are plenty of theories of constitutional interpretation; it remains true, however, that “[t]here is no law of constitutional interpretation.”

Second, as to everything else in his paragraph, Paulsen seems to think that restating my point counts as refuting it. Of course the cases “point in wildly different directions.” Of course they “offer and illustrate competing interpretive theories.” I never said constitutional law lacks exemplars of different interpretive approaches. I said (in the sentence immediately preceding the one Paulsen criticizes) that the case law “lacks an accepted account” of interpretation.  

I said (on the very next page) that the whole problem with current constitutional case law is that the cases are so all-over-the-map interpretively that practitioners can argue from “text, precedent, original meaning, morality, tradition, structure, and so on,” but “there is no knowing why or whether or when or in what priority these ‘modalities’ of argument will be considered in any given case.” How could a minimally competent reader think he had objected to this point by saying that the existing cases “offer and illustrate competing interpretive theories”?

“There is no law of constitutional interpretation”: It is logically impossible to read this statement as denying the existence of “theorists” espousing different views of constitutional interpretation. “Under current case law, judges are fully authorized” to “rely[] on” or to “ignor[e] original intent”: A first-year law student would understand that this sentence does not deny, but rather asserts, the fact that the cases offer competing interpretive theories. “Practitioners know they can argue from text, precedent, original meaning, morality, tradition, structure, and so on,” but “there is no knowing why or whether or when or in what priority” judges will accept these arguments: No
reasonable person would think he had objected to this proposition by exclaiming that “our practice . . . points in wildly different directions.” 17

There is little point responding to a “review” so manifestly unable or unwilling to follow relatively simple arguments. Therefore I am going to skip over the rest of what Paulsen says about my book and offer a word about what he says of his own approach.

Paulsen describes himself as an originalist who believes in “read[ing] the text carefully and faithfully.” 18 I leave it to readers to judge whether Paulsen has demonstrated a capacity to read a text carefully.

He seems to think he scores points for his version of originalism by saying he is against “grand theories” of constitutional interpretation. 19 This is just vacuous rhetoric.

Originalism is of course a theory of constitutional interpretation. Perhaps it is not very grand intellectually. But originalism is indeed “grand” if “grand” implies, as I suppose it is meant to do, that the theory rests on a large philosophy of some kind (whether political, linguistic, or something else) that in turn rests on fundamental (and controversial) premises concerning the status, purpose, and legitimacy of constitutional law. To be sure, originalists may not like having to explicate and defend the foundations of their theories, but that does not make their theories less grand. It merely makes them half-baked.

Consider Paulsen’s particular brand of originalism. He purports to reject “crude intentionalism.” 20 Original meaning, says Paulsen, is properly understood to be the “objective linguistic meaning of the words of a text (in historical context),” 21 as distinct from any “subjective,” “concrete historical understandings” 22 of the text, including any “historical beliefs” about the applicability of the text in specific settings. 23 This position is either incoherent or fundamentally misguided or both.

It is of course conceptually possible to divorce the “objective linguistic meaning” of uttered words from the subjective, concrete historical understandings of those words held by the people who wrote or spoke them. What we might call the “semantic content” of words, derived from the

17. Paulsen, supra note 3, at 2053.
18. Id. at 2061.
19. Id. at 2056-58.
20. Id. at 2059.
21. Id.
22. Id. (quoting Gary Lawson, Delegation and Original Meaning, 88 VA. L. REV. 327, 398 (2002)).
23. Id. at 2060 & n.43.
linguistic rules of the relevant community, can always differ from the speaker's or author's "intended meaning." People often employ words whose semantic content (in the above sense) differs slightly or significantly from their intended meaning. When we hear such words, we always have a choice in principle between interpreting them according to their semantic content or their intended meaning. Paulsen wants to say that only by following the original linguistic meaning can interpreters interpret correctly, remaining faithful to the actual written law as opposed to creating new law.\(^4\)

The fallacy in this thinking is easy to demonstrate. A recipe says "flour" where "sugar" may have been intended. An interpreter of this recipe can certainly choose to use flour, saying "flour means flour, and it meant flour at the time the recipe was written." The words "means" and "meant" in this declaration would refer to the semantic content of the word—derived from the general rules and usage of English—which in this case (let's suppose) is not open to doubt. But someone else trying to follow the recipe could always say, "I think the writers of this recipe may have meant sugar." He may then pursue a "crude intentionalism" and try to uncover the authors' actual subjective historical understandings. If he discovers that sugar was in fact intended, he will say, "See—they did mean sugar," and use sugar.

In the case of a recipe, it would probably be stupid to use objective linguistic meaning when it is known to contravene intended meaning. In any event, whether stupid or merely adventurous, using linguistic meaning would in an important sense not be faithful to the original recipe. It would produce a new recipe.

What is true of a miswritten recipe is not, of course, necessarily true of a constitution. There may be good reasons to follow historical linguistic meaning in constitutional law when linguistic meaning departs from widely shared, well-understood concrete historical understandings. But one thing that cannot be said in favor of doing so is that following linguistic meaning will not produce "new" law.

\(^4\) Id. at 2061. Others fall into the equivalent but opposite error, insisting that texts can be correctly interpreted only in accordance with the intended meaning and denying the possibility of interpretation according to any "semantic meaning" other than the intended meaning. See, e.g., Paul Campos, The Chaotic Pseudotext, 94 Mich. L. Rev. 2178, 2189 n.25 (1996) (claiming that "the semantic meaning of a text is identical to the [communicative] intentions of its author, and it follows from this that the correct interpretation of a text is always the act of successfully determining those intentions"); Steven Knapp & Walter Benn Michaels, Against Theory, in AGAINST THEORY: LITERARY STUDIES AND THE NEW PRAGMATISM 11 (W.J.T. Mitchell ed., 1985).
There is an excellent example of this point in Robert Bork’s *The Tempting of America.* Like Paulsen, Bork tries to defend an originalism that casts aside the actual concrete historical understandings of the Constitution in favor of a supposed objective meaning of the text. He does so in an effort to make originalism safe for *Brown v. Board of Education.*

Yes, Bork admirably concedes, “those who ratified the amendment did not think it outlawed segregated education or segregation in any aspect of life.”

Nevertheless, Bork asserts, *Brown* could “have clearly been rooted in the original understanding.” How? Well, “equality and segregation were mutually inconsistent, though the framers did not understand that,” says Bork, and “equality, not separation, was written into the text.”

In other words, the subjective understanding of the ratifiers—their concrete historical understandings—were out of whack with the objective meaning of the words written into the text. Equality means equality; this is not anachronistic; equality meant equality in the 1860s; equality was written into the text; segregation is unequal; hence segregated public schools are unconstitutional. Paulsen indicates that he essentially agrees with this analysis:

“[T]he result in *Brown* . . . makes entire sense if one focuses on the original linguistic meaning of the Fourteenth Amendment rather than on the mistaken subjective views or expectations of some individuals at the time that the Amendment’s principle did not extend to segregated education.”

The problem is not that *Brown* cannot be squared with the original linguistic meaning of the Fourteenth Amendment. Of course it can. The problem is that a great many other things can too. An originalism that cuts anchor with concrete historical understandings in this way can no longer coherently present itself as originalism.

The one virtue of originalism was that it purported to offer determinate, demonstrable answers to real constitutional controversies. Does the Eighth Amendment ban the death penalty? “Of course not,” an originalist could say; “I can easily prove to you that it was not so understood at the time of enactment. Any contrary reading by the Court today would therefore be a usurpation—government by judiciary.”

---

26. Id. at 75-76.
27. Id. at 82.
28. Id.
29. Paulsen, supra note 3, at 2060.
But when originalism cuts anchor with concrete historical understandings, the death penalty’s unconstitutionality certainly could be “rooted in the original understanding.” “Capital punishment was inconsistent with abolishing cruel and unusual punishment,” a Borkian originalist judge could say, “though the framers did not understand that, and the bar on cruel and unusual punishments was written into the text.” Even a Marxist judge could now be an originalist: “Private property and equality were mutually inconsistent, though the framers did not understand that, and equality was written into the text.” Or how about abortion? “Roe v. Wade makes entire sense if one focuses on the original linguistic meaning of the Thirteenth Amendment’s prohibition of ‘involuntary servitude,’ rather than on the mistaken subjective views or expectations of some individuals at the time that the amendment’s principle did not extend to laws banning abortion.”

Nothing in the objective linguistic meaning of “cruel and unusual” in the 1780s or “involuntary servitude” in the 1860s—when considered at a level of generality that excludes reference to concrete historical understandings—blocks the conclusion that the death penalty or a ban on abortion is unconstitutional. What prevents a clear-thinking originalist from reaching these conclusions is not the objective linguistic meaning. It is rather, precisely, a set of concrete historical understandings, consisting of the “subjective” views or expectations of a great many individuals at the time concerning the applicability of the text in specific settings.

As soon as an originalist starts saying that the framers’ and ratifiers’ concrete historical understandings of a constitutional provision were “mistaken” and may therefore be ignored in favor of the semantic or objective linguistic meaning of the words at the time of enactment, he is no longer an originalist but a Dworkinian. Dworkin’s distinction between “concept” and “conception” (with Dworkin claiming to honor the concept as opposed to the conception) tracks very closely, if it is not identical to, a distinction between the original semantic meaning of the words in the text and the concrete historical understandings of how that text would apply to particular cases.30

Proper interpretation of constitutional terms like “the equal protection of the laws” or “involuntary servitude” starts not from objective linguistic meaning, but from concrete historical understandings: namely, from the foundational paradigm cases. That’s what gives the Thirteenth and Fourteenth Amendment their core meaning, and that core meaning properly structures all subsequent Thirteenth and Fourteenth Amendment doctrine. Many of our

constitutional guarantees are like this: They take their core meaning from
historical paradigm cases.

The account of constitutional interpretation that I give in my book captures
this phenomenon and explains it. Neither a Dworkinian account of
interpretation, nor an account based on objective linguistic meaning that
repudiates Americans’ concrete historical understandings of the provision they
were enacting into the Constitution, ever can.

As to Professor Powell’s commentary, I can only say that his criticisms of
some parts of my book are quite well-taken, and that his praise of other parts is
very kind and probably undeserved.
Dear Mike and Jeff,

A book is an open invitation to a conversation between an author and his (or her) readers, and I am delighted that you both have accepted the invitation that I sought to extend in *America's Constitution: A Biography*. I recall many face-to-face conversations with each of you when we were all students together at the Yale Law School in the early 1980s. I learned a great deal from you at that time; I have continued to learn a great deal from you in print since then—indeed, you are both repeatedly cited with approval in my book; and I look forward to learning more from each of you in the days to come as the conversation that we have begun in this *Journal* ripens into what I hope will be additional, more informal, discussions among us.

Mike, I have only two quick things to say in response to your very warm review.

First, thank you. Thank you for your enthusiasm and encouragement, and most of all for your generosity of spirit. (Perhaps all that time you spent trying to set me straight in law school was not wasted after all.) Since you raise the question of whether your glowing review might be thought by some to be strongly colored by our long friendship, it may be worth noting (though it is immodest of me to do so) that several other leading reviews, written by eminent lawyers and historians whom I know much less well, have been similarly glowing—much closer to your bottom line than to Jeff’s.¹

---

¹. See, e.g., Scott Turow, *Everything Is Illuminated*, WASH. POST, Sept. 25, 2005, at BW03 (“[E]legantly written, thorough but concise, and consistently enlightening. . . . As one expects from the best history, *America's Constitution* illumines many contemporary debates. . . . I expect to be taking Amar's volume off my shelf for years to come as an indispensable reference whenever I want to know more about the actual words that underpin contemporary constitutional debates. . . . It is . . . an uncommonly engaging work of scholarship and deserves to be valued as such.”); Gordon S. Wood, *How Democratic Is the
Second, stay tuned. You raise important questions about a couple of suggestive but underdeveloped paragraphs that I penned on the Ninth Amendment. I hope to revisit this issue in greater detail in what will be a sequel of sorts, tentatively entitled America's Unwritten Constitution: Between the Lines and Beyond the Text.² The challenge, as I see it, is to take seriously unenumerated aspects of our constitutional tradition and practice but to do so in a way that does not undermine the preeminent virtues of a written constitution. Perhaps this cannot be done. Perhaps I am questing for a square circle. But as John Ely famously reminded us all in Democracy and Distrust, at critical moments the document itself does seem to gesture beyond its own four corners; and I aim to take seriously the gestures of both the Ninth Amendment and the Privileges or Immunities Clause. I hope to do so in a way that leads directly away from Dred Scott—not toward it, as you fear. As you note, my book sharply criticizes Taney's disgraceful opinion on originalist grounds. In my view, Taney's outlandish and outrageous conclusion that federal free soil laws were generally unconstitutional could in no way have been justified by honest reference to my proposed benchmarks for unenumerated rights—namely, "the great mass of state constitutions," "widely celebrated lived traditions," and "broadly inclusive political reform movements."³ The majority of state constitutions in 1857 were themselves free soil; the actual lived tradition in antebellum America was of various federal free soil laws stretching uninterruptedly back to the Northwest Ordinance passed by the very first Congress; and slavocrats in the Deep South could hardly be reckoned a broadly inclusive movement given the massive political exclusions in the South—of slaves, of free blacks, and of antislavery whites.

In my hoped-for sequel, I also aspire to think carefully about the role of judicial case law and stare decisis. I see a somewhat larger role for stare decisis than do you, but like you I believe that ultimately the doctrine should be

². I hint at the general contours and contents of this hoped-for sequel in the closing page of my postscript. See Akhil Reed Amar, America's Constitution: A Biography 477 (2005).
³. Id. at 329.
subordinate to the text, enactment history, and structure of the document itself, and its grand theme of popular sovereignty.\textsuperscript{4}

Jeff, you raise more questions for me (and about me) and so I owe you more answers. I appreciate that space constraints limited your ability to flesh out all your reservations about my recent book (and about some of my earlier work), so I hope that the conversation between us begun in this \textit{Journal} can continue outside it. Like you, I shall confine myself here to a few exemplary points rather than trying to cover everything that you say.

For starters, you raise questions about my general interpretive methodology. I have tried to explain and exemplify my preferred method elsewhere—most elaborately in a couple of articles that appeared in the \textit{Harvard Law Review}.

Readers of this \textit{Journal} can also get a sense of my overall approach from the other pieces in this Colloquium. You are right to call me a constitutional textualist,\textsuperscript{6} but I also fancy myself a constitutional structuralist and a historian of original meaning. Generally, I seek to braid together arguments from text, (enactment) history, and structure into a satisfying account of the document itself as distinct from much later case law interpreting the document, sometimes quite loosely. You wonder whether my approach mixes apples and oranges. I can only say that (1) if I do, there are times when mixture is appropriate (consider for example the fruit salad); and (2) there are

\begin{itemize}
\item \textsuperscript{4}I briefly develop this way of thinking about stare decisis and “precedent’s proper place” in Akhil Reed Amar, \textit{The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine}, 114 \textit{Harv. L. Rev.} 26, 78-89 (2000).
\item \textsuperscript{5}See \textit{Amar, supra} note 2, at 329; Akhil Reed Amar, \textit{Intratextualism}, 112 \textit{Harv. L. Rev.} 747 (1999).
\item \textsuperscript{6}A brief aside on textualism. There is, as you note, an inherent danger that a textualist may overread the text. I try to minimize this danger—though doubtless I fail at times—by trying wherever possible to use enactment history and structure to confirm the seemingly best reading of the text, and to reconsider my initial textual leaning if confirmation is not forthcoming. For example, at one point you raise a question about my emphasis on the power of Congress under the Constitution to wield “legislative power” and to adopt “laws”—words pointedly absent from the Articles of Confederation. You ask whether there is an important difference between “laws” enacted by the post-1788 Congress and “ordinances” adopted by the old Confederation Congress. I think the answer is yes, and my book provides historical support for this answer. See \textit{Amar, supra} note 2, at 516 n.61 (citing Richard P. McCormick, \textit{Ambiguous Authority: The Ordinances of the Confederation Congress, 1781-1789}, 41 \textit{Am. J. Legal Hist.} 411 (1997)). Given that you yourself seem to concede the correctness of my bottom line that the Constitution’s “Congress” was “a quite different institution” with far more effective coercive power than the Confederation “Congress,” the difference between us may at times be an aesthetic one: You would prefer that a particular textual point go unmentioned since you see it as wholly makeweight, whereas I prefer to highlight the text in combination with my other constitutional arguments that confirm my reading of the text.
\end{itemize}
many distinguished constitutional scholars and practitioners—liberals and conservatives, on the bench and off—who are roughly in the same methodological camp as am I (consider for example Hugo Black, John Hart Ely, Doug Laycock, and Steve Calabresi).\(^7\)

You also pose pointed questions about whether I am a proper historian.\(^8\) You are right that ultimately I am concerned with legal meaning. But legal meaning may of course pivot on certain historical facts. For example, on the question of the legal permissibility of secession, I think it hugely relevant that leading Federalists in leading places during the ratification process explicitly said that the new system would be indivisible; that no prominent Federalist ever said otherwise (even though this made it much harder to convince states' rightists and fence-sitters to vote yes); and that in the New York ratifying

\(^7\) You seem to think that I cannot be reckoned a proper originalist because of my views on Congress's power to "regulate Commerce with foreign Nations, and among the several states, and with the Indian tribes." I believe that whether or not you accept my interpretation of this clause, my argument is emphatically one based on text, Founding-era history, and structure. *Journal* readers can judge this issue for themselves, for most of my argument about this clause appears in my introduction to this Colloquium, with additional methodological elaboration on my part. You also point to my views about Article V. On this topic, the views expressed in the book are different from the views that I put forth in earlier articles. (Mike is right to see important shifts in my thinking here and elsewhere.) In any event, regardless of what you might think about the ultimate soundness of my Article V arguments, they, too, are based on text, Founding-era history, and structure. (For what it's worth, my earlier articles on this topic also featured much more than the views of James Wilson. Rather, the argument was based on a textual analysis of various parts of the original Constitution and the Bill of Rights, on the meaning of state constitutions, and on things said by many Founding figures other than Wilson about the Preamble, and about the First, Ninth, and Tenth Amendments.)

At the risk of kibitzing on your conversation with Jed, I would also note that in an important respect, I think you have misstated his argument as well. He does not claim that Court doctrine has always hewed to the core Application Understandings. Rather, he claims only that today's doctrine generally does so. I think he is right to limit his claim, though all this does raise real questions about the Court's fidelity to his approach over the actual course of American history—a topic that you as a historically minded commentator might have interestingly commented upon. For example, Supreme Court Justices gleefully enforced the Sedition Act of 1798 and again enforced laws criminalizing mere antigovernment speech in the 1910s in violation of core Founding-era understandings. If, as I have tried to show—and as Jed has nowhere denied—a core Application Understanding of the Fourteenth Amendment was that the Bill of Rights would in general (and expression rights would especially) be applied or incorporated against the states, then here too we confront decade after decade of Supreme Court nonenforcement of core rights. So too with much of the Fifteenth Amendment, alas.

\(^8\) Interestingly enough, this is not a question that has typically arisen when various distinguished card-carrying historians—such as Jack Rakove, Gordon Wood, Pauline Maier, David B. Davis, Les Benedict, and Eric Foner have evaluated my work.
convention, the secession issue arose in a highly visible way and was resolved by a clear set of anti-secession-right votes at a time when all eyes on the continent had good reason to be glued to New York and when the Federalists understood that their stubbornness on this point might cause them to lose the ultimate ratification vote in this key convention. None of these facts made it into your critique of my account; but I think these facts from history do very much bear on the public meaning of the Constitution at the time of its enactment. I further explain how this public meaning was codified in various provisions of the Constitution’s text—the “more perfect union” language of the Preamble, the uncompromising words of the Article III Treason Clause and the Article VI Supremacy Clause, and the evident contrast between the enactment rules of Article VII and the amendment rules of Article V—and by basic features of the Constitution’s geostrategic national security structure.

If you think my legal bottom line is wrong, perhaps it might have been better for you to have set forth the entirety of my constitutional arguments—based on text, structure, and enactment history—and then presented your own legal counterarguments, so that the reader could judge for herself. You instead invoke the views of two earlier Jeffersons—Thomas Jefferson and Jefferson Davis. (What is it with you Jefferson guys, anyway?) To me, what Thomas Jefferson may have thought in the 1790s and 1800s is not particularly helpful in understanding the public meaning of a document publicly debated and enacted in 1787-1788, when Jefferson was an ocean away from the main event. Jefferson Davis (who was not even alive in 1788) likewise was in no real sense a “witness” to the relevant public conversation, and the textual, historical, and structural arguments that he made on behalf of secession simply failed to mention much of the relevant history that I have tried to bring to the surface, and in my view failed to rebut the strong arguments against him based on constitutional text and structure. Judged by legal ground rules of text, (enactment) history, and structure, Lincoln’s bottom line was in my view right—not because he was a witness to the Founding but rather because his bottom line best squared with what the Founders said and did.

To the extent that you might disagree with Lincoln’s bottom line on this issue, I would say, with all due respect, so much the worse for you. The question here is not some abstract hypothetical or merely some “fun” (your word) parlor game allowing “a twenty-first-century scholar [to] ask nineteenth-century questions and chastise nineteenth-century statesmen.” The legality or illegality of secession was probably the most serious constitutional question ever to arise in America. As a result of Lincoln’s and

---

Davis’s different answers to this question, hundreds of thousands died, and ultimately our Constitution was reborn in the ashes. If Jefferson Davis was legally right, then it would seem that Abraham Lincoln was a lawless butcher—well intentioned, perhaps, but hardly a constitutional hero. Or if, as you at times seem to imply, neither side was clearly correct on the secession question, that legal conclusion, too, would I think badly tarnish Lincoln as both a lawyer and a President, charged as he was with preserving, protecting, and defending the Constitution.

Finally, a few words about the Preamble, constitutional geostrategy, and the Supremacy Clause. You quote Randolph pooh-poohing the significance of the Preamble, but do not note that I invoke perhaps the three most significant opinions of the Marshall Court—Marbury,10 McCulloch,11 and Martin v. Hunter’s Lessee12—each of which does turn to the Preamble at key moments. (As a rule, I’ll take John Marshall and Joseph Story over Edmund Randolph any day.) The Preamble also of course looms large in the text itself—and was central to the ratification debates. You say that I make the “implicit but unmistakable” (and self-aggrandizing) claim that my book is “novel[]” in arguing that geographic-geostrategic and national security considerations drove the Founding.13 I make no such claim, and in fact I say just the opposite: Many important scholars have discussed these issues before me. The idea that the Founding was primarily about national security and geostrategy was, in fact, probably the dominant view of most scholarship prior to Beard, and I cite several leading post-Beardians who have seen the light, including Frederick Marks III, David F. Epstein, and Peter Onuf.14 Indeed, in my Postscript, I say that “I am especially indebted to Frederick Marks III, for his brilliant work establishing the primacy of national-security and foreign-policy concerns in the making of the Constitution.”15 To repeat: I do not say that my view about the

13. Powell, supra note 9, at 2075.
14. See AMAR, supra note 2, at 523 n.95; see also id. at 561 n.30, which cites, among other works, your own excellent book on presidential powers, The President’s Authority over Foreign Affairs: An Essay in Constitutional Interpretation, and Dean Koh’s fine book, The National Security Constitution.
15. See AMAR, supra note 2, at 47. In passing you note that I do not cite a 2002 book and a 2003 article. Despite over 100 pages of endnotes, I of course could not cite everything, and I chose to highlight the works that most influenced my thinking and that appeared in print before my own published work on this topic, which first appeared in 1987-1991. See Akhil Reed Amar, Marbury, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U. CHI. L. REV. 443, 469-78 (1989); Akhil Reed Amar, Of Sovereignty and Federalism, 96 YALE L.J. 1425,
primacy of these concerns is novel. Rather, I claim that most scholars have not yet seen the light, as they are in the grip of various towering twentieth-century scholars—Beard, Merrill Jensen, and even to some extent my hero Gordon Wood—who have downplayed these issues in their accounts.

What I do claim is novel is my specific argument: (1) that the Preamble’s phrase about “form[ing] a more perfect Union” strongly resembled, and was perhaps consciously borrowed from, the British indivisible Union of Scotland and England of 1707; (2) that the Preamble phrase blended language from the official 1707 enactment, which spoke of “rendring the union of the two kingdoms more intire and compleat,”16 with language from Queen Anne’s July 1, 1706 letter to the Scotch Parliament, which spoke of an “entire and perfect Union”;17 (3) that the conceptual linkage between the Preamble’s more perfect union and the earlier 1707 union was publicly explained to ratifying Americans; and (4) that this high visibility 1707 model—this paradigm case, to use Jed’s jargon—of an indivisible island-nation drove the basic Federalist argument in 1787-1788 for an indivisible America that would rely on her oceans to secure her liberty, à la Britain. You say that there is no evidence that anyone at the Founding understood how the Preamble reflected and codified this vision. Here is a snippet of evidence—taken from The Federalist No. 5—that I would say does make the link between the Preamble’s language and the 1707 Act:

Queen Anne, in her letter of the 1st July, 1706, to the Scotch Parliament, makes some observations on the importance of the Union then forming between England and Scotland, which merit our attention. . . . “An entire and perfect union will be the solid foundation of lasting peace: . . . .”

. . . .

The history of Great Britain . . . gives us many useful lessons. . . . Although it seems obvious to common sense that the people of such an island should be but one nation, yet we find that they were for ages


16. See AMAR, supra note 2, at 36.
17. Id.
divided into three, and that those three were almost constantly embroiled in quarrels and wars with one another. Notwithstanding their true interest with respect to the continental nations was really the same, yet by the arts and policy and practices of those nations, their mutual jealousies were perpetually kept inflamed, and for a long series of years they were far more inconvenient and troublesome than they were useful and assisting to each other.

Should the people of America divide themselves into three or four nations, would not the same thing happen? Would not similar jealousies arise, and be in like manner cherished? Instead of their being "joined in affection and free from all apprehension of different interests," envy and jealousy would soon extinguish confidence and affection, and the partial interests of each confederacy, instead of the general interests of all America, would be the only objects of their policy and pursuits. Hence, like most other bordering nations, they would always be either involved in disputes and war, or live in the constant apprehension of them.18

I believe that readers will find lots more evidence in the opening chapter of America's Constitution.19

Finally, we come to the words in the Supremacy Clause that speak of "the land"—words that you insist have no conceivable legal bearing on the territorial-geographic nature of the American Constitution. You assert that "[n]o competent lawyer"20 would point to these words in, say, explaining why a state could not unilaterally take its land with it and leave the Union. I consider Lincoln a pretty darn competent lawyer, and though I admit that he did not highlight these two words in precisely the way that I have highlighted them, he did in his First Special Message to Congress on July 4, 1861 say that "even Texas gave up [her sovereign] character on coming into the Union; by

19. You mention that the Articles of Confederation also contained important language about "common defence" and note that I too point this out. You somehow think language from the Articles thus undercuts my constitutional argument. How so? I think the central purpose of the Articles was to secure common defense, and that it was failing its basic mission—hence the need for a new Constitution that would accomplish the most basic aims of 1776. This was indeed the basic Federalist argument—that the new Constitution would in fact vindicate the national security purpose of the old Articles. See THE FEDERALIST Nos. 40-41, 45 (James Madison). But all this stands in tension with the Beardian and neo-Beardian view that still prevails in many modern circles and that focuses more attention on class issues, the Contracts Clause, and matters of internal governance.
20. Powell, supra note 9, at 2078.
which act, she acknowledged the Constitution of the United States, and the laws and treaties of the United States made in pursuance of the Constitution, to be, for her, the supreme law of the land”; 21 and then in his Second Annual Message (on December 1, 1862) Lincoln proceeded to elaborate at great length the significance of territorial-land-based considerations that argued strongly against secession. I quote extensively from this Message in my book, and I shall not repeat the passage here. 22 (It’s also worth mentioning here that in his Inaugural Address, Lincoln argued against secession by quoting and highlighting the Preamble phrase about “form[ing] a more perfect Union.” 23)

Now, I think it will be quite clear to any fair-minded reader of my book that my specific reference to the words “the land” in Article VI is only one of a long string of pieces of legal evidence that I invoke for my views about the basic indivisibility of the Constitution and for the significance of geography and geostrategy in its creation. But you seem to think that this is the thirteenth chime of the clock that calls into question all that went before. OK, I’ll take the bait and take you on here. However, every reader of this Journal should be aware that I am spending vastly more space elaborating a small point than I actually spent making it my book. And I am doing so only because you think this is somehow proof of my fondness for arguments that no competent lawyer would make. 24

First, the “land” language of this clause was added at Philadelphia at precisely the same instant that various changes to the Preamble were made that textually highlighted the geostrategic link to Britain’s perfect union—and by


22. See AMAR, supra note 2, at 52. Here is some additional language from this speech linking land and law:

> A nation may be said to consist of its territory, its people, and its laws. The territory is the only part which is of certain durability. “One generation passeth away, and another generation cometh, but the earth abideth forever.” It is of the first importance to duly consider, and estimate, this ever-enduring part. That portion of the earth’s surface which is owned and inhabited by the people of the United States, is well adapted to be the home of one national family; and it is not well adapted for two, or more.

_Id._

23. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, supra note 21, at 262, 265.

24. Really, Jeff, surely you can’t mean this. One quick data point: my own work has been cited with approval by the Supreme Court about twenty times in the last twenty years—by Justices from every wing and on a broad range of topics. This is not how one would expect the Court to treat some legal incompetent who does not understand the basics of constitutional argumentation.
precisely the same Committee of Style (led by Gouverneur Morris). You say that the “land” language was simply lifted from Magna Charta, but it is widely understood that in America “the law of the land” can mean something different than in England. For example, here, “the law of the land” Clause establishes judicially enforceable limits on the power of Congress whereas English law does not envision judicial review of acts of Parliament. In part, this is because of other differences in language between England’s “law of the land” documents and America’s Article VI. But it is also well established that even the identical words can sometimes sensibly mean different things when used in a different context. (For example, Americans thought that various words of Magna Charta meant jury trials, when in fact this was probably not so originally. Much of the language of the Bill of Rights meant something rather different to the Fourteenth Amendment framers who reglossed it than it did to their Founding forbearers. Various words from the Establishment Clause changed meaning dramatically when copied verbatim by state constitutions.) Moreover, even in England, there were and are strong territorial elements worthy of our attention. In a feudal system in which military obligations traveled through land, a person born of foreign parents on English soil owed permanent obligations to the English crown; and England had strict territorial ideas about the use of the militia outside English soil and about the presence of slavery on English soil.

In short, I mentioned the words “the land” not because these words must be read in the way I suggest, but because they may permissibly be so read if such a reading makes good structural sense and coheres with the broad enactment history and the overarching purposes of the Constitution itself—which I think it does (and here I build on arguments that President Lincoln made long ago). Whether or not you agree with my argument, I believe that you should admit that it is strictly legal, and even (dare I say it?) competent.

I am loath to close on this note of sharp disagreement. So let me instead issue another invitation: Let's keep the conversation going. Mike, Jeff, next time you are in New Haven, the pizza is on me.

Sincerely,
Akhil
