REVIEW

The Text, the Whole Text, and Nothing but the Text, So Help Me God: Un-Writing Amar's Unwritten Constitution

Michael Stokes Paulsen†

America's Unwritten Constitution: The Precedents and Principles We Live By
Akhil Reed Amar. Basic Books, 2012. 615 pages.

INTRODUCTION

No, no, no! *America has no "unwritten constitution"!* Ours is a system of *written* constitutionalism. There are only sound conclusions and inferences—or unsound ones—from the text itself.

The text—the whole text, of course, including the relationships and interactions among differing provisions, the structures of government it creates, the logic of its arrangements, and the inferences that fairly can be drawn from its provisions—is the sole object of constitutional interpretation. The text of course must be understood in terms of the original public meaning of its words and phrases, in the linguistic, social, and political contexts in which they were written: history and context illuminate textual meaning; so does constitutional structure; so can precedent, at least sometimes. But ultimately, it is the objective meaning of the words of the written constitutional text that is the whole ball game. If what one is *doing* is interpreting and

† Distinguished University Chair and Professor of Law, University of St. Thomas School of Law. My thanks to Gary Lawson, Larry Solum, and Sherif Girgis for comments on fragments of early drafts. (Do not blame them for what I say.)

Akhil Amar is an old and dear friend. We were roommates and constitutional law sparring partners as students at Yale Law School in the early 1980s. We disagreed wildly and occasionally vehemently—yet somehow still cheerfully—over many things. We continue to disagree over a great many things today—including (as this review demonstrates) nearly everything in his recent book. As noted below, I have reviewed two of Akhil's other books highly favorably. See note 3. I hope he will forgive me this unfavorable—but still cheerful—review, which I offer in the same spirit as our dorm-room screaming matches thirty years ago. (You told me I could let you have it, if I thought you deserved it, Akhil. Well, here it is!)

applying the Constitution as authoritative written law—as opposed to engaging in some other interesting project—then one looks to understand the meaning of the text, the whole text, and nothing but the text. And if one's sworn *duty* is to faithfully interpret and apply the Constitution—if one is a judge or other public official who has sworn an oath to support the Constitution, or to preserve, protect, and defend it (as opposed to a mere law professor who has sworn no such thing)—one cannot do anything else without violating one's oath.

The Constitution of the United States does not answer, or even address, every important question of government, politics, law, or rights. Further, some provisions of the text admit of a fair range of meaning. But that does not mean that we have an "unwritten constitution." It means, rather more simply, that the written Constitution does not answer everything and therefore leaves some matters—indeed, a great deal—to the democratic choices made by representative government in accordance with the structures of government created by that document. It means that some matters are left to be worked out by government and politics, and that different choices might legitimately be made at different times. That is hardly to say that the Constitution is "unwritten" or (just as incoherently) that its meaning "changes" or "evolves." It is simply to say that the written Constitution does not address everything under the sun and that, where the Constitution does not specify a rule, the Constitution does not specify a rule. Policies are then left for the people to decide through the process of self-government. That, too, is a consequence of written constitutionalism. Where the Constitution says nothing, it says nothing—and there is nothing more to be said about what the Constitution says, at least not by courts purporting to apply the Constitution as a rule of law invalidating a political choice made by legislative or executive officials.

Where the Constitution's answer to some issue is less than clear, or where its meaning is abstract and general, the relevant constitutional decisionmakers are left with a range of interpretive and policy choices. The only question that remains is *who* gets to make those choices. That in itself is a constitutional question to be answered from the Constitution's text and structure and the fair inferences that may be derived from them.[1] There

[1] The correct answer, I submit, is that the Constitution's nature as supreme law and its structure of coequal, independent departments dictate that where the Constitution supplies a rule of law and governmental actors (federal or state; legislative, executive, or

may be linguistic indeterminacy; there may be matters left open or incomplete; there may be genuine interpretive choices to be made; there may be a legitimate range of disagreement about what does or does not follow logically from the words of the text; and there may be difficult applications.

But there is no such thing as "America's Unwritten Constitution." It is a misnomer, a hoax, a charade, a deception, a farce, a snare, a delusion, a lawyer's trick, a pickpocket's sleight of hand, a canard, to say that there is.

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That said, Professor Akhil Reed Amar's *America's Unwritten Constitution: The Precedents and Principles We Live By* is a brilliant and fun, if somewhat erratic and sometimes infuriating, book. It is well written, smart and clever as can be, chock-full of insights, stimulating, challenging, and provocative. It is in these many respects a fitting sequel to *America's Constitution: A Biography*,[2] Amar's earlier (and, I think, far better) book.[3]

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judicial) have acted in conflict with that rule, the judicial province and duty require courts deciding disputes within their jurisdiction to give legal effect to the Constitution's rule and deny legal effect to governmental acts in conflict with that rule. This is the familiar structural-textual argument for "judicial review" set forth in Federalist 78 (Hamilton), in *The Federalist* 521, 524–25 (Wesleyan 1961) (Jacob E. Cooke, ed), and *Marbury v Madison*, 5 US (1 Cranch) 137, 176–77 (1803). See also Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 Mich L Rev 2706, 2711–13 (2003) (defending the correctness of this argument and exploring its logical implications). In such instances, courts have authority to apply a rule supplied by the Constitution as a rule governing the case. (This does not mean, however, that courts can "bind" other branches of government, acting within their spheres, to adhere to the courts' *erroneous* interpretations, but that is a slightly different separation of powers structural argument. See id at 2714–16; Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Georgetown L J 217, 241–88 (1994).) Where the Constitution does *not* supply a rule with which governmental actors' actions are in conflict, however, the text, structure, and logic of the Constitution—the separation of powers, the coordinacy of the branches, and the nature of the judicial power within such a scheme—dictates that the courts may *not* legitimately decline to give legal effect to the actions of those actors. That is the familiar structural-textual argument of *M'Culloch v Maryland*, 17 US (4 Wheat) 316, 385–87 (1819). See Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 Nw U L Rev 857, 858 (2009).

[2] Akhil Reed Amar, *America's Constitution: A Biography* (Random House 2005).

[3] I have had the pleasure of reviewing two of Amar's books before. See generally Michael Stokes Paulsen, Book Review, *How to Interpret the Constitution (and How Not To)*, 115 Yale L J 2037 (2006) (reviewing *America's Constitution: A Biography*); Michael Stokes Paulsen, Book Review, *Dirty Harry and the Real Constitution*, 64 U Chi L Rev 1457 (1997) (reviewing *The Constitution and Criminal Procedure: First Principles*). Both books are, in a word, magnificent, as is his other major book, Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (Yale 1998).

There are just two things wrong with *America's Unwritten Constitution*. But they are two pretty major things: First, to be perhaps uncharitably blunt, Amar's thesis is all wrong. Many of his arguments and illustrations simply do not warrant the extravagant conclusion that there exists in America an unwritten constitution that parallels, qualifies, revises, and sometimes alters the written Constitution. Instead, what Amar's observations ought to yield, in those many instances when they are valid, is a methodology of smart, sensitive-to-history-and-context *written textualism* as the Constitution's correct and exclusive interpretive methodology. In some instances, his analysis straightforwardly supports such a conclusion. In other instances, his convoluted analysis demonstrates, indirectly, that straightforward original-meaning textualism is a far more sensible route to correct constitutional conclusions than free-form unwritten constitutionalism.

The second problem is even more serious and flows from the first: Amar takes his mistaken methodological inference of untethered unwritten-ism and runs with it, sometimes rather wildly, offering up bad arguments in support of untenable conclusions. At first gradually, and then with alarming alacrity, the book abandons any serious disciplining constraint on what can be said in the name of the Constitution. By the time one is halfway through this six-hundred-plus-page tome, it has become clear that Amar's unwritten constitution permits almost any ingenious, overclever outcome that a judge might care to reach, including some fairly monstrous ones (such as the Supreme Court's horrid decisions in *Dred Scott v Sandford*,[4] *Plessy v Ferguson*,[5] and other notorious cases).

To be clear: Amar does not embrace all such results—he adamantly denies some of them (pp 270–74). But it is not at all obvious *why* his methodology could not lead where he does not wish to go. At the same time—somewhat strangely given his boldness at other points—Amar declines to draw other, sound inferences from the written text; his audacity is selective.[6] In the

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4 60 US (19 How) 393 (1856).

5 163 US 537 (1896).

6 For example, given Amar's views of the limited force of judicial precedent (pp 234–37) and his defense in other scholarly work of the structural equivalence of all federal judges, see Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 BU L Rev 205, 230 (1985), it is disappointing to see Amar follow almost reflexively the conventional view that lower court judges must adhere to even clearly wrong Supreme Court precedents rather than rule independently in a manner faithful to their oath and leave it to the Supreme Court to reverse them (pp 232–

end, Amar's unwritten constitution consists mostly of conventional liberal political ideology, from which he dissents occasionally: He likes the results of the Warren Court, in the main, but often prefers different reasoning (pp 141–99). In a notable departure from liberal orthodoxy, he dislikes the exclusionary rule as a Fourth Amendment remedy (pp 114–16, 172–83) and defends a reading of the Second Amendment that extends an individual right to firearm possession (pp 165–66). But he embraces abortion rights, if only he could find an (unwritten) constitutional provision to justify them (pp 122–23, 291–302). He likes gay rights, gay marriage, and sexual liberty generally (pp 117–30). In short, he likes judicial activism when he likes its results and dislikes it when he dislikes its results. In the end, "America's Unwritten Constitution" is simply *Amar's* unwritten constitution.

Isn't that ultimately the problem with all versions of "unwritten constitutionalism"—that they end up being simply the mirror of their devisers' personal preferences? That they offer no reliable disciplining methodology that could constrain their manipulation by others, in the service of *their* personal preferences? That they are less reflective of the Constitution than of the interpreter? Despite the limitations of written textualism—the ambiguities of the text and the imperfections of the methodology—does it not in the end offer a more faithful method for interpreting and applying the Constitution than free-form unwritten-ism?

In Part I of this Review, I argue that a good bit of Amar's analysis in *America's Unwritten Constitution* is actually more supportive of the practice of *written* constitutionalism than the thesis of unwritten-ism that Amar advances, and that many of his unwritten detours are unhelpful and perplexing. In Part II, I argue that much of the rest of Amar's unwritten constitutionalism is simply misguided—misleading invention and extrapolation. It is *not* constitutionalism at all but make-it-up-ism, and it leads to some conclusions that are almost constitutional-nonsense propositions. In Part III, I explore the implications of Amar's unwritten-ism placed in the wrong hands, or even in reasonably good hands intent on reaching a desired result: skillfully applied, Amar's unwritten constitutionalism yields any result one might want. Finally, in Part IV, I sketch a theory of what to do with textual indeterminacy, arguing that the text and structure of

33). There are other instances in which Amar fails to pull the trigger: in his view of precedent generally, see text accompanying notes 46–55; in his seeming acquiescence in judicial supremacy; and in his deference to much of contemporary constitutional doctrine.

the Constitution suggest reasonably clear answers to *this* particular genre of constitutional question. It is the asserted indeterminacy of the text that launches Amar's quest for the unwritten constitution that can fill all gaps and answer all questions. But there is a better, textual solution: the Constitution's text and structure tell us what to do when textual meaning runs out.[7]

I. UNNECESSARY, UNHELPFUL UNWRITTEN-ISM

Professor Amar's core thesis is that America has an unwritten constitution that shadows and supplements its written one. Sometimes Amar tenders this proposition in a soft, seemingly unthreatening form: The unwritten constitution "supplements but does not supplant" the written document (pp x–xi, 273). It should not be thought "a carte blanche" to "ignore" the text's "core commands" (p 273) or be taken to "contradict the plain meaning . . . of an express and basic element of the written Constitution" (p 74). Sometimes, however, Amar elevates the unwritten constitution to "roughly on a par with . . . the canonical text" (p 479). And sometimes the unwritten constitution actually trumps the constitutional text: unwritten principles are capable of revising or even repudiating the evident meaning of the text's words, so that sometimes a provision should be read to mean "almost the *opposite*" of what it seems to say (p 6). Finally, very often (as we shall see) Amar's unwritten constitution permits constitutional revisions in the form of unwritten add-ons to the constitutional text. In the end, Amar's initial disclaimers do not disclaim all that much, and at several points he reclaims ground

[7] There are lesser problems with the book—problems that, ironically, parallel its title and theme and that contrast with Amar's fabulous earlier book on the written Constitution, *America's Constitution: A Biography*. Unlike *America's Constitution*, which (like the document it exegetes) was a lean, tight, carefully worded text, *America's Unwritten Constitution* (like the "undocument" it expounds) is sprawling, discursive, and un-unified, struggling for a global theme to unite its disparate chapters and arguments. Unlike *America's Constitution*, which was restrained in its style and disciplined in its scope—not addressing every imaginable issue—*America's Unwritten Constitution* is exuberant and tendentious, discussing anything and everything. The virtues of the written Constitution of the United States include its (mostly) carefully written provisions; its brilliant and elegant concept, structure, and logic; its relative simplicity and directness; and its willingness to leave many things to the working-out of practical democratic representative government. *America's Constitution* possessed the same magnificent virtues. Among the vices of an unwritten constitution is that it can wander, untethered, all over the place and try to be all things to all people. *America's Unwritten Constitution* possesses some of the same regrettable vices.

he has elsewhere disclaimed, embracing some rather extravagant departures from the constitutional text.

The problem begins with first principles. As rhetorically appealing as the term may be, there simply is no "unwritten constitution" in America. Indeed, there cannot be such a thing, consistent with the nature—and rather explicit terms—of America's *written* Constitution as a single, authoritative, binding, exclusive, written instrument of supreme law.[8] Article VI of the document specifies the document, "this Constitution"—and nothing else—as authoritative.[9] The Preamble likewise specifies "this Constitution," plainly referring to the text that follows, as the written instrument ordained and established by "We the People" for governance.[10] Article VI requires all government officers to swear an oath to support "this Constitution," again referring to the document just set forth.[11] Article V specifies the means for revising the text of "this Constitution," strongly suggesting both that it is this text alone that counts as America's Constitution and that the sole means of changing that Constitution is by changing that text.[12] And Article VII concludes the original document by specifying the conditions under which "this Constitution"—the written document Article VII concluded—will be deemed to have become operative.[13]

The conclusion is hard to avoid: if the written Constitution is the supreme, binding, authoritative law, there cannot be an "unwritten constitution" deviating from the written text—including, most fundamentally, the text's apparent exclusivity as supreme law. Unwritten constitutionalism is thus, almost by definition, in conflict with written constitutionalism as a matter of principle. And it is most definitely in conflict with the terms of "*this* [written] Constitution." In a regime governed by an

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8 I have set forth the textual argument for the exclusivity of the constitutional text at greater length elsewhere. See Paulsen, 103 Nw U L Rev at 858–62, 869 (cited in note 1) (arguing that Article VI specifies the text of "this Constitution" as the exclusive object of constitutional interpretation); id at 869 ("*The document specifies the document* as authoritative. By very strong linguistic implication, if not quite by explicit language, the document's specification of the document as supreme and binding would appear to exclude anything outside the document as authoritative. . . . The writing is exclusive."). See also Vasan Kesavan and Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 Georgetown L J 1113, 1127–33 (2003).

9 US Const Art VI, cl 2.

10 US Const Preamble.

11 US Const Art VI, cl 2.

12 US Const Art V.

13 US Const Art VII.

exclusive written text uniquely designated as supreme law, "unwritten constitutionalism" is almost literally unconstitutional unconstitutionalism.

How, then, does Amar reach his contrary conclusion? First, he observes that a fair bit of our constitutional practice and tradition is based on *inferences and deductions from* the written text (p 47). Second, he observes that some of our constitutional practice and tradition simply *cannot be deduced or derived from the text at all*, but seems to derive more from experience, lived tradition, common practice, symbolism, or judicial invention that has come to be accepted over time (pp 238–39). Therefore, Amar concludes, America has an unwritten constitution.

This is almost exactly half right. The problem is that Amar smushes together two quite different sets of phenomena, and while both observations are correct, the normative conclusions to be drawn from them are quite different. Logical inferences and conclusions drawn from the text are one thing. There is a powerful argument that this is a straightforward, entirely legitimate method of textual interpretation. Nontextual interpolations into the text, or extrapolations from it, are different entirely. Amar concludes that these two different strands are of a single fabric; they are two different ways of reading "between the lines" (p 47). They are therefore equally legitimate, and together they warrant the conclusion that America has an unwritten constitution that supplements, qualifies, and explains the written one.

Might I propose a rather different bottom-line conclusion—a two-part counterthesis that Amar's analysis and illustrations better support? First, the drawing of certain deductions and inferences from the written text often might be part of what it means to faithfully read and apply a written text—that is, it might be simply an aspect of good, thoughtful *written* constitutionalism. Second, inferences *not* fairly derived from the text, from its internal structure and logic, or from reliable historical evidence of original meaning simply are not justified as interpretations of the Constitution. In short, why might it not be the case that some inferences from the Constitution are *right*, but that inferences (or interpolations) not fairly attributable to the document are *wrong*?

My critique on this score proceeds in two stages: First, I set forth certain eminently defensible structural or inferential principles of textual interpretation—principles in many respects consistent with Amar's analysis. Second, I take a quick tour of

some of Amar's roundabout arguments for conclusions more sensibly grounded in straightforward textual interpretation—a tour that yields the conclusion that much of Amar's argument for embracing an unwritten constitution is simply unnecessary, unhelpful, and unsound.

A. Seven Habits of Highly Effective Textual Interpreters

Some of what Amar has to say about good methodological steps for faithful constitutional interpretation is, quite simply, terrific. Reformulated slightly, it could be embraced by even the most committed original-meaning textualist. As noted, however, these valid insights into the text provide no evidence at all for a grand theory of unwritten constitutionalism. Quite the contrary, they reinforce and support the practice of written constitutionalism and even help rescue it from certain difficulties or criticisms. In particular, I submit that the following are correct propositions of straightforward textual interpretation, each of which (except perhaps the last) is consistent with substantial chunks of Amar's discussion:

(1) Specific words and phrases, considered in historical and linguistic context, should be understood as importing, so to speak, specific historical conceptions and background understandings that informed readers of a document of this sort would have taken for granted. That is part and parcel of their original public linguistic meaning.[14]

(2) The text must be understood as a whole: various provisions qualify, modify, or shed light on the proper understanding and application of other parts of the text; the overall structure and logic of the text is part of the text; and the structure and logic of the document as a whole properly inform the correct understanding of particular parts. (This is a central theme in some of Amar's best, and most important, earlier academic work.)[15]

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[14] See Paulsen, 103 Nw U L Rev at 866–67 & n 26, 872–75, 884–88 (cited in note 1) (embracing this position and applying it to specific examples); Kesavan and Paulsen, 91 Georgetown L J at 1127–34 (cited in note 8); Vasan Kesavan and Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 Cal L Rev 291, 332–95, 398 (2002) (examining, in excruciating detail, the original meaning and usage of semicolons in the original Constitution, including background grammatical principles of the era in which the Constitution was written).

[15] See generally, for example, Akhil Reed Amar, *Intratextualism*, 112 Harv L Rev 747 (1999). For the classic academic presentation of this view, see generally Charles L. Black Jr, *Structure and Relationship in Constitutional Law* (Louisiana State 1969). See also Paulsen, 83 Georgetown L J at 226–27 (cited in note 1). The classic judicial illustration

(3) It is not at all improper constitutional interpretation to deduce from the document certain rules of law that flow logically from others contained in the text or discernible from its structure and operation, even if this sometimes yields mildly surprising conclusions. (In other writing I have analogized this technique to constructing proofs of various "theorems" in geometry and other branches of mathematics.[16] If the constitutional postulates are sound, and the logical inferences and deductions are rigorous and justified, the resulting theorems are also correct—justified, ultimately, by the constitutional text—whether or not anyone subjectively intended, expected, or contemplated such results, and sometimes even if the text's drafters intended or expected the opposite.[17])

(4) The Constitution leaves some matters of government open for choice by future generations and admits of different political answers at different times by different political decisionmakers; some of those options resulted in early choices as a matter of early practice that have become more or less settled in our political (quasiconstitutional) tradition, and others have not.[18] But a quasiconstitutional tradition, or long-standing practice, is not the same thing as a constitutional *rule*, and mere settled

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of this method is *M'Culloch*, discussed as such by both Amar (pp 22–31) and Black. See Black, *Structure and Relationship in Constitutional Law* at 13–15 (cited in note 15). *Marbury* is another such example. See Paulsen, 101 Mich L Rev at 2711–24 (cited in note 1).

Perhaps the consummate nonjudicial practitioner of such a holistic-structural, don't-read-the-parts-apart-from-the-whole method of constitutional interpretation was President Abraham Lincoln. See Michael Stokes Paulsen, Book Review, *The Civil War as Constitutional Interpretation*, 71 U Chi L Rev 691, 692–93, 703–26 (2004) (discussing structural, practical, whole-text constitutional interpretation, as illustrated by the interpretive methodology of Lincoln); Michael Stokes Paulsen, *The Constitution of Necessity*, 79 Notre Dame L Rev 1257, 1260–67 (2004).

16 See Paulsen, 83 Georgetown L J at 226–27 (cited in note 1) (dubbing such an approach "Euclidian").

17 I return to this critical point—that textual meaning and valid logical inferences from the text may yield conclusions that are sound even if sometimes at variance with the subjective expectations or intentions of the text's drafters—below, in discussing two of Amar's illustrations: the Sixth Amendment right of criminal defendants to testify and present evidence in their own defense, see Part I.B.1, and the meaning of "equal protection of the laws" as applied to racial segregation, see Part I.B.3.

18 For discussion of the proposition that the text sometimes affords political actors a range of choices, admitting of different choices at different times, all within the legislative province, see Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 Harv J L & Pub Pol 991, 994–96 (2008). See also generally Michael Stokes Paulsen, *The Dormant Fourteenth Amendment* (unpublished manuscript, 2013) (on file with author).

practice can become unsettled by innovations not foreclosed by a rule set forth in the Constitution.[19]

(5) Closely related to the preceding, sometimes the "single right answer" supplied by the text of the Constitution is in fact a *range* of answers—a domain from which political actors may choose, none of which can be said (judicially) to be a "wrong" answer in the sense of actually being *unconstitutional* (that is, lying outside the domain of constitutional political choice admitted by the constitutional language).[20]

(6) Sometimes, reasonable interpreters can disagree concerning the meaning or range of meaning of a constitutional provision or principle. That is, even among those who apply a methodology of sophisticated, rigorous textualism, fair-minded interpreters might reach different conclusions; the enterprise, even if done faithfully and properly, simply does not always yield uniform conclusions. (No big surprise here: reasonable original-meaning textual interpreters will sometimes disagree as to the correct conclusion.)

(7) And finally, (a corollary to (5) and (6)): Where the document is truly indeterminate or ambiguous on a specific point or its application to a particular issue—where reasonable interpreters, faithfully seeking to follow the Constitution's original meaning fairly can reach differing conclusions—the text, structure, and logic of the Constitution suggest a proper default rule. (One might say that the text is reasonably determinate on the question of what to do in the case of textual indeterminacy as to specifics.) And that rule is that *the people rule*, through the structures of popular representative government created by the Constitution and by state constitutions.[21] The Constitution creates a republican government with representative institutions, vested with power to implement that Constitution and govern

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[19] See Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 Yale L J 1535, 1542–43 (2000) (noting that "unfamiliarity does not equal unconstitutionality" and that the test of the correctness of a legal proposition is "the soundness of the reasoning supporting it, not its conformity with present convention").

[20] See Paulsen, 31 Harv J L & Pub Pol at 994–96 (cited in note 18); Paulsen, 103 Nw U L Rev at 860, 914–18 (cited in note 1). Below, I argue that this suggests a "rule of construction," or hermeneutic principle, that courts should uphold the actions of political branches of government if such actions fall within the range of meaning afforded by a broadly worded text, and that this rule is justified on a straightforward interpretation of the words and structure of the document itself. See text accompanying notes 94–100 and 103–06.

[21] See note 1. For further elaboration, see Part IV.

pursuant to its terms, in all respects not inconsistent with those terms.

Each of the above propositions is, I submit, consistent with rigorous, principled, written-text-is-exclusive, original-public-meaning textualism. None requires a text-defying leap to the conclusion that we have an "unwritten constitution." Thus, one can go along, a good part of the way, with Amar's analysis and yet vigorously disagree with his thesis that we have an unwritten constitution that complements and supplements our written Constitution.

A fair bit of what Amar has to say, especially in the earliest chapters of the book, can be reconciled in some fashion or another with these seven principles. Indeed, much of Amar's best analysis and resulting conclusions could be recast as exercises in textualism, thoughtfully applied. Amar's treatments of, for example, *M'Culloch v Maryland*[22] (pp 22–31), the Guarantee Clause as applied to Reconstruction powers (pp 79–88), and even modern First Amendment doctrine (pp 33–34, 151–72) can be accommodated to this description reasonably well: The text's structure and logic, as well as specific clauses, compel certain conclusions about the allowable scope of legislative judgment to effectuate national powers and the supremacy of national law over inconsistent state law (*M'Culloch*).[23] A text's objective meaning is not necessarily congruent with its drafters' expectations, and grants of power thus may be capable of new applications in new circumstances, including civil war and the abolition of slavery (the Guarantee Clause).[24] And thoughtful reflection on the meaning, in linguistic, political, and structural context, of terms like "Congress," "no law," "abridging," "speech," and "press" indeed yields a surprising amount of modern First Amendment doctrine as a matter of straightforward textual explication, not unmoored extrapolation.[25] Indeed, in Amar's earlier scholarly

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22 17 US (4 Wheat) 316 (1819).

23 See Paulsen, 31 Harv J L & Pub Pol at 995–96, 1002 (cited in note 18) (arguing that the Constitution confers on Congress sweeping legislative powers).

24 Consider Kesavan and Paulsen, 90 Cal L Rev at 308–32 (cited in note 14) (defending the correctness of Lincoln's constitutional views concerning the unlawfulness of secession and the propriety of various legal fictions concerning "reconstruction" of so-called seceded states, in part on Guarantee Clause grounds).

25 US Const Amend I. For a short account of how these words themselves inform contemporary First Amendment doctrine through a thoughtful, textualist approach, see Paulsen, 103 Nw U L Rev at 907–09 (cited in note 1). Amar's discussion of various aspects of First Amendment doctrine is scattered throughout the book (pp 503, 605) (textual and topical indexes).

work—especially in his already-classic article *Intratextualism*—he had portrayed some of these very illustrations as examples of sophisticated textualism, not as proof that we have a parallel, unwritten constitution supplementing the text.[26]

B. Some Unnecessary, Unhelpful, Unwritten Excursions

But several of Amar's other examples—cast by Amar as illustrative situations that demonstrate features of our supposed unwritten constitution—would be far better recast in terms of arguments from constitutional text, original public meaning, constitutional structure, and straightforward logical derivation. In many such instances, Amar's analysis is needlessly roundabout. Thoughtful textualism would get him where he wants to go far more securely. There are perhaps a dozen instances of this in the book, but three telling illustrations should more than suffice: the right of a criminal defendant to testify; the power of Congress to institute a military draft; and the unconstitutionality of government racial segregation. I take up each in turn, followed by a fourth, more global illustration of awkward, circuitous, and often misleading analysis: Amar's unclear embrace of judicial doctrine and precedent in conflict with the written Constitution.

1. Does the written Constitution provide a right to testify?

Consider, first, a question that Amar thinks provides powerful proof of unwritten constitutionalism (pp 98–110): Do criminal defendants have the constitutional right to testify in their own defense and to present physical evidence of their innocence? Amar thinks that finding such a right requires either unwritten constitutionalism or a reading of the Ninth Amendment that permits judicial recognition of federal constitutional rights not otherwise stated in the text. This is so, according to Amar, because under Founding-era evidence rules, "defendants were never allowed to take the stand to testify on their own behalf" (p 104), and such a result seems odd today (p 99).

Set to one side the implication that the Constitution must be read to embrace all good things (by today's lights)—a thoroughly antitextual notion that presumes that today's policy desires should steer interpretation of a text's meaning to the desired

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[26] See Amar, 112 Harv L Rev at 749–58, 812–17 (cited in note 15).

result.[27] Set to one side also the flawed assumption that a text's objective *meaning* otherwise would be determined by contemporaneous *practice* at the time of its adoption. That too is sloppy thinking: as noted above, objective linguistic meaning of course can differ from subjective expectations or from practice.[28] Sometimes expectation and practice are simply contrary to the text.

A yet more basic problem infects this example: Amar's we-need-more-than-the-text gambit is not at all necessary to justify his desired conclusion that the accused has a constitutional right to testify and present evidence on his own behalf. Both the Fifth Amendment's text and the Sixth Amendment's text support the inference that the accused has such procedural rights. The idea that "due process"—the core traditional notion that an accused cannot be deprived of his liberty without notice and an opportunity to be heard—includes a criminal defendant's right to testify in his own defense is scarcely an extravagant flight from the text, even if common law evidence rules were to the contrary.[29] Likewise, it hardly seems a stretch of the Sixth Amendment's language to say that an accused's right to "compulsory process for obtaining witnesses in his favor" includes a right to a legal process in which he may obtain *his own* testimony as a witness in his favor and present what evidence he has.[30] And finally, the Fifth Amendment's recognition of a right *not* to

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[27] Any methodology of "interpreting" the Constitution under which the document lines up perfectly with all of one's policy preferences ought to be regarded as highly suspect. That is surely less documentary interpretation than personal projection. See Paulsen, 103 Nw U L Rev at 912, 916 n 179 (cited in note 1). Indeed, one can fairly evaluate *whether* the Constitution lines up with one's policy preferences only by first interpreting the document—that is, seeking to ascertain the meaning of its words—and then (and only then) evaluating the document in terms of its political consequences. The two enterprises are distinct. See id at 910–11, 918–19.

[28] See text accompanying notes 16–17.

[29] It should be no surprise that the legal effect of a new written text might be to displace a common law rule. Texts do that all the time. It is barely more of a surprise that this might not have been immediately seen, or that initial practice should have stuck with tradition, not realizing the ways in which it had been superseded, whether specifically intended or not, by the rule of a newly enacted text. As Amar himself puts the point later in the book: "People who live through a revolution do not always immediately appreciate just what they have wrought" (p 286).

[30] See *Rock v Arkansas*, 483 US 44, 52 (1987) ("The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call 'witnesses in his favor.'"); id at 51 (noting a Fifth Amendment textual basis in the due process right "to be heard"). Amar mentions *Rock* but does not discuss the Court's textual points about the Sixth and Fifth Amendments, even as he asserts flatly that "the right is not enumerated in the written Constitution" and dubs the *Rock* decision "activist" (p 106).

be compelled to be a witness against oneself would seem indirectly to confirm that an accused's testimony is not otherwise outside the ambit of compulsory legal process.[31]

Sure, the text could have been more explicit on the specific point, especially given that prior prevailing practice was to the contrary. The textual argument is not an absolute knockout punch. But it is a reasonably sensible argument derived *from the text* itself, without going on any Ninth Amendment benders. Why the rush to find an "unwritten constitution" or posit that the text should be construed to locate such a claimed right "directly in principles of truth, justice, and the American way as understood and practiced by the American people" (p 103)? Amar's illustration does not support his conclusion at all. To the contrary, it suggests a rather different one: read the text carefully, in linguistic context; read the whole text, including related specific provisions; and do not let practice or convention detract from or contradict textual meaning, because the text may in fact state a rule departing from convention.

2. Does the written Constitution grant the power to impose a military draft?

Consider another example that Amar develops at length: whether Congress has the power to institute a military draft. One would think the simplest route to the obvious answer—*yes*—is that Congress is specifically given the explicit, unequivocal textual powers "[t]o raise and support Armies" and "[t]o provide and maintain a Navy" and, by virtue of the Necessary and Proper Clause, granted a range of choices as to the means for "carrying into Execution the foregoing powers."[32]

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[31] For more on the meaning of the Fifth Amendment and its relationship to common law disqualification, see Paulsen, Book Review, 64 U Chi L Rev at 1486–89 (cited in note 3).

[32] US Const Art I, § 8, cls 12–13, 18. Lincoln's (unpublished) opinion on the draft makes the constitutional argument as simply and clearly as possible:

> The case simply is the constitution provides that the congress shall have power to raise and support armies; and, by this act, the congress has exercised the power to raise and support armies. This is the whole of it. It is a law made in litteral [sic] pursuance of this part of the United States Constitution . . . . The constitution gives congress the power, but it does not prescribe the mode, or expressly declare who shall prescribe it. In such case congress must prescribe the mode, or relinquish the power. . . . The power is given fully, completely, unconditionally.

Abraham Lincoln, *Opinion on the Draft*, in Don E. Fehrenbacher, ed, *Abraham Lincoln: Speeches and Writings 1859–1865* 504–06 (Library of America 1989).

Amar eventually reaches the same bottom-line conclusion, but through a peculiar, circuitous route. It is worth following him on this tour, for it is reasonably representative of his methodological quest for an unwritten American constitution. Amar begins with the premise that such an unwritten constitution includes inferences that might be derived from *acts* of the nation or the people, especially in the course of *enacting* a text, and that these inferences can go beyond the words of the document (pp 51, 94). (This is one of Amar's least tendentious principles of textual extrapolation.) Amar then sets out at length the historical position that the Reconstruction Amendments were enacted in part as a consequence of force of arms in the course of the Civil War and its aftermath (pp 88–94). This does not make those amendments illegitimate, Amar notes (correctly) (pp 92–94).[33] But he also finds in this history unwritten implications for discovery of a congressional power to conscript for national military service—a power, Amar suggests, that had not before existed (p 92). According to Amar, the act of adopting the Second Amendment had, back in the 1790s, implicitly enacted an unwritten principle of the primacy of state militias (p 90). But with the events of the Civil War in the 1860s, the army of the nation became the locus of military power, displacing the old unwritten rule with a new unwritten rule. Thus, the unwritten principle implicit in the adoption of the Second Amendment was overtaken by the unwritten principle implicit in the experience of the Civil War and the subsequent act of adopting the Fourteenth Amendment—to some extent, at the point of a gun. "The high-profile deployment of the Union Army to guarantee a regime of true republican governments undercut the central ideological premise of the Second Amendment's preamble" (p 91). Thus, Amar argues, a national draft is now (that is, post–Civil War)[34] constitutionally valid:

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[33] For an argument that the Reconstruction Amendments were validly adopted in accordance with the rules set forth in the text of Article V, see Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 Yale L J 677, 706–12 (1993); Kesavan and Paulsen, 90 Cal L Rev at 325–30 (cited in note 14); John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U Chi L Rev 375, 419–57 (2001).

[34] It is not clear whether Amar thinks that the authorization for a draft during the Civil War itself was constitutional. This is an obvious problem with his glossing-and-unglossing approach: Do actions departing from a prior, unwritten constitutional "principle" *violate* that principle? Or do they constitute (unwritten) constitutional amendments that *supersede* that principle? Can unwritten constitutional provisions be rewritten (if that

> Nothing in the 1860s vision repudiated the Founders' explicit written commands, even as this unwritten vision superseded earlier unwritten understandings. Nowhere did the Founders' text *explicitly* provide that the army clauses should be construed narrowly lest they undercut America's militia system. Nowhere did the Founders' text *explicitly* bar a national army draft if such a draft were deemed necessary to execute the laws, suppress insurrections, or repel invasions. Nowhere did the Founders' text *explicitly* say that every conscript must be officered locally. Rather, these things were arguably implicit in Article I as glossed by Amendment II. These unwritten understandings should ultimately give way to a later principle of the unwritten Constitution celebrating the army as a proper engine of national defense and republican government.
>
> . . .
>
> It is these acts of amendment during Reconstruction, rather than the formal texts of the Founding, as understood by the Founders, that best justify the current legal gloss on the army clause of Article I. Under this gloss, the army clause is now read as giving Congress general power to conscript soldiers. (pp 91–92)

That is quite an argument. But most of it seems utterly unnecessary and perplexing. Wouldn't it be more straightforward (and more accurate) to state, simply, that the Constitution *says* that Congress has the power to raise and support armies and provide for and maintain a navy, and then dispense with all the unwritten glosses glossing other, earlier unwritten glosses? One can drive to Chicago by way of Anchorage, but it's not exactly the most direct route, at least not from most places in America. And there are problems galore with Amar's elaborate, circuitous detour, not the least of which is all the unwritten constitutional hitchhikers he is tempted to pick up along the way. The text not only better supports Amar's conclusion than does his unwritten constitutional excursion, but also provides a more secure and less readily manipulated answer.

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is the right word) by subsequent unwritten constitutional provisions? How can one tell if this is the case?

3. Does the written Constitution prohibit racial segregation by law?

A third example of a convoluted unwritten-constitution approach when a straightforward written-constitution approach would do is Amar's treatment of the now-classic question framed by *Brown v Board of Education of Topeka*:[35] Does the Fourteenth Amendment forbid racial segregation?

Once again, the written Constitution supplies a reasonably direct (if contestable) answer. Or at least it does if one focuses on the objective original linguistic meaning of the words of the text, in context, rather than on the subjective intentions or expectations of specific persons involved in the process of enacting them—a distinction foundational to written constitutionalism.[36] "No state shall . . . deny to any person . . . the equal protection of the laws"[37] would appear to state a sufficiently determinate rule that the government may not treat classes of persons differently and adversely for purposes of legal privileges and entitlements because of race (or because of certain other immutable characteristics not legitimately related to such rights and privileges).[38] There is perhaps some room to argue about whether this is the necessary meaning of the words of the text, and over the exact scope of the principle stated. But it is not much of a textual stretch at all: it is a reasonably straight-line reading of the language; if there is room to argue over this reading, it is not a great deal of room.

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[35] 347 US 483 (1954).

[36] See text accompanying notes 16–17. There is a fundamental distinction between the formal content of a rule stated in a legal text—its objective meaning—and the mere subjective expectations or intentions held by some (or many) persons about how that rule would or should be applied. The latter may be indirect evidence of the meaning of the language or terms: intention and expectation sometimes might be competent, pertinent, and probative data concerning actual linguistic meaning. But, in principle, the objective linguistic meaning of constitutional language might differ from anyone's specific expectations or predictions about how that meaning might apply in particular instances. See Paulsen, 83 Georgetown L J at 227 n 23 (cited in note 1) (collecting authorities); Paulsen, 103 Nw U L Rev at 873–75 (cited in note 1); Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 Harv L Rev 417, 417–19 (1899) ("We do not inquire what the legislature meant; we ask only what the statute means.").

[37] US Const Amend XIV § 1.

[38] See Paulsen, 103 Nw U L Rev at 901–02 (cited in note 1); Paulsen, 83 Georgetown L J at 227 n 23 (cited in note 1) (arguing that the necessary meaning of the Fourteenth Amendment's language "entails a prohibition on racial segregation or other racial discrimination by state law" irrespective of the intentions or expectations of some drafters that the language would not have this consequence).

The *Brown* question then becomes whether this principle is violated when the state, by law, segregates public education on the basis of race. In the real-world factual and social context of the practice of racial segregation in nineteenth- and twentieth-century America, the answer was an embarrassingly obvious *yes*.[39] The fact that not all persons in the generation that drafted and ratified the Fourteenth Amendment recognized this is largely beside the point: it does not alter the meaning of the language used in the Constitution, nor does it alter the reality that racial segregation violated that meaning.[40] *Brown* was rightly decided and *Plessy* was wrongly decided, on reasonably straightforward textual-interpretation reasoning.

Amar's approach is far more involved. But it also seems far more vulnerable as a matter of constitutional reasoning. He begins with the statement that "many congressional supporters [of the Fourteenth Amendment] emphatically stated that it would not prohibit segregation" (p 146). Amar then leafs through the pages of his unwritten constitution and finds this to say about that:

> In the end, faithful constitutional interpreters must investigate not merely *how many segregationists existed in*

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[39] See generally Charles L. Black Jr, *The Lawfulness of the Segregation Decisions*, 69 Yale L J 421 (1960). Professor Charles Black describes the argument for the correctness of *Brown* as "awkwardly simple": the Equal Protection Clause forbids directly disadvantaging blacks as such, and enforced legal segregation constitutes a very serious such disadvantaging. Id at 421, 424:

> [I]f a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station, and if the question is then solemnly propounded whether such a race is being treated "equally," I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter.

[40] Indeed, there exists important historical evidence that the generation that adopted the Fourteenth Amendment by and large understood its anti-racial-separation implications. For an important scholarly article advancing this view, see generally Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va L Rev 947 (1995). The earliest Supreme Court decisions following the adoption of the Fourteenth Amendment treated segregation as a denial of legal equality on the basis of race, holding such racial segregations and exclusions unlawful. See *Railroad Co v Brown*, 84 US 445, 452–53 (1873) (holding that racial segregation in transportation violates a federal statute forbidding discrimination on the basis of race). See also *Strauder v West Virginia*, 100 US 303, 308–09 (1879) (holding that racial exclusion from jury service violates the Fourteenth Amendment). As I have noted in other writing: "It took an aggressively nontextualist, 'purposivist,' social-policy, evolving-meaning, underlying-principle-ish judicial approach to constitutional interpretation to erase that prior understanding of the text and establish segregation as constitutional for six decades." Paulsen, 103 Nw U L Rev at 901 n 135 (cited in note 1).

> *1866–1868* but also *what they said and did* and whether their *words and deeds plausibly glossed* the Fourteenth Amendment. In short, we must probe how the unwritten Constitution of the mid-1860s interacted with the written Constitution itself. (p 147) (emphasis added)

This turns out all right, thankfully: "Ultimately, nothing in what segregationists actually said or did provides good grounds for revising our initial understanding of the Fourteenth Amendment's central meaning" (p 148).

This is both convoluted and troubling. Why on earth offer quarter to questions of "how many segregationists" there were and whether their "words" or "deeds" (their *deeds*?) "plausibly glossed" the Constitution (p 147)? Do we really need to—should we, really—"probe how" the supposed "unwritten Constitution of the mid-1860s," embracing to some extent segregation, "interacted with" the actual, written Constitution (p 147)? Isn't the argument from text alone a much better one? Once again, Amar's unwritten constitution provides an answer that is at once unnecessarily circuitous—even confounding—and less persuasive than that provided by the text of the written Constitution, applied in accordance with the original linguistic meaning of its terms rather than the subjective intentions or expectations of some of its sponsors.[41]

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[41] Most critics of original-meaning written constitutionalism take a rather different tack on *Brown*. They argue that segregation was consistent with the Fourteenth Amendment's original understanding because many people at the time thought it was. This is then supposed to demonstrate the need for an evolving-meaning, justice-driven approach to constitutional interpretation. For the classic statement of this view, see generally Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv L Rev 1 (1955). Original-meaning textualists respond that what matters is not subjective intention or expectation but the objective, original meaning of the text itself and that the irreducible necessary meaning of "equal protection of the laws" includes a rule barring official discrimination on the basis of race—period, full stop. See, for example, Paulsen, 83 Georgetown L J at 227 n 23 (cited in note 1); Steven G. Calabresi and Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 Nw U L Rev 663, 668–69, 686 (2009).

The anti-originalists' debate with original-meaning textualists is thus joined at the point of *what constitutes the original meaning* of the text. Anti-originalists think (wrongly) that textual meaning is coextensive with subjective intentions or expectations; they deplore written constitutionalism because they dislike the results they (mistakenly) think that it yields. Original-meaning textualists, however, think that written constitutionalism is a matter of objective linguistic meaning, not subjective intention, and they think that *Brown* is sound on such premises.

Amar is not fully in either camp. He thinks that the content of the Constitution lies not in the original meaning of its text but in the "interaction" of that meaning with various aspects of our unwritten constitutional tradition—enacted meaning, lived practice,

In a later chapter, Amar returns to *Brown* and segregation, making a somewhat different argument. The Constitution's text, Amar writes, often is in need of judicial *implementation* going beyond bare *interpretation* (p 212). Thus, courts have the power to fashion doctrinal "sub-rules" that are *not* "found in or logically deduced from the written Constitution" (p 217). Amar argues that the meaning of "equal protection of the laws" is one of those areas inviting judges to fill in the gaps with doctrine of their own creation:

> The terse text did not—and could not realistically be expected to—answer all these second-order issues about how to implement the equality norm in the particular milieu of mid-twentieth-century Jim Crow. The written Constitution simply laid down the civil-equality principle and entrusted courts (among others) with the task of making that principle real in court and on the ground as the genuine law of *the land*. The rule announced on May 17, 1954—that de jure segregation would be presumed unequal in light of the actual history of Jim Crow—was a thoroughly proper way for the Court to discharge its duty of constitutional implementation. (p 212)

Brown is right, according to Amar, because it is permissible for judges to formulate legal doctrine using the indeterminate text as a starting point from which to build and fill in details. Segregation is not necessarily forbidden by the Constitution's language forbidding denial of equal protection of the laws, but forbidding segregation is an allowable judicial "implementation" of that language (p 212).

This is troubling. If Amar's notion is right—if "equal protection of the laws" has no determinate meaning with respect to the question of legally compelled racial segregation—then why wasn't *Plessy* rightly decided? Applying Amar's methodology on its own terms, one might well conclude that evidence of contemporaneous intention undermines what might otherwise be thought the natural linguistic meaning of "equal protection of the laws," opening the door to considerations of lived experience, "careful consideration of contemporary social meanings and popular understandings with regard to . . . liberty and equality" (p 304), and judicial discretion to develop doctrines to fill perceived

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judicial doctrine, and precedent (pp 19–20). But why exactly this yields *Brown*, and not *Plessy*, is unclear.

gaps left open by the text. *Voilà*! Isn't this a near-perfect description of the reasoning of *Plessy*?[42] So why wasn't *Plessy*'s separate-but-equal doctrine fully as legitimate for its day—as permissible an "implementation" of the indeterminate principle of equal protection—as *Brown*'s rejection of separate but equal was for its day?

Amar comes perilously close to embracing such a stance: "[H]ad the Court in 1954 simply said 'equality, equality, equality' in all realms of public citizenship . . . the justices would have had to make clear that the Court had been wrong from day one in *Plessy*" (p 214). Yes, indeed. But what exactly would have been wrong with that? Does Amar really mean to suggest that the justices *weren't* wrong in *Plessy*? Why on earth would anyone not want to say that *Plessy always was* wrong—wrong when decided, wrong in 1954, wrong today—rather than say that it is all up to the judges' sub-rules at different times, which presumably could change yet again in the future?

4. Does precedent supersede the written Constitution?

That question, and Amar's apparent answer, highlights yet another problematic feature of Amar's unwritten constitutionalism: for Amar, the problem with acknowledging forthrightly the wrongness of a judicial precedent—*Plessy* or any other—is that it would undermine the value of stare decisis, the judicial policy of (sometimes) adhering to past judicial interpretations of the Constitution simply because they are past judicial interpretations.[43]

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[42] *Plessy* infamously embraced a regime of separate but equal as satisfying the Fourteenth Amendment. It is rather disturbing how closely the elements of the Court's analysis resemble the elements of Amar's unwritten constitutionalism. The *Plessy* Court's argument, in a nutshell, was that, while the Fourteenth Amendment's object was the "absolute equality of the two races before the law," it "could not have been intended" (*intention*) "to enforce social . . . equality, or a commingling of the two races upon terms unsatisfactory to either." *Plessy*, 163 US at 544. Segregation does not "imply the inferiority of either race," as illustrated by the "common" social practices of "separate schools for white and colored children" and laws banning racial intermarriage (*lived experience*). Id at 545. The question thus came down to "reasonableness." Id at 550. The legislature, in judging this, was "at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort" (*lived experience, again*). Id.

Plessy is, in short, as nearly pure an example of unwritten constitutionalism as they come, counterbalancing the text with considerations of experience, social and cultural understandings, and lived realities.

[43] This is the essence of the doctrine of stare decisis—adherence to a decision simply because it is precedent, irrespective of its correctness or incorrectness. See Frederick Schauer, *Precedent*, 39 Stan L Rev 571, 571, 575 (1987); Paulsen, 109 Yale L J at 1538 n 8

Amar argues that it would be institutionally embarrassing for the Court to have to admit to serious error (pp 230–31). It is therefore "understandable" that the Court might, "for reasons of institutional prestige," "downplay admission of past error" and say that a past case "was perhaps sensible when decided, but has been eclipsed by later legal and factual developments that could not have been perfectly foreseen when the Court first acted" (p 236).

This is not exactly a commendable stance. Indeed, when it amounts to posturing to save judicial face, it borders on the outright dishonest. Yet Amar embraces precisely such posturing, because he regards judicial precedent—and judge-made "doctrine" generally—as core features of America's unwritten constitution (pp 201–41). But accommodating judicial doctrine and precedent at variance with the written Constitution requires some rather intricate analytical gymnastics. Amar's theory of when judges should follow precedent illustrates the same problems inherent to unwritten-ism generally: First, most of it is unnecessary—if precedent is already consistent with the written Constitution, the precedent adds nothing new to analysis of the Constitution. Second, the rest of it is improper—if precedent is inconsistent with the written Constitution, following precedent is unfaithful to the Constitution.[44]

Amar's position on the force of judicial precedent is rather revealingly incoherent. It exposes, unintentionally, a deep underlying tension between a strong theory of stare decisis and fidelity to a written constitution. On the one hand, Amar writes, the document is primary. Judicial decisions contrary to the Constitution are simply violations of the Constitution:

> If the justices generally felt free (or obliged!) to follow clearly erroneous case law concerning the core meaning of the Constitution, then the foundational document might ultimately be wholly eclipsed. . . . If the written Constitution indeed contemplated this odd result, one would expect to see a rather clear statement to that effect: "This Constitution

(cited in note 19). See also *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833, 854, 857 (1992) (characterizing the doctrine of stare decisis as imposing a general obligation to follow precedent "whether or not mistaken").

[44] See Paulsen, 101 Mich L Rev at 2732 (cited in note 1) (arguing that stare decisis, in the strong sense of deliberately adhering to precedents even if wrong, is unconstitutional, and that stare decisis, if employed in support of a result independently reached, is a pure makeweight).

> may be wholly superseded by conceded judicial misinterpretations; all branches are oath-bound to follow these misinterpretations." But the Constitution says nothing of the sort. On the contrary, it explicitly and self-referentially obliges all officials to swear oaths to itself, not to conceded misinterpretations of it. (p 237)

This is a powerful textual argument against the doctrine of stare decisis in any strong form that would accord decision-altering weight to prior misinterpretations.[45] A strong version of stare decisis is also, as Amar points out, in conflict with the Constitution's structural logic of separation of powers and coordinacy of the branches under the supremacy of the written Constitution:

> The Constitution establishes a system of coordinate powers. If neither the legislature nor the executive may unilaterally change the document's meaning, why may the judiciary? The Constitution details elaborate checks and balances. If conceded misinterpretations become the supreme law of the land, what checks adequately limit judicial self-aggrandizement? . . . [I]t seems perverse to insist that We the People must repeat what We said whenever judges garble what We said the first time. . . . [J]udicial review presupposes that judges are enforcing the people's document, not their own deviations. Departures from the document—amendments—should come from the people, not from the high court. Otherwise we are left with constitutionalism without the Constitution, popular sovereignty without the people. (pp 237–38)

So far, so good—in fact, really good. But then Amar reverses course abruptly and throws it all away in the next paragraph: "When the citizenry has widely and enthusiastically embraced an erroneous precedent," he writes, *then* a "court of equity may

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[45] I have made similar arguments in other writing. See Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83 Notre Dame L Rev 1227, 1228–29 (2008); Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 NC L Rev 1165, 1172–1200 (2008); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 Const Commen 289, 289–91 (2005); Paulsen, 101 Mich L Rev at 2731–34 (cited in note 1); Paulsen, 109 Yale L J at 1548–49 & n 38 (cited in note 19); Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century*, 59 Albany L Rev 671, 680–81 (1995).

sometimes" treat the precedent as "sufficiently ratified by the American people so as to insulate it from judicial overruling" (p 238).

Mind you, this is assuming that the precedent is flat-out wrong—in Amar's own words, a "conceded misinterpretation," a "judicial self-aggrandizement" that "unilaterally change[s] the document's meaning" in a way tantamount to "constitutionalism without the Constitution" (pp 237–38). No matter: "If enough people believe in a given right and view it as fundamental"—*believe* in it?—"then that right is for these very reasons a right of the people," and it "does not matter how the people's belief arose—*even if it arose as a result of a Supreme Court case that was wrong as a matter of text and original intent when decided*" (p 239) (emphasis added). For Amar, two wrongs literally make a right: the Court should (sometimes) "affirm the originally erroneous precedent" because the case, "*though wrong when decided, has become right*" by virtue of the people's embrace of the judicial usurpation (p 239) (emphasis added).

Amar's stance on precedent resembles in certain ways his argument for recognizing "lived rights" generally (p 97)—a claim that I discuss in greater detail in Part II.[46] In each instance, creation of unwritten constitutional law works in only one direction. Lived rights can be created but not rescinded; no new right can cut back on an existing one (p 136). Likewise, judicial decisions that arguably interpret rights "too broadly" can become binding precedents, and thus insulated from overruling, if citizens embrace them (pp 238–39). If courts interpret rights "too narrowly" and citizens enthusiastically embrace *those* holdings, however, that's a precedential horse of a different color: "Even if both cases come to be widely embraced by the citizenry, only the rights-expanding case interacts with the text of the Ninth and Fourteenth Amendments so as to specially immunize it from subsequent reversal" (p 239).

Is this not obviously unprincipled and result-oriented? The problems with this position positively leap from the page. First, there is no principled metric for determining when the necessary citizen enthusiasm for embracing a wrong precedent exists, so as to transform judicial wrong into constitutional right. (Presumably,

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[46] See notes 60–68 and accompanying text.

though, judges know the citizenry's enthusiastic embrace of their erroneous precedents when they see it.)[47]

Second, it is a rather basic analytic mistake to think that "rights" flow in one political direction only, and that "broad" and "narrow" views of rights are self-defining. Whether a precedent expands or contracts rights depends entirely on one's characterization of the right (and the rights-bearer) in question. Does *Roe v Wade*[48] interpret "privacy" rights too broadly (a judicial error that can become an entrenched right)?[49] Or did it interpret the "right to life" and to the equal protection of the laws too narrowly (an error that the Court can correct)?[50] Does the exclusionary rule interpret Fourth Amendment rights too broadly (popularly embraceable error) or does it underprotect citizens' rights to justice and public safety (judicially correctable error)? Do cases withholding equal state benefits from students attending religious schools interpret Establishment Clause rights too "broadly" or Free Exercise and Free Speech Clause rights too "narrowly"? (What about decisions holding the reverse?) Even *Plessy* could be conceived of either as treating rights (of a certain kind) broadly or treating rights narrowly.[51]

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47 Amar's formula for unwritten "lived rights" generally is that they spring into being when there exists "[a] strongly held belief by 55 percent of Americans that they have a constitutional right" (p 136). Perhaps, on Amar's view, public opinion polls could be conducted measuring support for judges' erroneous constitutional decisions, and if the requisite 55 percent approval is obtained (at any point in time), then the decision (if "rights-expanding") would be deemed entrenched and permanent by virtue of the doctrine of stare decisis, no matter how wrong as an original matter (p 239).

48 410 US 113 (1973).

49 Id at 152–53.

50 Id at 156–57. For a discussion of the plausibility, on textual and historical grounds, of the position that the Court construed the rights of fetal human beings in an unjustifiably narrow fashion, see generally Michael Stokes, *The Plausibility of Personhood*, 74 Ohio State L J 13 (2013).

51 Amar's other theory for how precedent legitimately might alter the written Constitution is that an otherwise-wrong judicial decision may become a legal right if litigants "may have reasonably relied upon prior case law" (p 239). That is, an erroneous decision may become a vested right not by virtue of broad popular acceptance but by virtue of special-case subjective private reliance. This is a more conventional position; the Supreme Court has often defended its practice of (selective) stare decisis by reference to the need to protect reliance interests. See Paulsen, 109 Yale L J at 1553–56 (cited in note 19) (collecting and discussing examples, and critiquing the analysis). But the justification for this position remains unclear, and Amar's two-paragraph discussion does not offer much enlightenment: precedents "create facts on the ground that properly influence" subsequent application of the law (p 239). Amar does not explain what "facts" judicial error creates aside from the erroneous precedent itself, why this should "properly influence" subsequent application of the law, or when, why, and how subjective private reliance should entrench constitutional error. Should *Brown* have reaffirmed *Plessy* on

Finally, again returning to *Plessy* and *Brown*, it is not at all clear why, on Amar's own criteria, *Plessy* would not be a good case for application of the doctrine of stare decisis. Recall that Amar does not even appear prepared to say that *Plessy* was wrongly decided as an initial matter.[52] *Brown* was correct, but on the ground that it was a permissible (not a required) judicial "implementation" of equal protection, not on the ground that *Plessy* was an impermissible one (p 212). Yet Amar writes, further, that "if the current Court believes that the past Court did not err in interpreting the Constitution, but merely chose a suboptimal set of implementing sub-rules that nonetheless fell within the range of plausible implementations, the current justices may properly choose to let the matter stand" (p 234). Again: Why isn't this a description of *Plessy*? If what makes *Brown* right is that it is an allowable judicial doctrinal sub-rule—*not* the fact that *Plessy* was wrong from the get-go—why shouldn't *Brown* have stuck with *Plessy* on the ground that *Plessy*'s separate-but-equal doctrinal sub-rule likewise "fell within the range of plausible implementations"? Why wouldn't this be the perfect case for stare decisis? All of Amar's precedent-favoring factors are there: general public acceptance and embrace of *Plessy* as long-standing precedent; decades of vested private social and public reliance on the rule of *Plessy* as an established fact on the ground; and the principle of deference to a past decision that merely adopted a suboptimal set of implementing sub-rules that nonetheless fell within the range of plausible implementations of the indeterminate notion of "equal protection of the laws" (pp 234, 238–39).

Amar of course does not say that *Brown* should have reaffirmed *Plessy* on the basis of stare decisis. Instead, as noted, he says (generically and not about *Plessy* in particular) that "for reasons of institutional prestige, the Court might prefer, when overruling itself, to do so on grounds that downplay admission of past error" (p 236). But surely this is improper if anything is: In what sense is it faithful to the Constitution to overrule *Plessy* on less than perfectly honest and forthright grounds, piecemeal, in order to avoid acknowledging that *Plessy* was out-and-out error? Yet Amar seems to think that this might be proper. Not only do

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the rationale that vested social and economic private reliance had been built up around legal segregation, or that the fact of the decision in *Plessy* itself created new "facts on the ground" requiring adherence to *Plessy* as a precedent?

[52] See note 79 and accompanying text.

two wrongs (sometimes) make a constitutional right, but dishonesty is sometimes the best judicial policy.

Amar's approach to doctrine and precedent thus permits the judicial interpreter to go in whichever direction he or she likes with precedent: overrule a prior case; dishonestly distinguish it (or take disingenuous baby steps toward overruling it) for the sake of preserving "institutional prestige"; or uphold a precedent as being "within the range" of plausible doctrinal "implementations" of an indeterminate text. Take your pick.[53] In the end, Amar's theory of precedent is vulnerable to the same charges that can be leveled against his unwritten constitutionalism generally: it is inconsistent with constitutional text; it has no principled starting point or stopping point; and it is capable of being deployed to achieve any result and can justify entrenching the results the interpreter likes and overturning the ones he does not.

The right rule is the one that Amar started with before his exceptions ate it: judicial precedents in conflict with the Constitution *never* properly can be accorded precedence over the Constitution itself.[54] Doctrine, practice, and precedent in conflict with the Constitution are not part of any "unwritten constitution." They are simply doctrines, practices, and precedents in conflict with our written Constitution. Stare decisis, in the strong sense of deliberate adherence to concededly wrong prior decisions, is simply unconstitutional.[55]

* * *

There is a straighter path to each of these outcomes. An accused in a criminal proceeding has the right to testify in his own defense because he has the textual constitutional right to compel testimony in his favor, which would seem to include his own testimony, regardless of what common law rules had been, and the due process right to appear and be heard. Congress has the power to conscript men and women for the armed forces because it has the plain-text power to "raise and support armies" and the

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[53] Why, for example, isn't the exclusionary rule a proper "implementation" of the Fourth Amendment's prohibition of unreasonable searches and seizures? Amar reserves peculiar ire for this particular doctrinal emendation of the text (pp 114–16, 172–81), but his commendable policy arguments against the rule—that it is contrary to the truth-seeking function of criminal trials and does not serve to vindicate factual innocence—do not explain why it could not be considered an allowable (even if suboptimal) doctrinal sub-rule for implementing the Fourth Amendment's commands.

[54] See text accompanying notes 44–45.

[55] I have taken (and defended) this position before. See note 45.

further power to enact measures "necessary and proper" for carrying such power into execution. *Brown* is right because the meaning of "equal protection of the laws" excludes government discrimination based on race. *Plessy* was wrong because racial segregation by law violates that rule, not because it chose a suboptimal subdoctrinal rule. Wrong judicial decisions—decisions contrary to the meaning of the text—should be overruled because the text controls over faithless decisions departing from the text.

One can repeat this exercise with Amar's arguments a number of times, on a number of different issues. Often, the text supports his conclusions better than his unwritten-ism does. And it does so in an altogether more straightforward fashion. One is left with a head-scratching question: Why not just employ Occam's razor and cut to the chase? Wouldn't it make more sense, as a matter of interpreting a written constitution, to hold that the text controls—rather than that the text, as glossed by unwritten constitutionalism in a variety of indeterminate and inconsistent ways, does not sufficiently undo the text so as to warrant the conclusion that the text does not control? Why not just stick with the text and cut off a couple of extra loops on the roundabout?

Why go off and write a six-hundred-plus-page ode to an unwritten constitution? Why did the (unwritten) chicken cross the road?

II. UNTENABLE, UNPRINCIPLED UNWRITTEN-ISM

To get to the other side. The reason Amar embraces unwritten constitutionalism is that the text alone simply does not produce all the results he thinks must be right: it produces some outcomes that strike him as absurd; it fails to justify our actual constitutional practice in certain meaningful respects; and it fails to produce other outcomes Amar thinks important, just, and good. To avoid such untoward consequences we need to "read between the lines" (p 31), Amar says. *A lot*, as it turns out. That, ultimately, is the motivation that drives the analysis of many specific issues in this book.

Before I take up a few examples, let me begin by conceding some ground. First, it is true that the objective linguistic meaning of the Constitution, even when read in context, as a whole, and giving full credit to its structure and logical inferences, will sometimes yield unfortunate or undesirable results. Some such

results may even border on ridiculous—evidence that the Framers made some mistakes or got some things wrong. This is a genuine problem with an imperfect written constitution (like ours).[56]

Amar's solution is to find provisions in an unwritten constitution to correct such undesirable written constitutional outcomes whenever he finds them. But there is a better answer: recognize that the text occasionally produces unfortunate results and deal with such flaws directly. If the people judge the Constitution defective they can and should take action to amend the text. (In extreme cases, they might choose to abandon the written document entirely, as happened with the Articles of Confederation.)[57]

Let me concede some further ground: it is also true that some of our actual constitutional practice is in conflict with the Constitution. There is, perhaps, somewhat less conflict than many people think. As discussed above, much of our constitutional practice *is* consistent with the text of the Constitution, understood and applied in accordance with sound principles of original-meaning textual interpretation.[58] There is, typically, no need to resort to roundabout arguments from a supposedly unwritten constitution in order to reach sound and desirable conclusions consistent with much of current practice. And it is often misleading and confusing to do so.[59]

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[56] See generally Michael Stokes Paulsen, *Someone Should Have Told Spiro Agnew*, 14 Const Commen 245 (1997) (suggesting that, on the basis of the Constitution's text, the vice president would preside at his own impeachment trial). I take up the "absurdity" canon and the example of the vice president presiding at his own impeachment trial (an example Amar makes much of) in Part IV.

[57] The project of constitutional correction is best served by reading the Constitution in a straightforward manner, identifying problematic provisions, and fixing them. That task is made more difficult by imagining that the text might be read to mean what it does not say. (What if Madison, Hamilton & Company, rather than writing a new document, had argued that general principles of unwritten constitutionalism implicitly remedied certain defects of the Articles of Confederation, so that it meant something other than what it said? Would that have done the trick?)

[58] See Part I.B.

[59] For discussion of results consistent with original-public-meaning textualism, and refutation of common canards in this regard, see Paulsen, 103 Nw U L Rev at 898–909 (cited in note 1). The Ninth Amendment, as well as the Fourteenth Amendment's Privileges or Immunities and Due Process Clauses, often invoked as archetypes of constitutional indeterminacy, in fact have reasonably specific core meanings if properly interpreted in accordance with the original-public meaning of the text, in context. See id at 884–88, 895–98 (discussing the Ninth Amendment and the Fourteenth Amendment's Due Process Clause); Michael Stokes Paulsen, *Paulsen, J., Dissenting*, in Jack M. Balkin, ed, *What* Roe v. Wade *Should Have Said: The Nation's Top Legal Experts Rewrite America's Most Controversial Decision* 196, 198–207 (NYU 2005).

Still, it is true that a fair amount of our accepted constitutional practice today—accepted by some, at least—is *not* fairly attributable to the words, phrases, structure, and history of the constitutional text or to logical inferences fairly derived therefrom. Amar's solution here is less clear. He rejects some of that practice as simply irreconcilable with the text, but accepts other parts (notwithstanding its irreconcilability with the text) as a "gloss" on the text that has become part of our unwritten constitution. Sometimes he accepts the gloss applied by the Supreme Court. Sometimes he re-glosses the Court's glosses. The choices of what to gloss, what not to gloss, what glosses to accept as glossed by the Court, and what glosses to re-gloss, are themselves a form of glossing. It's gloss all the way down.

That is hard to square with the idea of faithfulness to a written constitution. Once again, there is a better, straightforward answer: when practice conflicts with the written Constitution, one should simply acknowledge the conflict. The Constitution supplies an answer as to what to do in such situations: when practice—including judicial precedent—conflicts with the Constitution, the Constitution's rule is that the Constitution prevails, not the faithless departure from it.[60]

Finally, it is true that the text itself will not support many of the outcomes Amar finds in his unwritten constitution. But this is as it should be. The Constitution is not an unwritten vessel into which to pour the objects of one's interpretive desires. And it is precisely on this score that *America's Unwritten Constitution* is most deeply and seriously flawed. For add up Amar's à la carte menu of unwritten constitutions—the unwritten "symbolic constitution" (pp 243–76), "feminist constitution" (pp 277–306), "lived constitution" (pp 95–138), "doctrinal constitution" (pp 201–42), "'Warrented' constitution" (pp 139–200)—and it's off to the races. Amar's unwritten-ism yields unconstrained, unpredictable, unprincipled, untenable, and (literally) *unconstitutional* outcomes—results that simply cannot be reconciled with the written constitutional text. Consider just a few examples.

For openers, take Amar's formula for discovering "lived" unwritten constitutional rights (p 97). Amar reads the Ninth Amendment as a guarantee of "the people's right to discover and embrace new rights and to have these new rights respected by government, so long as the people themselves do indeed claim

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[60] This is the argument of *Marbury*, reduced to its essentials. See note 1.

and celebrate these new rights in their words and/or actions" (p 108). The content of such rights is "influenced by what the people believe their rights to be at any given moment" (p 303).[61] The Fourteenth Amendment likewise invites courts to "muse upon the wisdom of ordinary citizens" (pp 119–20). The "privileges and immunities *of* citizens may be found by paying heed *to* citizens—what they do, what they say, what they believe" (p 120). The document "invites careful consideration of contemporary social meanings and popular understandings" of rights and liberties (p 304). But that is "not to say that popular social movements may, as a general matter, amend the Constitution" (p 296).

If this is not very clear or precise—it isn't—perhaps a numerical formula might help. Amar links the Ninth Amendment to the Privileges or Immunities Clause of the Fourteenth Amendment and to the Eighth Amendment's ban on cruel and unusual punishments and plucks a magic number out of the air: 55 percent. "A strongly held belief by 55 percent of Americans that they have a constitutional right against abusive practice Y may suffice as a textual matter to recognize this right as a truly unenumerated right of 'the people,' a genuine privilege 'of citizens' recognized as such by citizens" (p 136).

Put to one side the not-exactly-clear hedges. (The 55 percent rule applies to "strongly held" beliefs, with no guidance as to how to gauge the requisite intensity. And the 55 percent trigger only "may" suffice to create a new right.) The more basic problem is that Amar's unwritten Eleven-Twentieths Clause is entirely arbitrary. It does not flow "as a textual matter" from anything (p 136). It is simply made up.[62]

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[61] As noted above, I have suggested in other writing that the Ninth Amendment has a clear, straightforward historical meaning as literally a rule of construction forbidding the inference that the Constitution's listing of *federal*-law rights preempts *other* rights derived from *other* sources of law (such as state law, common law, or natural law). The Ninth Amendment does not itself create any such rights or vest them with federal constitutional status, but simply declares that their preexisting legal status is unaltered by the fact that the US Constitution recognizes certain federal constitutional rights. See note 59. For elaboration, see Paulsen, 103 Nw U L Rev at 884–88 (cited in note 1); Paulsen, Book Review, 115 Yale L J at 2046–48 (cited in note 3); Paulsen, *Paulsen, J., Dissenting* at 198 (cited in note 59).

[62] John C. Calhoun at least had a reason, even if not a convincing one, for his three-fourths ratio for when states' presumptive sovereign right to nullify federal law could be overridden by the views of other states of the Union: it was the ratio needed to ratify a constitutional amendment under Article V of the Constitution. See John C. Calhoun, *Exposition and Protest*, in H. Lee Cheek Jr, ed, *John C. Calhoun: Selected Writings and Speeches* 267, 304–05 (Regnery 2003). See also Paulsen, Book Review, 71 U Chi L Rev at

It is also unprincipled. For no apparent reason, Amar's 55 percent rule works in one direction only. What if public opinion shifts and 55 percent no longer believe in a right they once valued (written or not)? Is the right now repealed? Amar's answer is *no*: such "concern about possible rights diminution is irrelevant" as rights can only "join the existing stock" of rights (p 136). Once created, they are locked in. But why this should be so is left unexplained and undefended: Does perceived popular consensus change our constitutional rights or not?

One is left to speculate that the reason for Amar's one-way street is to entrench current liberal-elite consensus, at least in most respects. For example, notwithstanding Amar's 55 percent rule, there must remain a "lived" constitutional right to abortion irrespective of popular opposition. (Majorities of 55 percent or more oppose abortion in most circumstances and have consistently done so since *Roe*, but Amar does not appear to countenance the prospect of a popularly supported, lived right to life for the unborn.)[63] Amar's made-up exception to his made-up rule would appear to preclude other popular rights, too, in order to forestall certain outcomes: If the Constitution otherwise can be discovered to contain new, 55-percent-majority-approved rights, why isn't there a (consistently popular) lived constitutional right to school prayer, or to protect the US flag from desecration? The reason is the same as the reason for the 55 percent rule in the first place: Amar has said so.[64]

707–08 (cited in note 15). Amar explicitly rejects a three-fourths-of-the-states rule for recognizing new unwritten rights on the theory that that is the ratio for *amending* the Constitution, and judicial recognition of unwritten rights is merely *applying* the Constitution (p 136). Thus, the 55 percent rule is the one on which he settles (p 136).

[63] See note 77. As discussed presently, Amar defends a constitutional right to abortion in the Nineteenth Amendment's rule forbidding sex discrimination in the right to vote. See text accompanying notes 67–77. Amar argues that such a right exists if women supporting such a right think it should exist, as they supply the relevant "social meaning" of the Constitution (p 297). See text accompanying note 77 (discussing this position on its own terms).

[64] Amar makes the same claim a bit earlier in the book: "Various new unenumerated rights are one thing—a perfectly proper thing, thanks in part to these two amendments [the Ninth and the Fourteenth]. But new limits on ancient rights are something very different, something that the Ninth and Fourteenth Amendments, rightly read, do not support" (p 116).

The one-way nature of these rights resembles the one-way nature of new rights flowing from wrong judicial precedents, discussed above, and is subject to the same criticisms. See text accompanying notes 45–46. There is no principled metric for deciding when to recognize such rights, and the premise that rights are self-defining and run in only one direction is analytically flawed. See text accompanying notes 47–51.

In Amar's view, judges who selectively discover new rights "are not *amending* the document" (p 136). "Rather, they are *applying* it, construing directives in the Ninth and Fourteenth Amendments that call for protection of fundamental but nonspecified rights" (p 136). This is proper because the courts, in creating such rights, would be simply looking for "the same broad national support for a new right that would warrant a properly functioning Congress to recognize the right under its own authority" (p 136). Courts should, in Amar's view, recognize as constitutionally protected any right that Congress would have had the power to enact and ought to have enacted, but did not.

What might these rights be? Some concrete examples illustrate Amar's thinking. Here's my personal favorite: the Ninth Amendment (or perhaps the Privileges or Immunities Clause of the Fourteenth Amendment), with an assist from the Fourth Amendment's protection from unreasonable searches of people's "houses," apparently confers a lived-right constitutional entitlement to the home-mortgage-interest deduction from income taxes (p 129). I am not making this up. Amar is a bit cagey in how he puts this, but there it is, in his discussion of judicial recognition of lived, popular rights believed in and claimed by the American people:

> [F]ederal facilitation of the home-mortgage market and federal tax deductions of home-mortgage interest payments and of local property taxes [ ] are virtually untouchable politically, and in this respect resemble relatively clear constitutional texts that place particular issues politically off-limits. . . . True, nothing in the written Constitution explicitly demands special protection of "houses" or "privacy," but surely the document invites judges (and other interpreters) to attend to this explicit word and this implicit concept in pondering which unenumerated rights are properly claimed by the people. (p 129)

In fairness, Amar does not quite say that judges *must* recognize such a home-mortgage-interest-deduction constitutional right; the document simply *invites* such action. Similarly, there is at least a potentially recognizable unwritten constitutional right to Social Security benefits, because these too "are politically entrenched in modern America for similar reasons" (p 129).

Some of the other rights that Amar says have "bloomed profusely" (p 116) may be more familiar in today's constitutional discourse. But Amar's arguments are not familiar. Take, for

example, his argument for why gay sex is a right discoverable in the unwritten constitution. Amar's argument here consists of a cringe-worthy pun on satirical remarks in a 1787 newspaper article in which the writer was mocking the Anti-Federalists' objection to the Constitution's lack of a bill of rights. The Ninth Amendment should be taken in general to mean what the newspaper satirist was scoffing at, Amar argues. Specifically, the Ninth Amendment encompasses a right to gay sex acts, by analogy to the satirist's reference to the need to specify rights of "eating and drinking" (pp 124–26).

Here's Amar's full argument in three easy steps. First: The Ninth Amendment embodies America's "lived experience" and that experience values the home (p 124). We should therefore read the Fourth Amendment's restrictions on searches through this lens and give them added heft by virtue of the Ninth Amendment (pp 124, 128).

Second: In a newspaper submission in 1787, Noah Webster, a Federalist supporter of the proposed new Constitution (but not a framer or ratifier of either the original document or its early amendments) spoofed Anti-Federalist objections that the Constitution did not contain a list of enumerated rights. Webster proposed the following faux amendment: "That Congress shall never restrain any inhabitant of America from eating and drinking, at seasonable times, or prevent his lying on his left side, in a long winter's night, or even on his back, when he is fatigued by lying on his right" (p 125).

Third: Webster's 1787 reductio ad absurdum should be taken to illustrate the unwritten meaning of the Ninth Amendment, proposed some two years later (and in which Webster seems to have had no direct role[65]). Webster's jest is incorporated by the Ninth Amendment as a gloss on the Fourth Amendment, protecting freedom in the home. (Why this intermediate step is needed is unclear.) Therefore, Webster's satire demonstrates the existence of an unwritten constitutional right to engage in whatever private sexual acts one chooses with whomever one wishes.

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65 Noah Webster was not a member of the First Congress or of any body that voted on the ratification of the amendments proposed by the First Congress, now understood to comprise America's Bill of Rights. He wrote a pamphlet endorsing ratification of the Constitution. See generally Noah Webster, *An Examination into the Leading Principles of the Federal Constitution* (Prichard & Hall 1787).

Here's Amar's punch line:

> True, governments have generally not regulated on which side a man may lie in his own bed or when he must rise from that bed. But governments have at times tried to dictate with whom he may lie in that bed and have also tried to outlaw certain physical positions in that bed. Contrary to Webster's sanguine expectations, governments have also sought to regulate what persons may place in their mouths—perhaps not with intrusive rules about "eating and drinking," but rather with detailed dictates about which body parts of fully consenting adults may not lawfully be brought into oral contact. (pp 125–26)

Get it? Oral sex is like "*eating*" or "*drinking*." Choosing one's sexual partners or sex acts is like sleeping on the "side" one prefers.

As constitutional analysis, this is of course ludicrous. Of all the arguments that one could make for the asserted rights in question—sexual-liberty rights in general, gay rights in particular—this is the oddest and least persuasive I have ever seen.[66]

Take another example: Amar argues that the Nineteenth Amendment's guarantee of the right of women to vote creates a constitutional right to abortion.[67] Here is how his argument unfolds: the Nineteenth Amendment guarantees women not only the right to vote in state and federal elections (p 286) but also a

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66 This is the point that Amar is trying to establish. Three pages earlier he discusses *Lawrence v Texas*, 539 US 558 (2003), (p 122) (referring to *Lawrence* as a "soaring philosophical ode to liberty and equality").

The correct answer is that the Constitution simply does not specify such a right, but, for better or worse, leaves such matters to the good (or bad) judgment of representative bodies that may seek to regulate private sexual (or other) conduct in the home if they consider it appropriate to do so. For all the Constitution says, government—state government, at least—may regulate eating, drinking, smoking or other ingestion of certain substances, and even sleeping or other private activity, in the home, if it chooses to do so. Such power admits of the possible enactment and enforcement of many potentially ridiculous laws, but that does not render such laws unconstitutional.

67 The argument comes in the second half of Chapter Seven, entitled "'Remembering the Ladies': America's Feminist Constitution" (pp 277–306). The abortion argument comes later (pp 291–306). The argument as presented in this chapter of *America's Unwritten Constitution* is vague and a bit cagey, but it is essentially the same argument that Amar presented in an earlier essay. See Akhil Reed Amar, *Amar, J., Concurring in the Judgment in Part and Dissenting in Part in* Roe v. Wade*, No. 70-18, and Dissenting in* Doe v. Bolton*, No. 70-40*, in Balkin, ed, *What* Roe v. Wade *Should Have Said* 152, 160–68 (cited in note 59).

correlative right of women to hold elected office and serve on juries (pp 287–89).

This much is probably within fair textual-interpretive bounds: a decent (if not quite unavoidable) whole-text, original-meaning argument can be made that jury service and office holding are rights conceptually and historically linked to the franchise and embraced by it, and Amar makes just such a point (p 288).[68]

But then Amar takes a giant leap to the abstract principle that America therefore has an unwritten "Feminist Constitution" that can be read to stand for a great many other things (pp 277, 286–87). This is the oldest and lamest lawyer's trick in the book: take the words of a legal text, wave your hand and announce that the words stand for some "broader principle," formulate the principle as you will (making sure that it's broad enough to embrace the words of the text, but plenty more besides), then reread the text as if it contained the principle rather than the words. It is hard to think of a more transparent ruse than saying that the Nineteenth Amendment woman's suffrage guarantee stands for an amorphous principle of an unwritten Feminist Constitution, and then investing that constitution with whatever content one thinks goes along with feminism.

What does Amar's Feminist Constitution embrace? For one thing, it adopts the not-adopted Equal Rights Amendment (ERA). This is because the ERA was "a largely declaratory proposal" (pp 295–96)—a statement that surely would have come as news to those nearly three-fourths of the states that thought they were ratifying a constitutional text that would have meaning and effect, and to the just over one-fourth of the states that rejected the amendment for exactly that reason.[69]

The real agenda, however, appears to be finding an alternative roost for a constitutional right to contraception (to justify

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[68] Again, however, there may be a more straight-line path to this result. The Equal Protection Clause specifies that no state may deny equal protection of the law to "any person within its jurisdiction." US Const Amend XIV. Women are persons, obviously. The dictates of the Equal Protection Clause thus apply to sex-based legal classifications, including state classifications with respect to jury service and the protection of jury trial. Consider *Strauder v West Virginia*, 100 US 303, 308–09 (1879) (holding that the equal right of all members of the political community to serve on juries is within Congress's power to enforce the equal protection of the laws).

[69] Does the now-magically-adopted ERA have bite or not? What's the point of Amar's exercise if the ERA adds nothing but verbiage?

the outcome in *Griswold v Connecticut*[70]) and to abortion (to justify the outcome in *Roe*). Here is where the chain of reasoning becomes unbearably strained.

First, Amar posits, the adoption of the Nineteenth Amendment presumptively invalidated all pre-1920 laws adopted by all-male Congresses and state legislatures that affect women in identifiable ways (pp 291–92). Because such laws were adopted by legislatures under what Amar argues should be regarded—by virtue of the subsequent adoption of the Nineteenth Amendment—as an illegitimate political process from which half the rightful electorate was excluded, all such laws should be deemed retroactively vacated. *Poof*!

To say that this is a creative proposition is something of an understatement. The text of the Nineteenth Amendment reads as a purely prospective prohibition of state or federal denial of *voting* (and perhaps allied) rights to women: "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 sex." This prohibition comes with a purely prospective grant of legislative power to Congress to enforce this equal right to vote: "Congress shall have power to enforce this article by appropriate legislation." The Nineteenth Amendment does not retroactively do anything; it does not retroactively confer voting rights, let alone retroactively scotch selected laws. Tellingly, Amar nowhere quotes the language of the Nineteenth Amendment itself. Instead, he latches onto what he asserts to be its unwritten "underlying logic" (p 282) (emphasis omitted).

Amar's absurd starting premise forces him to craft an enormous exception taking back some of the absurdity: not all pre-1920 legal enactments are invalid, because that would make the Nineteenth Amendment itself unconstitutional (to say nothing of the entire original Constitution, Bill of Rights, and Reconstruction Amendments). Rather, the Nineteenth Amendment right to vote invalidates only pre-1920 laws that burden women in specific ways, on account of such laws having been adopted by (retroactively) unconstitutional all-male legislatures (pp 293–94). The Nineteenth Amendment is thus the fount of a principle invalidating pre-1920, gender-discriminatory laws (pp 292–93). This, Amar then concludes, establishes the existence of a consti-

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70 381 US 479 (1965).

tutional right to abortion—at least as against pre-1920 laws—because restricting abortion burdens women (p 292).

This is an odd recycling, in Nineteenth Amendment form, of a tired argument usually cast in terms of the Equal Protection Clause. The assertion is that abortion restrictions discriminate on the basis of sex because only women become pregnant.[71] That claim is obviously superficial and specious, however. Abortion restrictions do not regulate on the basis of sex—that is, they do not regulate women because they are women—but on the basis of pregnancy and the asserted need to protect another human life, present in the womb. Whatever one thinks of such a moral or policy view, abortion restrictions are not gender based. They restrict the conduct of one subclass of women—those who desire abortions—but they do not regulate women as a class, and they regulate the conduct of men with respect to abortion, too.[72] The sex-discrimination/equal protection argument for abortion rights fails as a matter of straightforward discrimination-law principles.[73] (Indeed, a sad irony is that the argument for abortion rights on grounds of "women's equality" ends up justifying a constitutional right to abortion of human females for being female.)[74]

The Nineteenth Amendment gambit has yet further problems—problems that lead Amar yet further away from the text. Amar's argument so far leads to the (already dubious) conclusion that abortion laws adopted by all-male legislatures, elected under pre–Nineteenth Amendment voting rules, are unconstitutional (p 292). That only gets him so far: 1920 was a long time

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71 See Anita L. Allen, *The Proposed Equal Protection Fix for Abortion Law: Reflections on Citizenship, Gender, and the Constitution*, 18 Harv J L & Pub Pol 419, 435–39 (1995); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 NC L Rev 375, 382–83 (1985). For a powerful recent refutation of this sex discrimination argument from a different feminist perspective, see generally Erika Bachiochi, *Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights*, 34 Harv J L & Pub Pol 889 (2011). It is difficult to see how the sex discrimination argument is improved in the slightest by transposing it from the Equal Protection Clause to the seemingly even less apt key of the Nineteenth Amendment right to vote.

72 See *Bray v Alexandria Women's Health Clinic*, 506 US 263, 267–74 (1993) (stating that action predicated on opposition to abortion is not gender-based "discrimination"); *Geduldig v Aiello*, 417 US 484, 494–97 & n 20 (1974) (holding that classification based on pregnancy is not sex-based classification subject to heightened scrutiny under the Equal Protection Clause).

73 For further discussion of these points, see generally Bachiochi, 34 Harv J L & Pub Pol 889 (cited in note 71). See also Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 Notre Dame L Rev 995, 1009 n 35 (2003).

74 See Paulsen, 78 Notre Dame L Rev at 1009 n 35 (cited in note 73); Michael Stokes Paulsen, *It's a Girl* (Public Discourse Oct 24, 2011), online at http://www.thepublicdiscourse.com/2011/10/4149 (visited Aug 12, 2014).

ago. What about abortion restrictions enacted *after* 1920? Even under Amar's Nineteenth Amendment partial retroactivity principle, modern abortion restrictions should be constitutional, shouldn't they?

To avoid this result, Amar argues (and has argued for more than a decade) that newer abortion restrictions are invalid under the Nineteenth Amendment—even after equal suffrage, even if supported by a majority of women—*because pregnancy and childbirth make political participation more difficult and therefore violate the Nineteenth Amendment right to vote*.[75] Amar evidently intends this argument to be taken seriously. He repeats it in this book (p 292) but shies away, slightly, from stating it quite as overtly as he has before, instead voicing it through his fictitious, feminist alter ego character, "Eve," engaged in an imagined debate with the awful male chauvinist "Adam" (pp 297–302).[76] But in the end, Amar sticks to his outrageous claim: abortion restrictions in force today, ninety-plus years after the constitutional grant of equal women's suffrage, violate the Nineteenth

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[75] See, for example, Amar, *Amar, J., Concurring* at 166 (cited in note 67) (arguing that some laws "continue[ ] to impose serious and gender-specific burdens on women . . . that, by disrupting women's lives and careers, may make it less likely that they will be able to be full political equals in legislatures, judiciaries, and other positions of government power").

[76] Adam denied that laws restricting or prohibiting abortion discriminate on the basis of sex and argued that these laws simply treat *pregnancy* differently because of the different reality created by the fact of pregnancy (including, obviously, the existence of a new human embryonic life) (p 298). Eve's rejoinder speaks for Amar here and presents his Nineteenth Amendment argument:

> Adam, you can't really mean that last point. Surely government should not be free to subordinate women so long as it does so via laws that use women's unique biology to disadvantage them as a class! Imagine, for example, a law that said pregnant people may not vote, or serve on juries, or be elected to office. Wouldn't such a law plainly violate the Nineteenth Amendment? If so, isn't this a square admission that laws heaping disabilities on pregnant persons as such are indeed laws discriminating "on account of sex"? (p 300)

Amar wrote nearly identical words in a hypothetical alternative abortion-rights opinion in *Roe* by "Justice Amar" ten years ago:

> Surely, government should not be free to subordinate women so long as it does so via laws that use women's unique biology to disadvantage them as a class. Imagine, for example, a law that said that pregnant people cannot vote, or cannot serve on juries, or be elected to office. Would not such a law plainly violate the Nineteenth Amendment? But, if so, isn't this a square admission that laws that heap disabilities on pregnant persons are indeed laws that discriminate "on account of sex"?

Amar, *Amar, J., Concurring* at 164 (cited in note 67).

Amendment right to vote and the Feminist Constitution unwritten between the lines.

If that isn't fully persuasive—Amar seemingly recognizes that it isn't (p 302)—he offers a fallback proposition that blithely abandons text, logic, and principle altogether: "*Where pure logic runs out, social meaning often fills the gap to complete the circle of proper constitutional analysis*" (p 302) (emphasis added). Talk about (literally) circular reasoning! If the text does not specify a desired result, and if logic does not yield it either, "social meaning" can supply the preferred outcome by supplying all of the missing steps. And the relevant "social meaning of contraception and abortion laws" is to be found "in the eyes of women themselves" (p 297)—or at least in the eyes of those who support abortion: abortion laws are unconstitutional because they are so viewed by those women who support abortion rights (as it turns out, a minority of women).[77] The fact that the written text does not contain any such rule does not really matter: "Whether or not the written Constitution compels this feminist rule of construction, this approach redeems the document's deepest principles" (p 305).

* * *

What is one to do with all this? In each of the instances described—a 55 percent formula for new, one-way-street lived rights; the claimed unwritten constitutional right to mortgage-interest deductions; an all-purpose Ninth Amendment; gay rights by analogy to eating and drinking; a Nineteenth Amendment right to abortion because pregnancy makes it harder for women to vote—Amar's unwritten-ism becomes practically a parody of itself. As noted above, in many instances it generates an utterly unnecessary excursion. In many others, it appears to

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[77] As far as relevant "social meaning" goes, it turns out empirically that women are decidedly more pro-life (or anti-abortion) than men: most women oppose most abortions. Indeed, the most consistently pro-abortion-rights demographic group is (perhaps not entirely surprisingly) young males. For a collection of the relevant studies, see Clarke D. Forsythe, *Abuse of Discretion: The Inside Story of* Roe v. Wade 305 & n 32, 332–33 (Encounter 2013). For analysis, see Richard Stith, *Her Choice, Her Problem: How Abortion Empowers Men* (First Things Aug/Sept 2009), online at http://www.firstthings.com/article/2009/07/her-choice-her-problem (visited Aug 12, 2014). Amar's "social meaning" argument is strange indeed. Only if one defines the relevant social meaning as that expressed by persons who agree with your position—"to complete the circle of proper constitutional analysis" (p 302)—can one disregard the position of the majority of women as part of the relevant social meaning.

license a silly, child's wordplay game that anyone can play and that can produce practically any desired result. As a matter of analysis of the actual Constitution, this is wholly indefensible. With distressing frequency, Amar's reasoning appears rather transparently, even embarrassingly, result-oriented. One need not work very hard to imagine slippery slope scenarios of what a willful interpreter might do with the unwritten constitution described by Amar. Akhil Amar races to the bottom of the slope straightaway.

III. ROGER TANEY WOULD HAVE LOVED THIS BOOK

The problem is not only with the specific untenable results that Amar reaches. It is that an interpretive method that can yield these results can yield *any* result. Amar's unwritten-ism is so malleable, so unmoored from the text, that it allows practitioners of it to reach almost any conclusion they want, including some fairly hideous ones.

We have already looked at *Plessy*: if the unwritten constitution permits judges to fill in, with doctrines of their devising, perceived gaps in unspecific texts, and promulgate such doctrines as if they were constitutional rules, there is no sound and sure basis for saying that *Plessy* was wrong, and no secure justification for not according it stare decisis effect as precedent.[78] Simply put, if unwritten-ism is right, *Plessy* was not wrong. Nothing in Amar's interpretive methodology—as opposed to his simple declaration to the contrary (p 273)[79]—forecloses such a result.

The same could be said for that granddaddy of judicial atrocities, the Supreme Court's 1857 decision in *Dred Scott*. Amar himself denies this, but, again, there is nothing in his articulated methodology that actually forecloses such a result and a great deal that could be used to support it.

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78 See text accompanying note 42.

79 In his chapter on the "Symbolic Constitution," Amar says that *Plessy* "disregarded the rather plain facts that: (1) the written Constitution promised that blacks would be treated as equal citizens, and (2) the whole point of Jim Crow was to deny black equality—to treat blacks as inferior" (p 273). He then offers a conclusory observation that, taken seriously, seems to walk back everything else he says in the book: "This judicial disregard cannot be justified by appealing to some vague notion of an 'unwritten Constitution' that must be given its due" (p 273). It is difficult to know what to make of this. It is either an obligatory, defensive hedge, or a simple self-contradiction. See also p 149 (making a passing remark that the Court "wrongly upheld segregation in *Plessy v. Ferguson*").

You be the judge. I offer here an unwritten-constitutionalism, reading-between-the-lines argument for the conclusions in Chief Justice Roger Taney's infamous opinion in *Dred Scott*, making straightforward use of Amar's methodological toolkit:

> While the text of the Constitution (circa 1857) did not *explicitly* grant a constitutional right to own black slaves, free of federal intrusion, such a right was implicit in the provisions that the document did contain with respect to slavery. Reading between the lines, we can see this rather clearly: the Constitution affirmatively protected slavery in undeniable ways. It provided an absolute constitutional right to recapture fugitive slaves, trumping state laws prohibiting slavery. It protected the right to import slaves for the first twenty years under the new Constitution—the first individual "constitutional right" in the Constitution.[80] It provided enhanced representation, and political power, for slave states, to the tune of three-fifths of a vote per head of slave chattel. It is simply *absurd* (is it not?) to think that this did not mean that the Constitution implicitly recognized an affirmative constitutional right to own slave property. It is simply *absurd* (is it not?) to think that the national government could then turn around and ban such constitutionally protected property ownership in federal territories.
>
> This result is confirmed by our unwritten "enacted" constitution: the very fact of adoption of these new, slavery-reinforcing provisions into the new Constitution shows that this is what "We the People" wanted—an enacted proslavery constitution.[81] This result is also confirmed by our unwritten "lived" constitution: for threescore and ten years, the written Constitution had been understood and applied, repeatedly and consistently, to preserve, protect, and extend the legal right to the institution of slavery. Both congressional practice and the "doctrinal" judicial constitution of precedent merged in support of this lived consensus.[82]
>
> The text may have been, slightly, underspecified with respect to slave-owners' full rights, but it is a fully appropriate part of the judicial role to fill in these interstices. Thus, while Article IV of the Constitution, which specifies the power of the national government to admit new states and legislate for the territories,

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[80] US Const Art I, § 9, cl 1.

[81] For a powerful demonstration that the act of adopting the new Constitution introduced new proslavery fundamental national law, going beyond the Articles of Confederation, see Amar, *America's Constitution: A Biography* at 20–21, 256–57, 473 (cited in note 2).

[82] See id at 113, 119–20, 260–64.

might not explicitly say that such territories are the common property of *all* the current states of the union, or that newly formed states must have the full equal rights of existing ones, surely that is the un-written message between the lines. It follows that existing slave states must have the equal right to transport their social and economic institutions to federal territories; that newly admitted states formed from those territories must possess the equal constitutional right to be admitted as slave states; and that the national government, in its temporary guardianship of the common territory of the nation, must take no action to interfere with such right to extend the institution of slavery, in accordance with the will of the people in any national territory or new state, under Article IV.

Moreover, the Fifth Amendment's prohibitions on the national government depriving anyone of property without due process of law, or of "taking" property without just compensation, forbid—at least implicitly, if not quite explicitly—national laws restricting the travel, transfer, or alienation of constitutionally protected property such as human slaves. Could anyone really fairly say that a law of the nation depriving a man of his property for the offense of travelling with that property to the common territory of the nation could be deemed consistent with the notion of "due process of law"?[83]

Finally, this right to own and take one's constitutionally recognized property in slaves to federal territories, immune from interference by the national government, is reinforced by perhaps the most comprehensive constitutional protection of all: the Ninth Amendment—a text that seems positively to *direct* us to look outside the text, to preconstitutional and "natural" rights, to fill in the "gaps" of what the text explicitly says with the rights we *know* simply *must* be included as well.[84] The Ninth Amendment, especially in light of all the other proslavery provisions in the Constitution, means that it literally went without saying that the national government could not interfere with the right to own slave property and take it with you wherever you went throughout the nation. One would no more need to say so specifically than one

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[83] The arguments of the two preceding paragraphs track—fairly closely—standard Southern arguments at the time for the right to bring slaves into the "common property" of the nation and Taney's argument in *Dred Scott* for the unconstitutionality of the Missouri Compromise's prohibition of slavery in certain Northern territories. *Dred Scott*, 60 US at 434–39, 450. They are simply expressed here in the terms of Amar's various unwritten constitutions.

[84] Compare with Amar's discussion (pp 97–138).

would need to recite that a man can change sleeping positions or decide what to eat or otherwise put in his mouth. The right to own slaves, recognized in the Constitution, was clearly a *preconstitutional* right of the people of every state. Because the text did not withdraw it specifically, the unwritten constitution (and the written Ninth Amendment) necessarily preserves it inviolate.

Slavery was initially, of course, an integral part of America's "symbolic" constitution.[85] The men who wrote the Declaration of Independence in 1776 recognized and accepted the institution of human chattel slavery based on race. It is thus part of the background understanding of American democracy and constitutionalism. It is impossible to believe that those men could have understood the right to own slaves as anything other than one of those self-evident inalienable rights of property not rightfully within the power of government to limit or restrict. These men were not hypocrites. They understood that the principles that they were declaring were principles governing free, white men. They did not say it in quite those terms, but it is written between the lines of the Declaration of Independence, every bit as much it is written between the lines of the Constitution.[86]

And while we're at it: Could a *state* law, forbidding a fellow citizen of the nation from travelling with his constitutionally protected property to that state, truly be thought consonant with Article IV's Comity Clause, which commands reciprocal recognition of basic rights by every state of the union for the citizens of every other state? The Privileges and Immunities Clause—the Comity Clause—might not explicitly *say* that, precisely, but the whole idea, written in the sticky hidden ink between the words of the written text of this fundamental provision cementing us together as a nation, is that the citizens of slave states must find their constitutional property rights respected in the other states of the union. How could it be otherwise and still preserve a "more perfect Union," as the Preamble of the Constitution so augustly proclaims?

It follows from all this that the Constitution clearly and unavoidably recognizes a constitutional right to own blacks as slave property, a right immune from federal interference or prohibition in the states where it exists, a right that extends to common property of the union without discrimination against citizens of slave

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[85] Compare with Amar's discussion (pp 245–75).

[86] Taney's opinion makes essentially this same argument from the symbolic force of iconic American nonconstitutional texts like the Declaration of Independence. See *Dred Scott*, 63 US at 407–12.

> states, and a right that extends to every state of the union by virtue of the rights that citizens of slave states carry with them throughout that union of states. It follows, then, that *Dred Scott* was rightly decided in its core holdings: that blacks, the race suited for slavery and not citizenship, cannot sue as citizens in the courts of the United States; that the Missouri Compromise, which purported to abolish slavery in certain territories of the United States, is an unconstitutional denial of the rights of property and equality of slave owners; and that the same right to slavery extends to require so-called "free states" to recognize the right to slavery conferred by the laws of their sister states.

Is this absurd and outrageous? Not at all—not if Amar's methodology is appropriate. Indeed, I submit that these arguments are *far less* of a stretch, *far less* extravagant and implausible, than some of Amar's arguments for the unwritten constitutional rights he finds. (A Nineteenth Amendment right to abortion comes to mind,[87] as does his Ninth Amendment–Fourth Amendment argument for various sexual-liberty claims[88] and for the lived-right entitlement to the mortgage-interest tax deduction.[89]) Amar's methodology, if widely accepted, would have given Taney quite a hand.

Dred Scott was wrong—on all of the points on which I have attempted to enlist Amar's approaches in its behalf. But it is wrong *only* if one rejects Amar's arsenal of interpretive weapons and instead adheres, in a reasonably strict fashion, to the original linguistic meaning of the constitutional text: the national government has power to legislate for the territories (and state-law-conferred rights do not control federal-governance choices); the text's slavery protections extend only as far as their words' meanings provide and do not properly provide a springboard for more; it is not the job of courts to fill in perceived "gaps" in the text, but the right of the people, acting through representative institutions, to legislate policy, within the scope of enumerated powers, in whatever interstices remain after the text's specification of individual rights; the Ninth Amendment is, literally, a rule of construction about the (non)effect of listing other rights in a bill of rights (doing so does not *rescind* state-law or common law rights), not a blank check for judicial writing

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87 See text accompanying notes 68–77.

88 See text accompanying notes 65–66.

89 See pp 1420–21.

of new, unwritten federal constitutional rights; and the Due Process Clause of the Fifth Amendment plainly does not confer (unwritten) substantive rights to be discovered and applied by the judiciary.[90]

Amar of course thinks that *Dred Scott* was wrongly decided—one of three Supreme Court opinions rightly thought to "occupy the lowest circle of constitutional Hell" (p 270).[91] But that is not really the point. The point is that, in the wrong hands—in the hands of any even reasonably skillful player intent on reaching a predetermined outcome—Amar's unwritten constitution admits of virtually any result. Give me Amar's interpretive methodology as a lever and a place to stand, and I can move the constitutional world.

IV. CONSTITUTIONAL RULES FOR CONSTITUTIONAL CONSTRUCTION

Still, Amar does have a fair point. In fact, he has a number of them. First, the text of the Constitution, understood according to the original linguistic meaning of its words and phrases, does not always supply determinate answers to important questions. There is *ambiguity*, there is *indeterminacy*, and there is *uncertainty* as to proper application of the text. What does one do in these situations? Second, there is the lurking specter of *absurdity*:

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[90] Justice Benjamin Curtis's dissent in *Dred Scott* puts the point perfectly and succinctly—and also serves as a fitting critique of the consequences of Amar's thesis:

> [W]hen a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.

Dred Scott, 60 US at 621 (Curtis dissenting).

[91] Amar calls *Dred Scott* a "preposterous garbling of the Constitution as that document was publicly understood when ratified" (p 271). (He appears not to recognize the irony of this condemnation in light of arguments for a Nineteenth Amendment right to abortion and a Fourth Amendment–Ninth Amendment argument for a right to the home-mortgage interest deduction.) *Plessy*, 163 US 537, and *Lochner v New York*, 198 US 45 (1905), are the two other cases in Amar's Unholy Trinity (pp 270, 273–74). His brief discussion of why he thinks these cases are wrong comes in his chapter on the so-called Symbolic Constitution. These cases have become *negative* icons (pp 270–74). "Each case presents an example of unwritten constitutionalism run amok, and thus powerfully reminds us of the need to place principled limits on judges who venture beyond the text and original understanding of the written Constitution" (p 270). *Exactly*. The problem, however, is that Amar's unwritten-ism imposes no such principled limits and could just as well justify these negative icons as condemn them.

sometimes the text, on its own, appears to permit or even require foolish outcomes; only by indulging background premises not specified in the literal text, or by adopting an interpretive canon of seeking to avoid absurdity, can we make good practical sense of the text. Third, there is the problem, already noted, of *incongruity* between literal text and actual practice: a considerable amount of our practice under the Constitution, of judicial precedent interpreting it, of the nation's lived experience in implementing it, and of popular sentiment concerning it, simply does not square very well with the original meaning of the document itself. What does one do when textual meaning runs out (as it always does, eventually) or runs into trouble (as it does with enough regularity to be troubling)? What does one do with ambiguity, indeterminacy, uncertainty, absurdity, and incongruity?

It has become common in recent constitutional scholarship to distinguish "interpretation" of the text—the attempt to discern objective linguistic textual *meaning*—and "construction," the enterprise of *applying* the text's meaning.[92] (I somewhat prefer the terms "exegesis" and "hermeneutics" to capture this distinction—terms customarily used in scholarly discourse concerning interpretation of biblical and other types of literature. Though more technical and fancy-sounding, exegesis and hermeneutics convey the same intended meaning, presumably, but are less vague, ambiguous, and subject to manipulation than "interpretation" and "construction."[93])

There is always, inevitably, *some* "construction zone" (to borrow Professor Larry Solum's wonderfully felicitous term)[94]:

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92 See, for example, Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 Const Commen 95, 100–08 (2010); Randy E. Barnett, *Interpretation and Construction*, 34 Harv J L & Pub Pol 65, 69–70 (2011).

93 The word "construction" is both vague and ambiguous: in common usage it has a connotation fairly close to "interpretation"—as in "construing" the text—which can create confusion over what are in theory discrete tasks; moreover, "construction" also has connotations of "creating" or "building" something, which gives *constitutional construction* a slight aura of allowable malleability, even creativity. In short, the term "construction" tends to be something of a mash-up, conflating textual interpretation with a certain freedom—even willfulness—in the task of applying the text to a specific problem or situation. (A former faculty colleague of mine at the University of Minnesota Law School once had on his door a copy of an amusing typographical error, or unwitting misquote, of *M'Culloch*, from a brief in an actual case, rendering John Marshall's statement as "We must never forget that it is *a Constitution* we are expanding.")

94 Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 Fordham L Rev 453, 458 (2013). But note how the term's charm in part lies in that it is a play on words—that it *makes use* of the fact that the word "construction" has dual meanings and

the hermeneutic task of deciding how to bring the meaning of the text to bear on the situation at hand. Meaning gets you only so far. You then have to decide what to *do* with that meaning once you have found it.

Sometimes the construction zone is small, because the text is clear and its application to the problem at hand is straightforward, so that the only hermeneutic decision is the decision whether or not to be governed by the meaning of the written constitutional text in a straightforward fashion. Sometimes the construction zone at least appears larger than this, however, because the text is vague, ambiguous, or in some other fashion bears a range of meaning. The hermeneutic question is what one should do with such texts. What principles should direct those called upon to apply the written text to the practical task of governance, where the text is in some fashion or to some degree indeterminate, and should those principles be different for different institutional actors?

A few years back I wrote an article entitled *Does the Constitution Prescribe Rules for Its Own Interpretation?*[95] My answer was *yes*: the Constitution contains explicit and implicit general, global interpretive instructions for how to ascertain, faithfully, the meaning of the Constitution's words;[96] the document also contains a surprising number of specific interpretive instructions concerning the proper way to understand the meaning of specific provisions.[97] I did not draw a crisp distinction between instructions concerning faithful constitutional *interpretation* (the task of textual exegesis) and instructions concerning constitutional *construction* (the hermeneutic task of appropriating and applying texts' meaning on the ground, so to speak). Perhaps I should have, for in some sense that is a distinct question. The Constitution's core instruction with respect to *interpretation* is that the words and phrases of the document should be accorded their original meaning, in context; that is how to understand what the text says.[98] Does the Constitution also specify, or im-

may to that extent be ambiguous. Literal "construction zones" involve building, making, or repairing something. (They are not "construing" zones.)

95 Paulsen, 103 Nw U L Rev at 857 (cited in note 1).

96 Id at 864–72.

97 Id at 884–93.

98 That is the position I defend in *Does the Constitution Prescribe Rules for Its Own Interpretation?* Paulsen, 103 Nw U L Rev at 920–21 (cited in note 1). In that article I sometimes address, implicitly or explicitly, questions of "construction," or application, of the document. Id at 858.

ply, rules for its *application*? It might not make for a catchy article title, but maybe I should have posed as a separate question: "Does the Constitution Prescribe Hermeneutic Principles for Applying Textual Meaning to the Practical Tasks of Constitutional Governance and Adjudication of Cases by Courts?"

Akhil Amar's answer is *no*: this is *all* up for grabs, the text is indeterminate, the resulting construction zone is vast, and the room for intellectual play within the construction zone is essentially limitless. Because construction is inevitable, at least to some degree, and because there have always been *some* recognized rules of construction in law—the rule against absurdity,[99] for example—we therefore have an unwritten constitution. The logical leap to "anything (clever) goes" is an enormous one, of course, and the enormous problems with Amar's book demonstrate the hazards of taking such a leap with no textual net.

I would like to suggest a different general answer. To be sure, construction is inevitable to some degree. But written constitutionalism itself strongly suggests, and our specific written Constitution confirms, that there are meaningful boundaries on any such construction projects. These boundaries are not imported from outside the text but are *implicit in the text, structure, and logic of the document itself*. Put differently, the Constitution supplies not only interpretive instructions—rules directed toward correctly ascertaining textual meaning—but also hermeneutic principles constraining what faithful appliers (of various kinds) properly can *do* with that meaning, and what they should do when that meaning runs out. Here are a few such hermeneutic principles:

First, the whole project of written constitutionalism is, as it were, *construction-reduction*: the purpose of reducing decisions to writing is to reduce decisions. Those decisions made by the Constitution are settled and binding. That is a rule of construction of sorts—it is a hermeneutic rule that, when exegesis of the text supplies an applicable rule of law, that rule must be followed as a rule of governance. This rule of construction, however, is plainly one that is warranted by the text. The Supremacy Clause of Article VI specifies that "[t]his Constitution . . . shall

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[99] See William Blackstone, *Commentaries on the Laws of England* 60, 91 (Chicago 1979) ("[T]he rule is, where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them."). Amar discusses the rule against absurdity in particular (pp 7–9).

be the supreme Law of the Land."[100] The Supremacy Clause is most naturally read as supplying a simple hermeneutic rule for applying our written Constitution: where the Constitution supplies a rule, that rule governs.

This hermeneutic rule is reinforced, in the very same sentence of Article VI, by what appears to be a rather specific hermeneutic directive to judges to treat the *meaning* of the document, once ascertained according to correct principles of interpretation, as binding in their *application* of it to specific cases: the text specifies that the "Judges in every State" shall be "*bound thereby*," notwithstanding any possibly inconsistent state law.[101] And immediately after that, the Constitution prescribes that *all* government officials swear an oath to support "this Constitution" (including its Supremacy Clause),[102] a provision that would appear to offer at least some further evidence supporting a hermeneutic principle of direct-and-binding application of the Constitution's meaning, once properly ascertained, to all tasks of governance for which it supplies a rule. In short, if we purport to be governed by a written constitution—a political decision extrinsic to the text—then that written constitution says that the written constitution is supreme governing law binding on those who invoke its authority. That is the first core rule of constitutional "construction": where the Constitution supplies a determinate rule, that rule governs.

Second, implicit in the structure and logic of written constitutionalism, and in the nature of the governmental arrangements that our Constitution creates, is a corollary rule of construction about what to do *when textual meaning runs out*: when exegesis of the text does not supply a rule of law, the logic of the governmental structure created by the Constitution indicates that the democratic, republican institutions vested with legislative and executive power concerning such matters get to do the "constructing," within the range of any construction zones afforded by a partially indeterminate text. The structure of the Constitution—its separation, division, and limitation of powers among the three branches of the national government and the nature of the republican government it creates—strongly supports this

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[100] US Const Art VI, cl 2.

[101] Id (emphasis added). One can probably infer—without going all the way down the road to an unwritten constitution—that this applies to federal judges as well as state judges.

[102] US Const Art VI, cl 3.

hermeneutic principle. (So do limitations on the nature of judicial power, and limitations implicit in the structural-textual argument for judicial review, as I discuss next.)

This second hermeneutic principle of written constitutionalism is linked to the specific structure and nature of the *US* Constitution. While a written constitution might choose to vest all interpretive power, or power to fill in all uncertainties, in a specific body or actor (like a "constitutional court"), our system of separation of powers does not assign plenary interpretive power—or "construction" power—to any one branch but leaves the power to interpret and apply the Constitution to the respective powers of multiple actors, with none granted supremacy over the others.[103] A construction zone is simply not, under the political theory of the American Constitution, a grant of judicial lawmaking power.

This would seem to furnish the proper basis for the intuition that a "presumption of constitutionality" should attach to the considered actions of Congress and the president.[104] The principle is sometimes stated in such a way as to imply (incorrectly) that this is merely a judicially devised rule of restraint extrinsic to the constitutional text, rather than a rule fairly discerned from the text itself. Strictly speaking, however, it is not that there is literally a *presumption* of correctness attached to another branch's actions or some vaguely neo-Thayerian principle of judicial "deference" to the political branches' choices.[105] Rather, it is simply that, as a matter of correct interpretation of the text, the proper hermeneutic principle is that indeterminacy does not

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[103] As famously expressed by James Madison, "The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers." Federalist 49 (Madison), in *The Federalist* 338, 339 (cited in note 1). For a detailed explication of this position, see generally Paulsen, 83 Georgetown L J 217 (cited in note 1).

[104] See, for example, *Walters v National Association of Radiation Survivors*, 468 US 1323, 1324 (1984).

[105] See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv L Rev 129, 144 (1893). In earlier writing I have objected to use of the term "deference" if it refers to a decision contrary to one's settled conviction as to the right answer to a legal question on account of the contrary position of another constitutional actor. See Paulsen, 83 Georgetown L J at 336 n 413 (cited in note 1) ("I emphatically reject the view, which sometimes travels under the name of deference, that an interpreter (typically, a judge) should reach a conclusion different from the one produced by her best legal analysis, or should refrain from reaching any conclusion at all, because of the views of another.").

warrant judicial invalidation of legislative or executive actions that fall within the range of meaning of the specific text at issue.[106]

Third, and relatedly, the argument for what is commonly called "judicial review"—the power of courts to refuse to give effect to unconstitutional actions of political actors—is itself premised on a rule of construction: that where the Constitution supplies a rule of law, and the political branches or states have acted contrary to that rule, the courts must give effect to the Constitution's rule and not the contrary action.[107] This principle likewise suggests its own corollary rule limiting the power of judicial review: where it *cannot* be said that the actions of the political branches are contrary to a rule of law supplied by exegesis of the text—whether because the text does not speak to the point, because exegesis of the text reveals a range of answers none of which can be privileged over the others, or because the text is vague, ambiguous, or otherwise indeterminate—then the actions of the political branches must stand. Again, this is not because of some principle of deference to democratic institutions,

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[106] See Paulsen, 103 Nw U L Rev at 882 (cited in note 1) ("Unspecific texts do not warrant abstracting more specific principles. The Constitution's structure suggests the opposite rule: Unspecific texts, to the extent of their un-specificity, permit a range of legitimate interpretation and application by *political* decisionmakers."); Paulsen, 31 Harv J L & Pub Pol at 994 (cited in note 18) ("Where a constitutional provision has a legitimate range of meaning—where there is ambiguity or open-endedness—and the legislature has acted pursuant to a view fairly within that range, a court may not properly invalidate what the legislature has done.").

There may need to be specific sub-rules of construction to deal with separation of powers disputes and federalism disputes—when the question is *which* democratic political institution gets to do the construing and constructing. See, for example, Gary Lawson, *Dead Document Walking*, 92 BU L Rev 1225, 1233–35 (2012) (proposing several, debatable, such rules of construction with respect to enumerated powers and state-versus-national authority); Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 Harv J L & Pub Pol 411, 421–28 (1996). See also *Morrison v Olson*, 487 US 654, 704 (1988) (Scalia dissenting) (noting that the Court's usual "presumption of constitutionality" accorded an act of Congress "does not apply" in a separation of powers dispute between Congress and the president over whether Congress's enactment is constitutional) (emphasis omitted). In each case, whether a specific sub-rule of construction is justified is itself properly a question of interpretation of the Constitution's text and structure—and *not* a matter of rules imported from extrinsic sources or devised as a matter of policy. It goes without saying that the correct content of such sub-rules is often fairly debatable as a matter of original textual meaning. See, for example, Paulsen, 31 Harv J L & Pub Pol at 992, 1003 (cited in note 18) (arguing, contra Lawson, that the better structural inference from the text, as concerns allowable congressional construction of the scope of enumerated federal legislative powers, falls more along Hamiltonian rather than Jeffersonian lines: that broadly worded powers should be accorded the full sweep of their language).

[107] That rule is brilliantly and clearly set forth and defended in *Federalist 78* (Hamilton), in *The Federalist* 521 (cited in note 1) and *Marbury v Madison*, 5 US 137 (1803). See also generally Paulsen, 101 Mich L Rev 2706 (cited in note 1).

imported from *outside* the text. It is because such a principle is, in general, a sound inference *from the text itself*—from specific provisions and from overall structure. The power of judicial review derives from a rule of construction about the effect of determinate constitutional language for judicial obligation: courts must invalidate political actions contrary to a rule of law supplied by the text. The limitations on the power of judicial review derive from the same rule of construction: courts must *not* invalidate political actions *unless* contrary to a rule of law supplied by the text.

All of this suggests a fourth, more general constitutional rule of constitutional construction: rules of construction for applying the Constitution need to be rules warranted by and consistent with the text of the Constitution. And how does one tell if a rule of construction is truly justified by the text? I offer here a rule of thumb, but a useful one that I believe supported by the Constitution and by written constitutionalism generally: the more closely a particular rule of construction can be tied to the text, structure, and historical evidence of original intention of the Constitution, the more legitimate and reliable it is likely to be. The looser such fit, the less legitimate and proper the rule of construction. Alas, it is fair to say that the latter describes a good many of Amar's construction projects: the "Lived Constitution" (p 95), "'Warrented' Constitution" (p 139), "Doctrinal Constitution" (p 201), "Symbolic Constitution" (p 243), and "Feminist Constitution" (p 277), are creative hermeneutic paradigms. But they are only very loosely connected to the text, and sometimes several steps removed from it.

A fifth hermeneutic principle follows from the idea that rules-of-construction principles need to be closely tied to the text: the traditional canon disfavoring textual readings that produce absurd results is one that needs to be closely guarded and tightly limited. Indeed, one should almost prefer occasional textual absurdity to the slippery slope of unwritten-ism. Here's the argument: The idea of written constitutionalism, as noted, in principle leans against the project of construction, and all the more heavily so the more a construction seems to counsel against applying the plain, natural, or better sense of the text's original linguistic meaning.[108] The text ought not to be construed to be "the best constitution it could be" if the text is actually *not*

[108] See Part III.

the best constitution that could be.[109] Policy-driven rules of construction are the least likely to be legitimate, the least likely to be fairly derived from attempts at faithful exegesis of the written text rather than from the construers' preferences. Similarly, a desire to make the text "work," in the sense of being conformable to modern preferences and sensibilities or conformable to modern practice, is not a textually supportable rule of construction.[110]

The "absurdity" canon is tricky, and potentially dangerous, precisely because it falls midway between accepted historical principles for ascertaining original textual meaning—it is an attempt accurately to capture textual meaning by recognizing that literalism might not, in some applications, reflect the text's true sense—and policy-driven construction to reach better, preferred results. One should lean against any argument that an outcome is "absurd" simply because it is unexpected, unfamiliar, or even (seemingly) undesirable from a modern policy perspective. One should perhaps even tolerate a degree of seeming absurdity for the sake of safeguarding the general principle of fidelity to actual textual meaning. If the written Constitution, interpreted in accordance with its original linguistic meaning, sometimes produces "bad" results, unintended outcomes, even arguably "absurd" consequences, those effects are made *identifiable* by faithful textual exegesis and are *remediable* by correcting the written text. There is thus a textual remedy for the disease of textual inadequacy or absurdity. If, however, any such defects can be deemed whisked away by magical unwritten principles, one can never know what really needs correcting in the first place—the text may mean what it says, and it may not—and one can never know quite where the unwritten "correction" will go and whether it was correct or not.[111]

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[109] For an argument that interpretation ought to make what it interprets the best it can be, see Ronald Dworkin, *Law's Empire* 62 (Belknap 1986).

[110] Of course, it may well be that a constitutional provision bears a sufficiently broad range of meaning that different practices at different times are consistent with a text whose rule is an elastic or general one. But that is a different thing entirely. In such an instance, one is not construing text to make it conform to practice; one is noting that practice conforms to the text, faithfully interpreted to permit a range of choices.

[111] Amar's book begins with the construe-to-avoid-absurdity canon—a good rhetorical strategy if one is attempting to build a case for expansive construction zones. And in building his argument in favor of the anti-absurdity rule, he chooses an illustration in which I am the Absurdity Villain. (This may also be a good strategy.) In a two-page, half-in-jest law review article that I wrote some years ago, Paulsen 14 Const Commen at 245 (cited in note 56), I argued that the textually best reading of the Constitution is that the vice president of the United States is the presiding officer over his own impeachment

Might I therefore (as humbly as doing so will permit) suggest a friendly refinement to Blackstone? The absurdity canon of construction is properly limited to instances in which its application can be said to facilitate accurate textual interpretation of a legal document in accordance with the true, original public meaning of the language employed—that is, the objective meaning the words would have had, in historical, linguistic, and political context, to a reasonable, informed speaker and reader of the English language at the time that they were adopted. It is *not* properly employed *to displace* the original, objective public meaning of the text with even a demonstrably far more sensible rendering in the eyes of the interpreter-construer.

Sixth, and finally, specific provisions of the Constitution ought to be understood in light of, and within the context of, the Constitution as a whole. They should be construed, when possible, in light of the overarching purpose of preserving America's constitutional government and the success of the overall constitutional enterprise. This may mean—as President Lincoln thought it did—that the Constitution is properly and fairly read as embodying an internal meta-rule of construction strongly favoring national preservation and avoidance of truly cataclysmic consequences. In Lincoln's view, the president's duty to preserve, protect, and defend the Constitution entails a correlative duty to preserve, protect, and defend the nation whose constitution it is; just as "a life is never wisely given to save a limb," the enterprise of American constitutional government as a whole ought not be sacrificed for a reading of a particular part.[112] This

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trial, a truly stupid mistake made by the drafters of the Constitution but nonetheless (unless and until fixed) the legally "correct" answer as a matter of constitutional *interpretation* as the text now stands. Chapter One of Amar's book is devoted to an elaborate refutation of this position (pp 3–22). Amar's analysis in that opening chapter is the springboard for his general thesis that we often should not read the Constitution to mean what it says. (Therefore, in a way, I feel guiltily responsible for Amar's project: it was launched in part to slay my mirthful embrace of a seemingly absurd result.)

For my part, I am inclined to accept the (relatively few) truly absurd results that follow from faithful reading and application of the Constitution's text, even if it means that the vice president presides over his own impeachment trial. Such errors are readily correctable by constitutional amendment. The acknowledgement that the Constitution contains errors is far more palatable than abandoning the project of written constitutionalism entirely in favor of ingenious rules of construction, invented doctrines, and judicial manipulation that produce results like *Dred Scott*, *Plessy*, *Lochner*, and *Roe*. Give me a scoundrel vice president—we've endured several already (Burr, Johnson, Agnew, Gore, and others)—over Amar's unwritten constitution any day.

[112] Lincoln, *To Albert G. Hodges*, in Fehrenbacher, ed, *Abraham Lincoln: Speeches and Writings* 585, 585 (cited in note 32). I have embraced this view, and Lincoln's bril-

is a rule of construction, to be sure. It pushes the envelope of the text about as far as it can go. (It has some similarities to the absurdity canon in this respect.) But it remains a rule of construction that, like the others, derives its content—and whatever legitimacy it has—from a reading of the text, the whole text, and the logical and structural inferences that fairly can be derived from the text. It does not come from extrinsic principles separate from the text's original and objective meaning.

CONCLUSION

I have been hard on my old friend, Akhil Amar—perhaps too hard. There is much terrific material in *America's Unwritten Constitution*: much to ponder, debate, and consider. As food for thought, it is a feast.

But as medicine for what ails written constitutionalism, it cannot be taken without disastrous effects. Much of it is unnecessary and unhelpful medicine: the written Constitution does the desired work better than Amar's thesis of an implicit unwritten constitution. And much of it is improper medicine: Amar's unwritten constitution in important, unpredictable, and unprincipled ways supersedes entirely, and tends to destroy, the enterprise of written constitutionalism. The prescription kills the patient.

And that is the huge flaw of this hugely ambitious project. Amar's diagnosis of the flaws of written textualism is considerably overblown. Original-meaning textualism allows for some troubling results, presents certain issues, and creates some headaches. But Amar's cure is worse than the disease, by far. Free-floating, untethered-from-text unwritten constitutionalism prescribes the guillotine as a remedy for a headache.

America's Unwritten Constitution is the most important, dangerously wrongheaded academic book about the Constitution written in many years. It is important because it comes from the pen of Akhil Amar, one of the nation's most important constitutional scholars and the author of one of the best, most definitive treatments of the written Constitution ever (*America's Constitution: A Biography*), along with a host of other excellent books and articles. And it is dangerous for much the same reason. Amar's status and skills give this book the capacity to deceive and mislead many. It is therefore important—vital, even—that the often-

liant defense of it, in other writing. See Paulsen, 79 Notre Dame L Rev at 1263–67, 1282–89 (cited in note 15).

dreadful ideas that the book advances, and the dreadful theme of unwritten constitutionalism that it embraces, be confronted directly and repudiated emphatically.