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## AMERICAN CONSTITUTIONALISM — WRITTEN, UNWRITTEN, AND LIVING

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I am grateful to Professor David Strauss for the care and generosity with which he has engaged *America's Unwritten Constitution: The Precedents and Principles We Live By*.<sup>1</sup> I am also grateful for Professor Strauss's own previous work in constitutional law, work that helped me refine various ideas that ramify through my book.

In what follows, I first identify some striking similarities between Professor Strauss's work and mine, and then highlight some important differences.

### I. CONVERSATION: COMMON GROUND ABOUT "COMMON GROUND"

There are notable affinities between Professor Strauss's general vision and my own. Consider for example these key passages from Professor Strauss's 2010 book, *The Living Constitution*:

Many people revere the U.S. Constitution. Many Americans consider themselves connected, in some important way, to the earlier generations who wrote and ratified the Constitution we have today — not just the living Constitution, but the document. Allegiance to the Constitution, and a certain kind of respect for the founding and for crucial episodes in our history, seem, to many people, central to what it is to be an American. . . .

. . . .  
... The written Constitution is valuable because it provides a common ground among the American people, and in that way makes it possible for us to settle disputes that might otherwise be intractable and destructive.

. . . .  
... [O]ne of the absolute fixed points of our legal culture is that we cannot . . . say that the text of the Constitution doesn't matter. We cannot make an argument for any constitutional principle without purporting to show, at some point, that the principle is consistent with the text of the Constitution. That is an essential element of our constitutional culture. And no provision of the Constitution can be overruled in a way a precedent can . . . .

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<sup>1</sup> David A. Strauss, *Not Unwritten, After All?*, 126 HARV. L. REV. 1532 (2013) (book review).

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... It might ... be possible for certain provisions to serve as common ground even if others were disregarded, but we are in a better position to use the text as common ground if we can say that the whole Constitution is binding than we are if we routinely disregard parts of the Constitution and try to insist that only certain clauses are binding.

The common ground justification might seem to be somehow too functional, too cold-blooded. It seems to reduce the Constitution from being a quasi-sacred document, the product of the framers' genius, to being a desiccated focal point, something that people just happen to accept. But it is a mistake to think that the common ground justification diminishes the Constitution.

It takes a certain kind of genius to construct a document that uses language specific enough to resolve some potential controversies entirely and to narrow the range of disagreement on others — but that also uses language general enough not to force on a society outcomes that are so unacceptable that they discredit the document. The genius of the U.S. Constitution is precisely that it is specific where specificity is valuable and general where generality is valuable. ...<sup>2</sup>

Now, consider certain corresponding passages from my book:

America's two Constitutions, written and unwritten, cohere to form a single constitutional system. ....

No Supreme Court opinion has ever openly proclaimed that its members may properly disregard or overturn the written Constitution. According to the Court, ... the written Constitution ... may not as a rule be trumped by a mere case, statute, or custom.

Other elements of our unwritten Constitution — well-established legislative and executive practices and deeply embedded American political norms — similarly evince fidelity to the written Constitution. Congress members, presidents, cabinet officers, state legislators, and governors all pledge allegiance to the terse text. Ordinary citizens celebrate this document — at times to the point of idolatry, revering it without reading it.

....

... Though interpreters may sharply disagree about the document's meaning, all point to the same basic text, which provides firm common ground for constitutional conversation and contestation. This text ... is the national focal point, the common denominator for all constitutionalists, whether Democrat or Republican, liberal or conservative, private citizen or public servant.

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... Even when the Constitution does not supply an unambiguous and concrete solution to a particular issue ... , the document may still provide

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<sup>2</sup> DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 101, 103, 111–12 (2010).

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a relatively clear framework of constitutional conversation and contestation. In other words, the text at times gives later generations not the right answers but the right questions for us to ask and the right vocabulary for us as we begin thinking over and arguing about those questions.

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... Written words such as “equal,” “unreasonable,” and “unusual” direct sensitive interpreters to unwritten sources, including state practices, mass social movements, social meaning, lived experiences, and so on. Words like this, in short, are brilliantly designed to keep the American Constitution in touch with the American people even in the absence of formal Article V amendments. These words help America’s written and unwritten Constitutions cohere.

....

Even if twenty-first century Americans unanimously agreed that the written Constitution had no binding legal authority whatsoever over us, we would nevertheless do well to dwell on it. The American Revolution, the Civil War, the Progressive Era, and the Second Reconstruction of the 1960s have all left their explicit marks on this unfolding document. The convenient manner in which amendments are layered one atop another in chronological sequence adds special transparency to this intergenerational project and invites readers to view the terse text in light of the grand narrative of American history. Even a casual reader can see when each textual change was made and can thus easily trace the temporal trend-line of American constitutionalism. Like a miniature Grand Canyon, the written Constitution exposes America’s colorful history to the eye of the ordinary observer.

The document’s brevity and its intimate relation to America’s storyline make it a brilliant focal point drawing together ordinary twenty-first-century citizens coming from all directions. The genetic forebears of today’s citizenry arrived in the New World at different times from different lands, professing different faiths, speaking different tongues, and displaying different skin colors. Yet in the written Constitution itself, we can all find a common vocabulary for our common deliberations and a shared national narrative — an epic saga of ordinary and ever more inclusive Americans binding themselves into one people, one posterity.<sup>3</sup>

The careful reader will have noted that Professor Strauss and I at times use the same images: The written Constitution is “common ground” for all Americans, providing a “focal point” for social coordination. We both believe that sometimes the Constitution’s language only “narrow[s] the range of disagreement” among later generations of interpreters and implementers (Strauss) by providing us with a “vocabulary” and a “framework” for “conversation and contestation”

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<sup>3</sup> AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION*, at xi–xii, 83, 303–04, 479–80 (2012).

(Amar). Alongside its specific commands, the document also contains general language, and in this clever combination resides the document's "genius" (Strauss) and "brillian[ce]" (Amar).

At least two important consequences flow from these similar accounts. First, the text need not always be read in narrowly originalist fashion in order to function as a focal point. Some of the terse text's words may work particularly well if understood in light of their ordinary plain meaning today, or their deep structural entailments, or their contemporary practical instantiations and implementations, as distinct from meanings that might have been most prominent at the moment of their initial adoption.

Strauss highlights this methodological point as a general proposition;<sup>4</sup> in my book, this idea surfaces in several places, and is perhaps particularly notable in my account of women's rights.<sup>5</sup> I call attention to the fact that women were excluded from the rooms that framed and ratified certain constitutional texts — including many of the rooms where woman suffrage itself was framed and ratified! On reflection, it seems perverse to cabin the natural sweep of the Fourteenth and Nineteenth Amendments' letter, spirit, and structure by placing great weight on their formal legislative history insofar as that history could be read as reflecting a stingy vision of women's equality. After all, the Nineteenth Amendment itself, once enacted, rendered retroactively problematic the facts that most women had been excluded from the vote on whether women should vote and that all women had been excluded from the previous Reconstruction votes on the scope of human equality. To give strong antifeminist weight to the largely male legislative history of various equal rights amendments — when the broadly worded text does not explicitly demand this weight — is to miss the deep logic of the Nineteenth Amendment itself. The amendment's plain (if deep) meaning counsels against exaggerating male voices *hors du texte* when construing a Constitution whose new big idea was precisely to affirm female equality.

Second, in order to make clear that the text does indeed continue to operate as a functioning focal point, we should prefer readings of the text that cohere with actual practices on the ground. Thus, I try wherever possible to link well-settled practices and judicial outcomes with orphaned clauses — to show, contra various critics, that the practices and rulings are textually grounded and that certain now-obscure constitutional texts in fact are not dead letters, as sometimes thought. As Professor Strauss points out in his review of my book, these clauses

<sup>4</sup> STRAUSS, *supra* note 2, at 106 ("usually . . . the words of the Constitution should be given their ordinary, current meaning — even in preference to the meaning the framers understood").

<sup>5</sup> AMAR, *supra* note 3, at 279–85.

include the Bill of Attainder and Title of Nobility Clauses of Article I, sections 9 and 10; the Republican Government Clause of Article IV; the Ninth Amendment; the Citizenship and Privileges or Immunities Clauses of the Fourteenth Amendment's first section; the Right to Vote Clause of the Fourteenth Amendment's second section; and the Nineteenth and Twenty-Fourth Amendments.<sup>6</sup> Professor Strauss correctly identifies my work as distinctive in its emphasis on these clauses and its efforts to explain settled judicial doctrines and modern practices by reference to these clauses. But my project should not be seen as idiosyncratic. Rather, it should be understood as directly responsive to a big idea that Strauss himself highlights: "[W]e are in a better position to use the text as a common ground if we can say that the whole Constitution is binding than we are if we routinely disregard parts of the Constitution and try to insist that only certain clauses are binding."<sup>7</sup>

## II. CONTESTATION: RECLAIMING HISTORY, RECENTERING ORIGINALISM, AND AMENDING STRAUSS'S ACCOUNT OF AMENDMENTS

Professor Strauss's account and mine diverge in certain respects. Though he duly notes the reverence that many modern Americans feel for the written Constitution, he personally has a cooler, more detached perspective. My tone is generally gushier — "oracular" and "preachy" as Strauss notes.<sup>8</sup> But could it be that my more romantic account is actually more realist — closer to how most Americans, both inside and outside government, in fact talk and feel — and therefore closer to the

<sup>6</sup> Strauss, *supra* note 1, at 1533. I also do some fun things with the Twenty-fifth Amendment. See AMAR, *supra* note 3, at 384 n.\*; 586 n.61 (linking the amendment to the debate over the constitutional status of independent agencies); *id.* at 403 (linking the amendment to the evolving norms of modern political parties regarding the power of presidential nominees to pick their vice-presidential running mates). In addition, I connect the Fifteenth Amendment to rights of jury service. Professor Strauss wonders if this move has any explicit support in Supreme Court precedent. He seems to believe the answer is no, Strauss, *supra* note 1, at 1555–56, but in fact the answer is yes, see, e.g., *Neal v. Delaware*, 103 U.S. 370, 389 (1881). And for a long list of similar state supreme court cases linking the Nineteenth Amendment and/or state woman suffrage amendments to jury service, see AKHIL REED AMAR, *AMERICA'S CONSTITUTION* 619 n.51 (2005).

<sup>7</sup> STRAUSS, *supra* note 2, at 111. In a similar vein, I argue that in choosing between two plausible readings of the Ninth Amendment's words, faithful constitutionalists should embrace the reading that:

[H]elps the written Constitution cohere with settled contemporary practice — with the actual world of American constitutional law that recognizes and reverences many utterly uncontroversial rights (such as the right of a criminal defendant to testify at his own trial) even though these rights are unenumerated and emerged long after the Founding. Those who respect the terse text and want it to succeed in its general project should hesitate to reject a perfectly plausible reading that ultimately strengthens the text by connecting it with the basic rights claimed and practiced by each generation of Americans.

AMAR, *supra* note 3, at 109.

<sup>8</sup> Strauss, *supra* note 1, at 1534.

larger American culture that must inform any sound interpretative account of a “living Constitution”?

Strauss criticizes originalists who claim that only their approach preserves proper judicial restraint.<sup>9</sup> But I offer a different vision of originalism: modern interpreters should attend to the understandings at the time of enactment not because these old unwritten understandings always and everywhere tightly bind us today and thereby effect strict interpretive restraint, but because we can learn from our constitutional predecessors. The evils that our predecessors lived through, that they experienced firsthand at epic moments in American history, can help us understand why they put certain things in the text — to spare us. Various rights emerged from real wrongs, wrongs we ignore at our peril. On my view, the written Constitution is often wise — typically wiser than judges acting under their own steam — because the document distills the democratic input of many minds over many generations.<sup>10</sup>

Perhaps because of his theoretical priors — in particular, his early doubts that he would find much that is truly sound and usable in

<sup>9</sup> STRAUSS, *supra* note 2, at 113–14. See also David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 926–28 (1996).

<sup>10</sup> See generally Akhil Reed Amar, *The Supreme Court, 1999 Term — Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000). In particular, see *id.* at 53–54, where I argue:

The case for the Constitution is thus not that it alone uniquely constrains judges. . . . Maximal judicial constraint is not the goal . . . . Law not only constrains but empowers; and the document aims to empower judges by directing their attention to a wise and democratic set of judgments as food for thought.

Perhaps conflating me with others who do exaggerate originalism’s practical ability to effect strict judicial constraint and determinacy, Professor Strauss wonders whether it is troubling for my approach that in 1790 Congressman James Madison took a position on the federal bank at odds with arguments later championed by Chief Justice Marshall, arguments that I expound and endorse. Strauss, *supra* note 1, at 1537–40. I am not troubled by this fact. Good lawyers using the same proper tools and modalities of argument — text, history, structure, practice, precedent, and so on — will often disagree. But in certain situations, one view may simply be far more legally sound than another. On the issue of the federal bank, I’m with George Washington and John Marshall all the way, not just because they correctly envisioned the future, as Strauss notes, but also because they accurately recalled the past — the Founding itself, in which a proto-*McCulloch* vision of broad federal power to effectuate national security and prosperity was articulated by leading Federalists, see AMAR, *supra* note 6, at 40–53, 105–19. As for Madison in 1790, I don’t think he was “a constitutional dunce,” Strauss, *supra* note 1, at 1539, but I do think he was a wily pol, attentive to his electoral base. His 1790 arguments were uncharacteristically weak and inconsistent with things he had done under the Articles of Confederation; and later in life, as President, Madison himself sidestepped his 1790 position. In 1790, almost all the opposition to the bank came from Virginia and Maryland. If opposition was truly grounded in a compelling legal argument for states’ rights, why didn’t other states’ rightists join the cause? If, however, opposition was instead rooted in certain local political concerns — including concerns about whether a Philadelphia-based bank might queer the deal to site the national capital on the Potomac — then Madison’s flip-flopping and lapses become much easier to understand. On Madison as a shrewd pol, see AMAR, *supra* note 3, at 395–97.

originalist history, and his skepticism that proper constitutional decisionmaking in the modern era should turn on historical tidbits from long ago — Strauss has not lived his academic life plowing originalist fields. For better or worse, I have worked and played in these fields for decades, with lots of dirt under my fingernails; and my detailed report from these precincts is that there is a great deal there to learn from, a great deal that is generally inspiring, when understood in context. Thus, my account of America's unwritten Constitution, alongside my earlier work, is rather more originalist than Strauss's account of America's living Constitution, which tends to showcase judges and judicial doctrine.

I have especially profited from Strauss's powerful accounts of the role that judicial doctrine does and should play in implementing the Constitution, and how implementation (what others sometimes call "construction") should not be equated with pure interpretation.<sup>11</sup> But I worry that Strauss's account tends to inflate the independent and autonomous significance of judicial doctrine by downplaying the importance of formal amendments in ultimately driving doctrinal development. Building on his provocative article, *The Irrelevance of Constitutional Amendments*,<sup>12</sup> Strauss's book declares that "[f]ormal amendments, adopted according to Article V, are actually not a very important way of changing the Constitution."<sup>13</sup> On Strauss's view, much of modern constitutional understanding arose "principally through an accretion of judicial precedents, which is characteristic of our living Constitution."<sup>14</sup>

I have a different view. True, some constitutional clauses, including some constitutional amendments, are simply declaratory, and we should properly read the Constitution in much the same way with or without these clauses.<sup>15</sup> But are all constitutional amendments declaratory/irrelevant? If so, what mass delusion has gripped so many generations of Americans over the centuries to induce them to participate intensely in the onerous process of adding new words to the terse text — words that (on Strauss's view) are basically irrelevant? Strauss's overly cool — indeed, frosty — account here does not seem particularly realist, and also seems in tension with his general idea about treating the entire constitutional text as an important coordinating device.

<sup>11</sup> See David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988).

<sup>12</sup> David A. Strauss, Commentary, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001).

<sup>13</sup> STRAUSS, *supra* note 2, at 116.

<sup>14</sup> *Id.* at 120.

<sup>15</sup> Examples might include the Necessary and Proper Clause and the Tenth Amendment.

On my view, modern American constitutionalism did not come about simply because judges living autonomously in Doctrineland made adjustments in classic incremental common law fashion. The Warren Court revolutionized doctrine and repudiated earlier case law across a vast range of topics — race, religion, incorporation, expression, voting — and properly did so in order to bring case law into alignment with a text whose *amendments* supported this judicial revolution.<sup>16</sup> These amendments, after all, had explicitly added to the

<sup>16</sup> See generally AMAR, *supra* note 3, at 139–99. In particular, see *id.* at 552 n.78, where I contrast my account of the Warren Court revolution with Professor Strauss's view. In his review, Professor Strauss suggests that my account of equality rights against the federal government based on the Citizenship Clause is textually and historically "[im]plausible" and raises very hard questions concerning textual redundancy. Strauss, *supra* note 1, at 1542. I respectfully disagree. I discussed this issue only briefly in my new book, AMAR, *supra* note 3, at 109–10, 150–51, because I have discussed it at greater length and with more documentation in two previous books and several articles. See, e.g., AMAR, *supra* note 6, at 382–83, 388; AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 171–74, 196 n.\*, 281–83 and accompanying notes (1998) [hereinafter AMAR, THE BILL OF RIGHTS]; Akhil Reed Amar, *Constitutional Rights in a Federal System: Rethinking Incorporation and Reverse Incorporation*, in BENCHMARKS: GREAT CONSTITUTIONAL CONTROVERSIES IN THE SUPREME COURT 71 (Terry Eastland ed., 1995); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 767–73 (1999). These sources provide copious citations to the Fourteenth Amendment's legislative history and to landmark opinions of the first Justice Harlan. For recent originalist scholarship compiling a great deal of additional evidence strongly supportive of my (and Justice Harlan's) claims, see Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 U. VA. L. REV. (forthcoming 2013). Strauss wonders what is the "point" of all my originalism on the segregation issue. Strauss, *supra* note 1, at 1542. The point is to understand what the amendment's framers actually sought to do and why, even if their background views are not absolutely binding on us today — because, to repeat, we can learn a great deal from earlier generations of Americans at epic turning points of American history. Professor Strauss tends to place judges on a pedestal. And if he is right about *Bolling*, then we do indeed have judges to thank for a strong racial equality jurisprudence. But if Justice John Marshall Harlan, Ryan Williams, and I are right, then we have the American people themselves to thank for these principles — and the Court actually can be faulted for failing to do justice to the text and to the people in the long, sad era of *Plessy*-blessed apartheid. Cf. AMAR, *supra* note 3, at 199 ("Reflecting the deep wisdom of the American people in their most decisive moments, the written Constitution deserves judicial fidelity, both because it is the law and because, for all its flaws, it has usually been more just than the justices."). Professor Strauss also asks about changes in public opinion regarding segregation between 1868 and 1954. I agree these changes and indeed additional post-1954 changes in public opinion are important elements in the analysis, as I explain, *id.* at 148–49, 211–15.

Two other items regarding the Fourteenth Amendment also merit mention. Professor Strauss raises a question about the fundamental rights of aliens under any approach, such as mine, that emphasizes the Fourteenth Amendment's citizenship language. Strauss, *supra* note 1, at 1552 n. 55, 1556. It is a very fair question, and I tried to offer a detailed answer to it in AMAR, THE BILL OF RIGHTS, at 364 n. 42. Professor Strauss also might be read as suggesting that "no one . . . seriously" believes that in the 1860s the Fourteenth Amendment was centrally focused on issues of gender discrimination in addition to race discrimination. Strauss, *supra* note 1, at 1555. Not only do I seriously believe this, but in previous work I have provided considerable textual and historical evidence for this belief. See AMAR, *supra* note 6, at 380–85; AMAR, THE BILL OF RIGHTS, at 216–18, 239–41, 245–46, 260–61, 293–94; Akhil Reed Amar, *Women and the Constitution*, 18 HARV. J. L. & PUB. POL'Y 465, 467–70 (1995). My views on this issue are shared by many (but not all) scholars who have carefully studied the relevant historical materials from the



Founding text key words about human equality, citizenship, civil rights, voting rights, and congressional power.<sup>17</sup>

Further support for the Warren Court revolution came from what these amendments did as well as said. Faithful interpreters must interpret amendments as deeds as well as texts — and this unwritten aspect of American constitutionalism, I argue, helps justify much of our current case law that is otherwise hard to explain. Thus, on my view it is hardly irrelevant that the Bill of Rights in general and the First Amendment in particular emerged from a remarkably populist process — an epic continental conversation in 1787–1788 whose populism and openness help explain why the Bill spoke repeatedly of rights of “the people” and what was meant by “the freedom of speech.”<sup>18</sup> It is hardly irrelevant that America’s two major political parties presented to the American people sharply distinct constitutional visions in the 1860s and that Americans mobilized in specific and significant organizational ways to constitutionalize the Republican Party’s vision of freedom, civil equality, and voting rights.

Also, it is hardly irrelevant that an initially proslavery Constitution that sidestepped various voting-rights questions now boasts no less than five amendments (the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth) that expressly affirm “the right to vote.” On my view, we must attend not simply to what each amendment explicitly says in isolation, but what these amendments implicitly say when read as an ensemble. Though holistic between-the-lines meaning is in some sense unwritten — it transcends the literal meaning of each word or clause read in isolation — it is a pervasive part of proper constitutionalism, I argue.

Where the amendments are concerned, this holistic perspective has a powerful punch line. American history from 1787 to the present has not always and unwaveringly moved in the direction of increased liberty and equality. Often the pattern had been  $x$  steps forward and  $y$  steps back — and sometimes  $y$  has been greater than  $x$ . Our laws

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1860s. Thus, I cannot accept Professor Strauss’s assertion that a robust jurisprudence of women’s equality rights is an entirely “nontextual development.” Strauss, *supra* note 1, at 1555. I do however agree with him that this jurisprudence also owes a great deal to nontextual — unwritten — developments that have properly informed, energized, and glossed the text, as I explain in detail in a chapter devoted entirely to women’s rights. See AMAR, *supra* note 3, at 277–305.

<sup>17</sup> The Warren Court also revolutionized criminal procedure. On this topic I am more critical of the Court, and I am grateful to Professor Strauss for noting this fact in his review. Strauss, *supra* note 1, at 1533–34. Some other reviewers — mostly, political conservatives — have suggested that my book is generally liberal, but have failed to mention that on the exclusionary rule, my views are very far from the standard liberal line.

<sup>18</sup> Professor Strauss sensibly wonders whether free speech for ordinary moments can properly be deduced from the role that free speech played in the extraordinary moment of the Founding itself. Strauss, *supra* note 1, 1547–50. For my specific answer to this thoughtful question, see AMAR, *supra* note 3, at 529 n.6.

have not invariably improved. Our culture has progressed and regressed, and our cases have ebbed and flowed. But our *formal textual amendments* have in fact almost invariably made amends. They have made our system consistently more equal and free and almost never less.<sup>19</sup> This extraordinary vector of constitutional progress seems very relevant indeed — a key (albeit unwritten) feature worth stressing, not slighting. Or so I argue.

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<sup>19</sup> The Eighteenth Amendment, enshrining Prohibition, is the main exception, and this amendment was of course extremely short-lived and followed by an explicit repealing amendment — the Twenty-First.