

---

---

## BOOK REVIEW

### NOT UNWRITTEN, AFTER ALL?

AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY. By Akhil Reed Amar. New York, N.Y.: Basic Books. 2012. Pp. xvi, 615. \$29.99.

*Reviewed by David A. Strauss\**

If you want to understand American constitutional law, you have to read the U.S. Constitution. That seems obvious. But you can't *just* read the U.S. Constitution, because there is more to constitutional law than that. The very first page of Akhil Reed Amar's impressive book, *America's Unwritten Constitution*, makes this point well. Nothing in the text of the Constitution explicitly forbids racial segregation. The text does not explicitly say that the Bill of Rights applies to the states. "One person, one vote"; "the rule of law"; "checks and balances"; "separation of powers" — none of these phrases are in the text of the Constitution (p. ix). There are many more examples. These add up to an "unwritten Constitution," Professor Amar says, that, together with the document, make up "America's working constitutional system" (p. ix).<sup>1</sup> Of course the elements of the unwritten Constitution are written down in various places, but not, at least not explicitly, in the famous document.

*America's Unwritten Constitution* asks the important questions: If there is an unwritten Constitution, where do its "provisions" come from? How do we figure out what it requires, with enough precision to resolve specific legal issues? What, exactly, is the relationship between the written and unwritten Constitutions (pp. x–xi)? The book does not answer these questions systematically; what Amar said in an earlier article, that "[t]hese questions are best answered by example rather than by a priori reasoning,"<sup>2</sup> captures his method here as well. The book is, in a sense, a demonstration, not an explanation, of how the unwritten Constitution works.<sup>3</sup> It contains twelve chapters, each with a subtitle suggesting a different unwritten Constitution: the "Im-

---

\* Gerald Ratner Distinguished Service Professor of Law, the University of Chicago. I am grateful to Richard Posner and Adrian Vermeule for comments on an earlier draft, and to the Burton and Adrienne Glazov Faculty Fund at the University of Chicago for financial support.

<sup>1</sup> Emphasis has been omitted.

<sup>2</sup> Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 827 n.305 (1999).

<sup>3</sup> Near the end of the book, Amar suggests that the purpose of the book is to "train[] our senses to detect America's unwritten Constitution alongside its written counterpart" (p. 433).

---

---

PLICIT Constitution,” the “Enacted Constitution,” the “Lived Constitution,” the “Doctrinal Constitution,” the “Institutional Constitution,” and others. In each chapter, Amar briefly describes a way of ascertaining the contents of the unwritten Constitution; then, in the bulk of the chapter, he makes detailed arguments for specific legal conclusions on a wide range of subjects: for example, why freedom of speech, or women’s equality, or certain executive branch powers are properly seen as part of the Constitution.

Amar says that what unites each chapter is the “methodological tool” (p. xv)<sup>4</sup> he uses to “locate and bring into sharp focus the unwritten substantive do’s and don’ts” (p. xiv). But it is clear that the author’s heart is much less in the brief and abstract justifications for using the various “methodological tool[s]” than in the specific arguments that apply those tools. Those arguments are lively, ingenious, and erudite.

Several things about this book are particularly striking. First, despite the book’s title, the star of the show is, in fact, the written Constitution. Many principles that one might think are unwritten turn out — when Amar is done with them — to be in the written Constitution itself, once you read the written Constitution the right way. That is not true of each of his unwritten Constitutions, but I think it can fairly be described as one of the main themes of the book — not surprisingly, given Amar’s well-known earlier work.<sup>5</sup>

Second — again despite the book’s title, which suggests a description of existing constitutional norms — Amar often defends some surprising and unconventional views about constitutional law. The Guarantee Clause of Article IV, the Ninth Amendment, the Citizenship and Privileges or Immunities Clauses of the Fourteenth Amendment, Section 2 of the Fourteenth Amendment, the Nineteenth Amendment, the Twenty-Fourth Amendment, and, glancingly at least, the Titles of Nobility and Bill of Attainder Clauses of Article I, as well as some other provisions — all are interpreted in ways that would surprise someone who, for example, learned constitutional law from Supreme Court opinions. Generally — and again despite the title of the book — Amar’s unconventional readings are designed to show that established principles of constitutional law that might seem to be “unwritten” are in fact securely connected to the written Constitution.

Third, while the book is filled with surprising interpretations and arguments, in the end it does not call for a large-scale reformation of constitutional law. Amar disagrees with his share of Supreme Court

---

<sup>4</sup> Emphasis has been omitted.

<sup>5</sup> See generally Akhil Reed Amar, *The Supreme Court, 1999 Term — Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000).

decisions: the Fourth Amendment exclusionary rule gets particularly rough treatment, and it is not alone. But his views about how cases should come out, unlike many of his challenging and iconoclastic arguments, are, for the most part, comfortably within conventional boundaries.

The most striking thing about the book, however, is that it is, in many ways, a tour de force. It is extraordinary both in its scope and in the erudition it displays: it is impossible to do justice, in a review, to the learning reflected in its pages. A book that is so dense in historical detail and textual argument could easily become tedious, but this book does not; every chapter is easy to read but packed with substance. The book can be a little oracular at times, and a little preachy; and I have some qualms both about the big picture it paints and about some of the specific arguments it makes. But this is, without question, a remarkable work of scholarship.

In Part I of this review, I will describe some instances in which, I think, Amar overemphasizes the role of the written Constitution in determining the shape of American constitutional law — and correspondingly understates the importance of the extratextual influences on American constitutional law that the title suggests are the subject of the book. In Part II, I will discuss the relationship between Amar's overemphasis on the document (if that is a fair characterization) and his unconventional analysis of several issues, and I will venture some thoughts about both the foundations and the consequences of the book's approach.

### I. IS IT ALL ABOUT THE DOCUMENT?

In American constitutional law, every claim about what the law requires must, in some way, be connected to the text of the written Constitution. This is a fixed point of our system. You will not be taken seriously if you assert that something is unconstitutional but cannot specify the provision of the written Constitution that you are invoking. Things do not have to be like this, of course. One could imagine a system in which the written Constitution had a status comparable to that of a statute in a common law system: supreme in the area it covers, but not comprehensive and so leaving room for law to develop without reference to it. But that is not our system.

The question is: how important is the text, really, to constitutional law? One polar position might be that the text plays a purely formal role, analogous to that of the Queen in the current British government: one has to invoke the text of the Constitution in making a constitutional argument, but the text does not actually affect anything. If that were true, the Constitution would be formally written, but actually wholly unwritten. The other polar position would be that the text operates like a detailed regulatory code that gives a specific answer to

almost every question that arises. In that scenario, the Constitution would be, for practical purposes, entirely written; there would be little point in talking about an unwritten Constitution.

Neither of these polar positions is correct. The text obviously answers some important questions without any recourse to what might be called an unwritten Constitution: the length of the President's term in office and how many senators each state has, for example. But it's also obvious that the text doesn't give clear answers to every important question. The problem, then, is to describe the intermediate position that our system actually occupies.

Amar's account, I believe, gives too much emphasis to the written Constitution, and not enough to other influences that actually determine the content of American constitutional law. I will discuss three examples: *McCulloch v. Maryland*,<sup>6</sup> the important early decision on the extent of federal power; the desegregation decisions, *Brown v. Board of Education*<sup>7</sup> and *Bolling v. Sharpe*,<sup>8</sup> and the law of freedom of speech, associated of course with the First Amendment. *America's Unwritten Constitution* ranges so widely that discussing any limited number of examples can present a misleading picture. There is much more to the book than the passages I will discuss. But I think these cases are fairly representative of large elements of Amar's approach. And perhaps it is reasonable to focus on these cases because they are so central to American constitutional law.

#### A. *McCulloch and the First Bank of the United States*

*McCulloch v. Maryland* held that Congress had the authority to establish the Bank of the United States, even though none of the powers granted to Congress explicitly included that authority.<sup>9</sup> Today, of course, Congress's power to regulate the economy is a central aspect of American government, and *McCulloch* can fairly claim to be the constitutional basis of that power. *McCulloch*, Amar says, is an example of "the implicit Constitution hiding behind the document's explicit words" (p. 22). The way we discover that implicit Constitution is to "read the document as a whole" (p. 6). "Doing so," according to Amar, "will enable us to detect larger structures of meaning — rules and principles residing between the lines" (p. 6). Chief Justice John Marshall's opinion in *McCulloch*, Amar says, followed this approach: it "repeatedly relied not on explicit clauses but on the implicit meaning of the Constitution as a whole" (p. 23).

---

<sup>6</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>7</sup> 347 U.S. 483 (1954).

<sup>8</sup> 347 U.S. 497 (1954).

<sup>9</sup> 17 U.S. (4 Wheat.) at 425.

Article I, section 8 of the Constitution enumerates powers vested in Congress, and the power to establish a national bank is not among them.<sup>10</sup> Marshall asserted that the Bank was a means of carrying out several of those powers — the power to collect taxes, to borrow money, to raise and support armies<sup>11</sup> — but, as Amar recognizes, the opinion does not explain in any detail the connection between the Bank and these powers (pp. 25–26). Instead, “Marshall’s trademark brand of holistic analysis,” Amar says, “proceeded in three steps” (p. 27). The first was that (in Amar’s words) “[t]he central purpose of the Constitution was to safeguard national security across a vast continent” (p. 27). The second step was that “[c]reating a national bank fit sensibly within that central purpose, given all the ways that a continental bank might facilitate continental defense” (p. 27). And third, “[t]his kind of sensible fit with the Constitution’s broad purposes, as opposed to a mathematically perfect nexus between a statute and a specific empowering clause, was all that was required” (p. 27). “To read *McCulloch*,” Amar says, “is to behold the art of constitutional interpretation at its acme” (p. 22).

Maybe so, but there is a problem. As Amar recognizes, when the First Bank of the United States was established in 1791, James Madison — whose authority Amar, like everyone else, invokes on many constitutional issues — vigorously argued that the Bank was unconstitutional.<sup>12</sup> Madison, like Marshall and like Amar, looked at the structure of Article I. But he drew the opposite conclusion from Marshall: “[I]t is a grant of particular powers, leaving the general mass in other hands.”<sup>13</sup> That is, Madison said, the structure of the Constitution dictates that, contrary to the *McCulloch* opinion, the Bank must be closely linked to a specific power. Otherwise, Madison said — arguing from the Constitution’s structure — what would be the point of enumerating powers, if more powers could be added by implication?

Madison then did what Amar lauds Marshall for not doing: he went clause by clause through Article I and explained why none of them authorized the Bank.<sup>14</sup> Madison concluded — directly contrary to the aspects of the *McCulloch* opinion that Amar celebrates — that the constitutionality of the Bank was “condemned by the rule of interpretation, arising out of the constitution” and “condemned by its ten-

<sup>10</sup> See U.S. CONST. art. I, § 8.

<sup>11</sup> *McCulloch*, 17 U.S. (4 Wheat.) at 381–82.

<sup>12</sup> See, e.g., James Madison, Statement on the Grant of the First Charter of the Bank of the United States (Feb. 2, 1791), reprinted in LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 39–45 (M. St. Clair Clarke & D.A. Hall eds., 1832) [hereinafter DOCUMENTARY HISTORY].

<sup>13</sup> *Id.* at 40.

<sup>14</sup> *Id.* at 40–44.

dency to destroy the main characteristic of the constitution,"<sup>15</sup> by which he meant, apparently, the limit on federal power.

Even apart from Madison's stature as the "Father of the Constitution," Madison's argument reveals a problem with the approach that Amar praises *McCulloch* for embracing. The problem is in the assignment of a unitary purpose to the Constitution. Perhaps a "central purpose" of the Constitution was, as Amar says, "to safeguard national security across a vast continent" (p. 27). The Bank furthered that purpose, considered in isolation. But if that had been the Constitution's only purpose, Article I would look quite different; it might, for example, simply vest plenary power in Congress. Another purpose, as Madison said — undeniably correctly — was to establish a federal government that had only limited power. The enumeration of federal powers (as opposed to a plenary grant of power) reflected the purpose of limiting federal power. That purpose, considered in isolation, would "condemn[]" the Bank, as Madison said.

The Constitution was, of course, a compromise between proponents and opponents of a powerful national government. So if we just look at "the general purposes that the American people had in mind when they framed and ratified the document" (p. 26), we find cross-cutting purposes, one of which sustains the Bank and one of which does not. How can we decide which side wins?

This problem is endemic to arguments that rely on "structure." Those arguments are an analogue to the purposivist approach to statutory interpretation associated with the Legal Process school, which holds that an ambiguous provision in a statute should be interpreted in a way that promotes the statute's purposes.<sup>16</sup> But as many commentators — and the Supreme Court — have pointed out, no statute has only a single purpose.<sup>17</sup> "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice . . . ."<sup>18</sup> For that reason, as the Court explained, "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law."<sup>19</sup> The same is true of constitutional provisions, and of the Constitution as a whole.

---

<sup>15</sup> *Id.* at 44–45.

<sup>16</sup> See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 1374 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (1958) (asserting that, in interpreting a statute, the correct approach is to "[d]ecide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved" and "[i]nterpret the words of the statute immediately in question so as to carry out the purpose as best it can").

<sup>17</sup> See, e.g., Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983).

<sup>18</sup> *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (per curiam).

<sup>19</sup> *Id.* at 526 (emphasis omitted).

*McCulloch* was both a correct decision and as important a decision as Amar says. But its correctness, and its importance, are established by two other things, not just (maybe not even) by the kinds of “holistic” arguments that Amar celebrates (for example, pp. 27, 47). The first is precedent, of a nonjudicial variety. By the time *McCulloch* came before the Supreme Court, the Bank had been in existence, on and off, for a generation. The First Bank of the United States was established (despite Madison’s constitutional objections) in 1791. It expired after twenty years. In 1815, Congress tried to renew the Bank. James Madison, as it happens, was the President. He vetoed the renewal, but not for constitutional reasons: he explicitly acknowledged that the Bank was constitutional.<sup>20</sup> (He later signed an amended version of the bill incorporating the Bank.<sup>21</sup>)

In his veto message, Madison explained why he had changed his mind about the constitutionality of the Bank. He said that “the question of the constitutional authority of the Legislature to establish an incorporated bank” was “precluded, in my judgment, by repeated recognitions, under varied circumstances, of the validity of such an institution, in acts of the legislative, executive, and judicial branches of the Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation.”<sup>22</sup> Madison’s evolution on this issue is an example of how the unwritten Constitution works: the written Constitution had not changed, but, according to Madison, the Bank, once unconstitutional, had become constitutional. That had happened not because of any single event but because of an accumulation of nonjudicial precedents: the acceptance of the Bank by the various branches of the government and by the people generally. Marshall’s opinion in *McCulloch* made a similar point.<sup>23</sup>

Professor Amar understands this kind of argument: in a different chapter, he shows that important features of the law governing executive and legislative power were settled not by the text but by “long-standing usage” (p. 345). This is true, for example, of Congress’s ability to limit the President’s authority to remove the heads of certain federal agencies: “[P]ost-1789 presidents and Congresses have in effect decided that the president needs only the power to remove [these agency heads] for cause, rather than at will” (p. 323).<sup>24</sup> The scope of

---

<sup>20</sup> See James Madison, The President’s Veto of the Bill (Jan. 30, 1815), reprinted in DOCUMENTARY HISTORY, *supra* note 12, at 594, 594–95.

<sup>21</sup> See On the Grant of the Charter of 1816 (Apr. 4–5, 1816), reprinted in DOCUMENTARY HISTORY, *supra* note 12, at 707, 713.

<sup>22</sup> Madison, *supra* note 20, at 594.

<sup>23</sup> 17 U.S. (4 Wheat.) 316, 401 (1819) (asserting that the constitutionality of the Bank “can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it”).

<sup>24</sup> Emphasis has been omitted.

the President's power to make recess appointments has a similar provenance: not the text, but long-standing practice. "Here, as elsewhere, an ambiguous text has been definitively glossed by what has in fact been done early and often by leaders from across the political spectrum" (p. 345).<sup>25</sup> That is, essentially, what Madison said about the Bank in 1815, when he changed his position.

The nonjudicial precedent that Madison cited strengthened the argument that *McCulloch* was legally correct in upholding the constitutionality of the Bank, but of course *McCulloch* is a famous decision not because of what it said about the Bank in particular but because of what it said about federal power. That is, what makes *McCulloch* a great decision is something beyond both structure and precedent. Marshall correctly anticipated that the nation would need a powerful central government. This was not a lawyer's judgment about the text or even a judgment about what the general acceptance of the Bank had shown; it was a judgment about the course of history.

Amar says that "Marshall's constitutional genius" consisted in his ability "to grasp that Americans had not ratified the Constitution clause by clause, enumerated power by enumerated power. The people had ratified the Constitution as a whole, and thus the federal government's powers needed to be read as a whole rather than as a jumble of discrete clauses" (p. 26). This is, I think, a mistaken account of Marshall's "constitutional genius," and not only because it seems to make the James Madison of 1791 a kind of constitutional dunce. Amar's account is too much in thrall to the text. It puts too much emphasis on a very contestable argument about "holistic" interpretation and not enough on past practice, for one thing; and, for another, not enough emphasis on the kinds of judgments about policy and so-

---

<sup>25</sup> A recent decision of the D.C. Circuit severely restricted the President's power to make recess appointments. *Noel Canning v. NLRB*, Nos. 12-1115, 12-1153, 2013 WL 276024 (D.C. Cir. Jan. 25, 2013). The court held that the President may make recess appointments only during the recess that occurs between sessions of Congress, *id.* at \*8-16, and further that the President may fill only vacancies that occur during the recess, *id.* at \*16-23. The court emphasized the precise words of the Recess Appointments Clause: that the Clause refers to "the Recess of the Senate" and to "Vacancies that may happen during" that recess. U.S. CONST. art. II, § 2, cl. 3. The use of the definite article before "Recess," the court reasoned, meant that the Clause allowed appointments to be made only during the recess between sessions, not during breaks within sessions. *Noel Canning*, 2013 WL 276024, at \*8-9. And a vacancy "happen[s]," the court said, "only when it first arises." *Id.* at \*17. The court discussed the history of the recess appointments power, but its primary emphasis was on the text of the provision.

Amar's discussion, which emphasizes not the text but the historical practice that informs the President's power to make recess appointments (p. 576 n.16), leaves no doubt that Amar would disagree with the D.C. Circuit on the question of when a vacancy must arise, and little doubt that he would disagree about the kind of recess that the Clause envisions. But the D.C. Circuit's decision highlights the risks of an approach, like Amar's, that usually exalts the text — especially when that approach provides little systematic guidance about when a consistent historical practice can overcome the kind of fine-grained reading of the text that Amar prefers in other settings.



cial needs that are sometimes unavoidable in constitutional law. Marshall's constitutional genius had to do with those judgments, not with the logic of constitutional argument. Marshall was in tune not with the document — whose structure could have been read, as Madison initially read it, to limit the federal government — but with the future.

### B. *The Segregation Decisions*

*Brown v. Board of Education* is the most famous judicial decision of the twentieth century, and it is, by general agreement, on a very short list of the most significant decisions in the history of the U.S. Supreme Court. It was criticized as legally unsound at the time, not just by defenders of segregation but by people whose moral objections to Jim Crow laws were unquestionably sincere.<sup>26</sup> Today, *Brown* has achieved as unchallenged a status as anything in constitutional law. Most people would agree that if an argument about the Constitution leads to the conclusion that *Brown* was wrong, then it is a bad argument.<sup>27</sup>

While *Brown* does raise some issues about how much of American constitutional law is determined by the written Constitution, it is *Brown*'s companion case, *Bolling v. Sharpe*, that presents perhaps the most interesting and difficult questions about the relationship between the written and unwritten Constitutions. In fact, *Bolling*, which was decided the same day as *Brown*, seems — like Madison's evolution on the Bank — to be an excellent example of America's unwritten Constitution in action. *Bolling* held that segregation in the public schools of the District of Columbia was unconstitutional.<sup>28</sup> *Brown*, of course, relied on the Equal Protection Clause of the Fourteenth Amendment.<sup>29</sup> But that clause, by its terms, applies only to the states, and the District of Columbia is not a state; it is governed by Congress. So what provision of the Constitution made segregation in the District unconstitutional?

The Supreme Court's answer was the Due Process Clause of the Fifth Amendment.<sup>30</sup> But the Fifth Amendment became part of the

---

<sup>26</sup> The leading example is HERBERT WECHSLER, *Toward Neutral Principles of Constitutional Law*, in PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 3, 43-47 (1961).

<sup>27</sup> For a notable exception, see ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 280-81 (2006) (advancing the view that "judges had no business deciding th[e] sort of question" presented in *Brown*, *id.* at 280, and explaining that "[t]he right question is not whether *Brown* was right or wrong, taken in isolation" but "whether a jurisprudential record containing neither *Brown* nor [various] . . . abominable decisions would have been better than a jurisprudential record containing all of them," *id.* at 281).

<sup>28</sup> 347 U.S. 497, 500 (1954).

<sup>29</sup> 347 U.S. 483, 495 (1954).

<sup>30</sup> *Bolling*, 347 U.S. at 500.

---

---

Constitution when slavery was the dominant economic and social institution in large parts of the country. It is impossible to believe that the Fifth Amendment, when adopted, was understood to prohibit racial segregation. So *Bolling* has, at best, a very uncertain basis in the text of the Constitution.

Despite that, *Bolling* has not only survived but thrived. Courts routinely refer to the “equal protection component” of the Due Process Clause of the Fifth Amendment and treat that clause as imposing the same restrictions on the United States that the Equal Protection Clause of the Fourteenth Amendment imposes on the states.<sup>31</sup> Several of the cases that first developed the constitutional prohibition against sex discrimination, for example, struck down Acts of Congress.<sup>32</sup> But the Court did not attach the slightest significance to the fact that there was a serious problem identifying the constitutional provision that invalidated those statutes.

There is no mystery about what was going on in *Bolling*, and it does not really have much to do with the text of the Constitution. Once the Court had decided *Brown*, it was “unthinkable” — as the Court said in the *Bolling* opinion itself<sup>33</sup> — that segregation could survive in the nation’s capital. The Court formally invoked the Due Process Clause as the basis for the decision, because that clause had been interpreted to forbid arbitrary legislation.<sup>34</sup> But the text of the Constitution did not dictate *Bolling*, to say the least; *Brown* did. This certainly seems to be one unmistakable example of how the unwritten Constitution works in our system.

The subsequent uncritical acceptance of the “equal protection component” of the Fifth Amendment is even more dramatic. One could imagine *Bolling* being understood as a truly exceptional case, to be justified, perhaps, on the ground that Congress acts like a state government with respect to D.C., or maybe just accepted because of the unique status of race discrimination in American history. But the way *Bolling*’s principle so easily became a fixture, despite its very dubious textual basis, is pretty striking. That, again, is an interesting datum about extratextual constitutional law.

*America’s Unwritten Constitution* does not devote a lot of attention to *Bolling*, which is itself a little surprising if I am right that *Bolling* and the persistence of the “equal protection component” are preeminent examples of the unwritten Constitution. But the treatment of *Bolling* is, I think, representative of many of the other discussions in

---

<sup>31</sup> See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 204 (1995).

<sup>32</sup> See, e.g., *Califano v. Goldfarb*, 430 U.S. 199, 201–02, 217 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 653 (1975); *Frontiero v. Richardson*, 411 U.S. 677, 690–91 (1973).

<sup>33</sup> *Bolling*, 347 U.S. at 500.

<sup>34</sup> See *id.* at 499 n.2 (collecting cases).

the book, because it is concerned not with the extratextual basis of the decision but with finding a better textual home for it. That is, the concern is less with how the unwritten Constitution works, and more with showing that it's actually all written.

Amar suggests that two provisions of the original Constitution — the clauses in Article I, Section 9 providing that “[n]o Bill of Attainder . . . shall be passed”<sup>35</sup> and that “[n]o Title of Nobility shall be granted by the United States” (p. 143)<sup>36</sup> — would have been interpreted to outlaw racial discrimination in the United States from the start if they had been “read generously, with idealistic attention to both letter and spirit” (p. 144). Amar also suggests briefly that the Supreme Court was right to rely on the Fifth Amendment’s Due Process Clause because the Fourteenth Amendment “reglossed” the Fifth Amendment to incorporate equal protection principles into it (p. 544 n.5). But he seems finally to settle on the clause of the Fourteenth Amendment that says that all persons born or naturalized in the United States are citizens of the United States (pp. 211–12).<sup>37</sup>

None of these is an especially plausible basis for *Bolling*, at least if the Constitution is read in the way that legal documents are normally read. The fact is that the Equal Protection Clause — the agreed-upon basis for *Brown* — refers only to states and says nothing about the federal government. It would have been easy enough to provide, in the Fourteenth Amendment, that neither the federal government nor the states may deprive people of the equal protection of the laws. The fact that the Amendment does not do that should count for something. “Regloss[ing]” an earlier provision seems like an odd way to do something that could have been done just by inserting another few words in the text. And if the Citizenship Clause required racial equality, then why aren’t other parts of the Amendment redundant? Of course one *could*, as a verbal matter, read the Citizenship Clause to support the holding in *Bolling*, just as the Supreme Court read the Due Process Clause to do so. But it is simply not the case that someone reading the words of the document would naturally come to the conclusion that the Equal Protection Clause applies, literally or in effect, to the federal government. By far the most straightforward conclusion is to the contrary.

There may be some value in trying to figure out the least implausible textual basis for the principle of *Bolling v. Sharpe* — although, in truth, I am not sure how much of a point there is, when the courts are

<sup>35</sup> U.S. CONST. art. I, § 9, cl. 3. Professor Amar discusses the Bill of Attainder Clause on page 144.

<sup>36</sup> The author quotes U.S. CONST. art. I, § 9, cl. 8.

<sup>37</sup> “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” *Id.* amend. XIV, § 1.

---

---

comfortable relying on the Fifth Amendment's Due Process Clause and there is no indication that the law would be any different if they invoked a different provision. In any event, though, creatively searching for a textual basis for a rock-solid principle seems at first glance to be an odd project for a book about the unwritten Constitution — unless the idea is to diminish the importance of any form of unwritten constitutionalism by showing how much can be derived from the text.

But the deeper problem is that the preoccupation with the text obscures what is actually a very interesting story about unwritten constitutionalism: a case study in how a constitutional principle with a very weak grounding in the text not only can be adopted but can become unquestioned and then extended. Was the success of *Bolling* attributable to the extraordinary legitimacy of *Brown* and the fight against Jim Crow? Was it, more generally, a reflection of the naturalness of treating the federal and state governments alike in this domain? (If so, why did that become so natural?) Does it suggest that American constitutional law, in important respects, is a precedent-based, not a text-based, system? Those are the questions that might have been examined.

Amar does not devote a lot of this book to *Brown*, either, but then *Brown* does have a much more plausible textual basis than *Bolling*, and *Brown*'s connection to an unwritten Constitution is much less obvious. Still, there is a connection. There are well-known questions about how to justify *Brown* under the written Constitution. The school segregation laws at issue in *Brown* purported not to discriminate against blacks; they purported to maintain equality between black and white schools under a regime of "separate but equal." The Supreme Court in *Brown* rejected the notion that segregated facilities could ever be equal. The problem was that this judgment — that racial segregation was necessarily inconsistent with the kind of equality guaranteed by the Fourteenth Amendment — was not one shared by the members of Congress who proposed the Fourteenth Amendment or by the public at the time. The evidence is well known, and Amar canvasses it (p. 146): schools in the North, as well as the South, were segregated; District of Columbia schools, controlled by Congress, were segregated; a number of members of Congress insisted that the Fourteenth Amendment would not require desegregation; even the Senate galleries that heard the deliberations were segregated.<sup>38</sup> The Court, in its opinion in *Brown*, did not even try to argue that the Fourteenth Amendment was understood, at the time, to outlaw segregation in education. So what justification did the Court have for disagreeing

---

<sup>38</sup> See generally Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

with the ratifiers' judgment that segregation was consistent with equality?

Amar seems to rely mostly on what is, I think, a standard justification for *Brown*: that the Fourteenth Amendment enacted a principle of racial equality. The people who adopted the Fourteenth Amendment may have believed that segregation was consistent with equality, but they did not encode that judgment in the text. Segregation, very obviously, was a component of a system of racial hierarchy and subordination that was anything but equal in any normal sense of the word. So the Court was free (in fact, obligated) to conclude that segregation violated the Fourteenth Amendment.

This is a plausible argument; it has some well-known weaknesses, but as I said, *Brown* is not central to *America's Unwritten Constitution* and there is no reason it has to be, so Amar is not obligated to explore all the counterarguments to his position. But his conclusion about *Brown* (and *Bolling*) does, I think, raise some broader questions about the role he assigns to the document:

*Brown* and *Bolling* correctly understood and honored the document's core meaning. Equal meant equal, and citizenship meant citizenship. Thus, on May 17, 1954, the Court read the Constitution aright and said what the law was. As cases about constitutional interpretation — about the meaning of the written Constitution and about the judiciary's province and duty of law declaration — *Brown* and *Bolling* were thus easy as pie. (pp. 211–12)

It's possible that *Brown* and *Bolling* were, in the end, easy cases. I am not sure I would reach that conclusion as emphatically as Amar does; the fact that people of good faith were uncertain about the lawfulness of *Brown* might deserve more attention.

More to the point, if *Brown* was an easy case, the document is not what made it easy. Does the Fourteenth Amendment's use of the word "equal" mean that courts are free to invalidate any practice that, in their view, treats people unequally? That can't be right: it would more or less allow judges to strike down any laws they thought were unfair. Was *Brown* easy because racial segregation was particularly morally egregious? Because racial injustice is so close to the historical core of the Fourteenth Amendment? Because judicial and nonjudicial precedent had developed in a way that provided a foundation for *Brown*'s conclusion that separate was never equal? You cannot answer these questions just by emphasizing that "equal mean[s] equal"; indeed you cannot answer them without going beyond the text. You have to explain how a court is to decide whether the treatment of a group amounts to impermissible inequality.

*Brown* is impregnable now, but these kinds of questions have not gone away. They are raised, of course, by litigation seeking to establish the rights of gays to be free from discrimination. Beyond that, does the Equal Protection Clause forbid sex-segregated schools?

---

---

Might racially segregated primary or secondary schools be acceptable today, if supported by the African American community? Are affirmative action measures a covert form of discrimination against minorities, as some opponents of affirmative action have urged? We will need to get at the nontextual bases of *Brown* — the best defenses of the decision that separate was not “equal” — to answer those questions.

*America's Unwritten Constitution* does a lot, and it cannot be faulted for failing to provide a complete justification for *Brown*. But more than the text was involved, and saying that the “meaning of the written Constitution” made *Brown* “easy as pie” may obscure more than it reveals.

### C. Freedom of Speech

Freedom of speech plays a prominent part in Amar's account; it is subsumed under several of his unwritten Constitutions. His discussions of free speech are interestingly different from the discussions of *McCulloch* and the segregation cases. The written Constitution is still the centerpiece, but not because of its text alone.

One of the striking claims in the book is that the First Amendment is not the source of the constitutional protection of free speech. Rather, Amar says, the free speech principle was implicit in the original document. In fact, if I understand him correctly, Amar goes even further. The conventional wisdom is that while the First Amendment forbade the federal government from abridging the freedom of speech, the states were subject to no such limit until, at least, the adoption of the Fourteenth Amendment: the Supreme Court did not apply the First Amendment to a state law until 1925,<sup>39</sup> and it did not invalidate a state law on First Amendment grounds until 1931.<sup>40</sup> But Amar suggests that the principle of free speech implicit in the original Constitution limited the states as well, at least when the speech was on matters of political significance (pp. 36, 78).

Amar identifies at least three sources of this constitutional protection of free speech. The principal one is that the Constitution envisions popular elections for some state and federal offices — more or less explicitly in some respects, and implicitly in the clause requiring the United States to “guarantee to every State . . . a republican Form of Government.”<sup>41</sup> Free speech, at least on matters related to politics, is a necessary part of any electoral regime that is not a sham (p. 37–38). “The entire Constitution was based on the notion that the Ameri-

---

<sup>39</sup> See *Gitlow v. New York*, 268 U.S. 652 (1925).

<sup>40</sup> See *Stromberg v. California*, 283 U.S. 359 (1931).

<sup>41</sup> U.S. CONST. art. IV, § 4.

---

---

can people stand supreme over government officials, who were mere servants of the public, not masters over them” (p. 37).

Beyond that, Amar says, the process by which the Constitution was ratified makes free speech a constitutional principle. One novel form of constitutional argument that Amar introduces in this book is that the way in which the Constitution or an amendment was ratified carries over into the interpretation of the document itself. How a legal regime came into being sheds light on what the regime should be. This notion is the organizing principle of Amar’s chapter entitled (a little awkwardly) “Heeding the Deed: America’s Enacted Constitution.” For the freedom of speech, the crucial fact is that the ratification debates, in the state conventions and in the nation at large, were uninhibited and robust. “[T]he very act of constitutional ordainment itself occurred in and through a regime of boisterous, virtually uncensored free speech” (p. 55). That fact alone, Amar says, is a basis for establishing a constitutional principle of free speech apart from the First Amendment.

Finally, Amar derives a free speech principle from the Speech or Debate Clause of the Constitution (pp. 35–36), which provides that “for any Speech or Debate in either House” of Congress, Senators and Representatives “shall not be questioned in any other Place.”<sup>42</sup> Amar traces the Speech or Debate Clause immunity to the protection enjoyed by members of the British Parliament; he argues that while Parliament is sovereign in Britain, the people are sovereign in the United States, and so they should enjoy some form of immunity for their speech (p. 168).

What Amar says about the First Amendment — that it was not essential to the development of the constitutional principle of free speech in the United States — seems both true and important. Every liberal democracy in the world protects free speech to a substantial degree, whether or not it has a written constitution with something resembling the First Amendment. There are differences around the margins — hate speech and defamation, for example, are not protected as extensively in some other places as they are here — but there is no difference in the basic commitment to free expression. And, after all, there was no inevitability about the First Amendment or the rest of the Bill of Rights. Many Federalist supporters of the Constitution thought that a bill of rights was superfluous and agreed to it only to secure the votes of potential opponents of ratification.<sup>43</sup> It is impossible to believe that the United States would have evolved in a dramatically different way from the way we have, and the way every other liberal de-

---

<sup>42</sup> *Id.* art. I, § 6, cl. 1.

<sup>43</sup> See, e.g., THE FEDERALIST NO. 84 (Alexander Hamilton); Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301, 336–37.

---

---

mocracy has, if the Federalists' view — that the protections of the Bill of Rights were already implicit in the Constitution — had prevailed.

Amar's insightful point about the First Amendment should open the door to another story about the unwritten Constitution. How do we explain the path the United States took to the established constitutional principles that protect free expression — both the basic principles that we share with other similar nations, and the details (relatively speaking) that differ? Amar tells part of that story, but only the part that surrounds the written Constitution. In effect he substitutes, for the First Amendment, other aspects of the written Constitution — the Speech or Debate Clause, the implicit and explicit commitment to popular sovereignty, and the novel arguments about the significance of the ratification process.

Do Amar's arguments succeed? Ordinarily one might expect an account like Amar's to provide either a descriptive explanation or a normative justification. I am not sure that Amar intends his account to be either of those things. As I suggest in Part II, I think Amar's project is best understood as something different — an effort to provide what might be called a usable past, and a usable text, for people who are committed to a principle for other reasons. But in any event, I think that what Amar says does not really work as either description or justification.

As a description, Amar's account would imply that freedom of expression became securely established in the United States with the ratification of the Constitution. But of course that is not true. Speech was repeatedly suppressed, by the federal government and the states, in ways that we would consider anathema today. This happened, most clearly, during the Adams Administration, when Congress adopted the Alien and Sedition Acts and many states suppressed speech as well; in the slavery controversy before the Civil War; during the Civil War; in the first decades of the twentieth century, in a variety of settings; during World War II; and at other times as well.<sup>44</sup> None of this is news to Amar, of course; his account of the slavery controversy is especially powerful and enlightening.

Amar's arguments also, I think, do not really justify freedom of speech as a legal principle. It does not follow, from the free-wheeling nature of the ratification debates, that the regime established by the Constitution also required free-wheeling debate. As a general matter, it is simply not obvious that a ratification process provides a template for what government should be like once the ratification is complete. A ratification process is extraordinary: one would expect it to involve unusually high levels of political involvement by ordinary citizens and

---

<sup>44</sup> See generally, e.g., GEOFFREY R. STONE, *PERILOUS TIMES* (2004).



to try to convey the sense that everyone has been heard. Certainly this was true of the ratification of the U.S. Constitution.<sup>45</sup> But once people have agreed on the regime, there is, it might be argued, no need to incur the evils that come with uninhibited expression; it is better for the people at large to go back to their business and for the elites to govern without the confusion and disturbance that unrestricted speech will produce. This view may seem alien to us, but it is not an incoherent view, and it reflects the way many organizations function: people are invited freely to debate the crucial or foundational issues from time to time, but once those issues are settled, people should more or less fall in line.

Similar points might be made about the inference Amar draws from the Speech or Debate Clause. As Amar of course recognizes, the Speech or Debate Clause confers an extremely broad immunity, broader than anyone would suggest for ordinary citizens (p. 35). Defamatory or fraudulent speech — possibly even speech that is part of a criminal conspiracy — is immune if uttered by a member of Congress on the floor of a House.<sup>46</sup> Amar makes an interesting argument that there is something arbitrary about giving members of Congress such complete freedom on the floor of the House if they do not have at least some freedom to speak in public (p. 36). But there is no necessary connection between protecting the speech of elected representatives and protecting the speech of members of the public. The most straightforward explanation for the extraordinary breadth of the Speech or Debate Clause is that there are especially good reasons to protect the speech of elected representatives. As long as representatives can speak, people can express their views by voting. A government that can silence representatives is singularly dangerous. One could infer from this that an ordinary person also has a right to speak; but one could also infer the opposite, that the protection of elected representatives is sufficient.

The Constitution's commitment to popular democracy is equivocal, but it can be enlisted in support of a free speech principle. Still, there are two difficulties. First, it is possible to imagine a democratic regime without the kind of robust free speech to which we have become accustomed. The model for democratic deliberation might be something much less unruly, like a formal debate or a hearing in court. Even today, in our system, we have such a model: workplace elections, supervised by the National Labor Relations Board, to determine whether employees will have a collective bargaining representative. The Board

---

<sup>45</sup> See generally, e.g., GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787* (1969).

<sup>46</sup> See, e.g., *United States v. Helstoski*, 442 U.S. 477 (1979); *United States v. Johnson*, 383 U.S. 169 (1966).

is allowed to require so-called “laboratory conditions”: the speech of employers and unions is circumscribed; falsehoods are not allowed, nor are predictions that amount to threats.<sup>47</sup> Nothing in the written Constitution’s embrace of popular elections precludes that kind of regime. It would be very different from what we have — candidates could be punished for false statements or for unduly dire predictions about the consequences of the opponent’s victory. But the “laboratory conditions” model cannot be ruled out as a way of ensuring popular sovereignty.

The second problem with inferring free speech from popular democracy is, of course, that the free speech principle, as it is understood in the United States and elsewhere, limits even the popular will. One could infer from popular sovereignty that the people can do what they want — including silencing speech they don’t like. That is not the inference most of us would favor, and our system has drawn the opposite inference: that true popular sovereignty requires that dissidents be allowed to speak, no matter how much the majority of the moment wants to silence them. But it is that inference — which cannot simply be deduced from a commitment to popular sovereignty and, I think, has to be seen as the product of an unwritten constitutional development — that is responsible for the free speech principles we have today. The textual and paratextual sources that Amar cites do not, by themselves, establish those principles.

You don’t have to take my word for it. The Sedition Act of 1798,<sup>48</sup> which made it a crime to publish any “false, scandalous and malicious writing” critical of the government or its officials,<sup>49</sup> was supported by many members of the Founding generation, sitting in Congress. Today, the Sedition Act is a quintessential example of the kind of restriction forbidden by the American system of free expression, but many people involved in the drafting and ratification of the Constitution did not see things that way. Amar describes this as a “widespread failure of understanding” of “the logical implications of the new American system” (p. 286). “People who live through a revolution,” he points out, “do not always immediately appreciate just what they have wrought” (p. 286). But in what sense, exactly, was this system wrought by them, if they were unaware of what they were doing?

The answer, I believe, is that the Founding generation gave later generations the resources to look back and claim the Constitution on behalf of principles that those later generations valued for other rea-

---

<sup>47</sup> See, e.g., *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 616–20 (1969). See generally Derek C. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38 (1964).

<sup>48</sup> Ch. 74, 1 Stat. 596 (expired 1801).

<sup>49</sup> *Id.* § 2, 1 Stat. at 596.

sons — in the case of free speech, because a system of free expression is the best way to run a democratic society that is respectful of its citizens. But the commitment to that principle comes from somewhere else; then the question is whether there are resources in the nation's history to support that principle. Amar has shown us that there are, in the written Constitution and its ratification. That is the nature of his argument, or at least so I will suggest in Part II. But that is different from showing that the Constitution and its ratification “wrought” the system of free expression — either in the sense of establishing it in fact, or in the sense of providing the materials that, by themselves, give us a compelling legal argument in favor of the principles of free speech with which we are familiar today.

## II. WHY IT SHOULD NOT BE ALL ABOUT THE DOCUMENT

Many of the most arresting parts of *America's Unwritten Constitution* resemble the novel arguments about *Bolling*, *Brown*, and free speech: that *Bolling* and *Brown* are based on the Citizenship Clause, and that free speech principles are derived from the Speech or Debate Clause and the ratification process. Throughout much of the book, Amar's arguments have two characteristics: they are highly creative, and they reflect a nearly exclusive emphasis on the document — the text of the Constitution and the events surrounding the ratification of its provisions. The question is: what do we learn, or gain, from these creative document-centered arguments?

It would be one thing if Amar were calling for a wholesale revision of American constitutional law — if he wanted, for example, to establish far-reaching constitutional rights to education, health care, housing, or income equality, or, at the other end of the spectrum, to declare welfare and regulatory laws unconstitutional. Novel results might call for novel arguments. But that is not Amar's agenda; to his credit, his commitment is to a method, not to results.

At the same time, though, the arguments that Amar offers, for all their ingenuity, do not provide a better justification for existing law, or for the relatively modest revisions that Amar does advocate. As I will try to show, many of his arguments, like those for *McCulloch*, *Brown*, *Bolling*, and free speech, are quite problematic, at least judged according to conventional legal criteria. These arguments also do not, in general, provide a better understanding of the underlying issues that should shape the law, or of the forces in society that do shape the law.

What these arguments provide is a refuge for someone who is unshakably committed to the document as the source of American constitutional law. If you believe that the only true source of constitutional law is the written Constitution — but you want to accept American constitutional law in something like its present shape — then Amar will show you how to do it. He will show you how the text and the

---

---

events surrounding its adoption can be mobilized to support, for the most part, established constitutional principles. You won't need much help from precedent, for example, or from arguments based on policy or morality.

It is a dazzling display, but I am not sure it succeeds. In this Part, I will first discuss whether various arguments that Amar offers really do support the conclusions he draws. Most of these arguments provide unconventional, document-based reasons for established (or at least mainstream) legal propositions — instances in which, in Amar's words, the Supreme Court reached the right result, but on the basis of the wrong clause. After that, I will raise some questions about the overall soundness of (what I take to be) the project.

A. *The Right Result, but the Wrong Clause*

1. *The Ninth Amendment and the "Lived Constitution."* — The Ninth Amendment and the Privileges or Immunities Clause, which play hardly any role in judicial decisions interpreting the Constitution, are much more important in Amar's account. They are the source of what he calls "America's Lived Constitution" (p. 95). "[M]any of the Ninth Amendment rights of the people and the Fourteenth Amendment privileges and immunities of citizens," Amar says, "may be found in everyday American life — in the practices of ordinary Americans as they go about their affairs and in the patterns of laws and customs across the land" (p. 103). According to Amar, these are the provisions that the Court should have used to support its decisions establishing a right to contraception, *Griswold v. Connecticut*<sup>50</sup> and *Eisenstadt v. Baird*<sup>51</sup> (pp. 117–21). That is because, when those cases were decided, laws outlawing the use or distribution of contraceptives were "at odds with actual social practices and norms of ordinary law-abiding Americans" (p. 121). The same is true, he says, of the law forbidding homosexual sodomy that the Supreme Court struck down in *Lawrence v. Texas*<sup>52</sup> (p. 122), although that decision gets an assist from the mention of "houses" in the Fourth Amendment, since the offending acts occurred in one of the parties' residence (p. 130). The law invalidated in *Roe v. Wade*,<sup>53</sup> though, was not an outlier, and so cannot be justified in this way; Amar (like many others) thinks the Court should have considered that law a form of sex discrimination (pp. 291–92).

Professor Amar has, I think, identified an important feature of American constitutional law: the courts seem hostile to laws that they

---

<sup>50</sup> 381 U.S. 479 (1965).

<sup>51</sup> 405 U.S. 438 (1972).

<sup>52</sup> 539 U.S. 558 (2003).

<sup>53</sup> 410 U.S. 113 (1973).

believe are outdated, and they are especially willing to strike down laws that are outliers — on the books in only a few jurisdictions — or that are seldom enforced.<sup>54</sup> It is also plausible to say that the Ninth Amendment should play a role here, as Justice Goldberg suggested in his concurring opinion in *Griswold*.<sup>55</sup> But there are many possible challenges to this approach. If these really are the “actual social practices and norms of ordinary law-abiding Americans” (p. 121), why haven’t the laws been amended to allow them? How can life-tenured judges — as compared to politicians who actually have to run for office — claim special insight into the practices and norms of ordinary people? Can a court’s approval or disapproval of a certain kind of law, as a matter of social policy or morality, enter into its assessment of whether the law is outmoded? Isn’t the entire approach at odds with principles of federalism, because it will tend to suppress local and regional variations?<sup>56</sup>

*America’s Unwritten Constitution* does not ignore these challenges. But again the priority seems to be less to grapple with them than to establish a better basis in the written Constitution for what the Court is already happily doing under some other provisions that are arguably a less good verbal fit. Revealingly, Amar addresses these kinds of challenges most thoroughly when he considers the cases, decided under the Eighth Amendment, that have limited capital punishment for similar reasons; he does so because the Eighth Amendment uses the word “unusual,” which points directly to some of these problems. But the problems exist throughout this area — whenever the courts try to get rid of obsolete, idiosyncratic, or unenforced laws — and those problems, not the search for the most verbally plausible textual basis, are the key to understanding and evaluating the law in this area.

2. *Conscription and the Fourteenth Amendment.* — Amar asserts that the military draft, although probably unconstitutional before the Fourteenth Amendment was adopted, became constitutional afterward. He argues that the Framers of the Constitution did not want to authorize conscription by the federal government. State militias could conscript soldiers, and the federal government could order state militias into federal service, but the militias were trained and led by state-

---

<sup>54</sup> The idea that the Supreme Court tries to anticipate the way society will move in the future, and should do so, is the theme of ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1978). See also David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859 (2009). The willingness to suppress outliers is emphasized in MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* (2004). See, e.g., *id.* at 78–79, 136–37, 453–54.

<sup>55</sup> The Privileges or Immunities Clause is limited to citizens; that creates a problem (noted by Amar in a different context (p. 120)), because there is no apparent reason for denying these rights, once recognized, to aliens.

<sup>56</sup> I have tried to address these issues in Strauss, *supra* note 54.

appointed officers, thus limiting federal power. The Fourteenth Amendment changed that — not because of language in the Amendment, Amar says, but because (if I understand correctly) the Fourteenth and Fifteenth Amendments would not have been ratified but for the presence of the Union Army in the South, and the Union Army was raised by conscription.<sup>57</sup> The argument is parallel to the claim that the process by which the Constitution was ratified supports free speech principles. “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” (p. 92).

This argument is vulnerable even on its own terms: as Amar acknowledges, after the Civil War ended, most conscripts were discharged from the Union Army, so the Army that occupied the South when the Constitution was amended was mostly a volunteer army. But even if that weren’t true, the argument seems to be a non sequitur. Of course, the Civil War experience itself was relevant to the constitutionality of conscription. The nation found it necessary to use conscription to fight the Civil War, and that might easily be part of an argument for departing from the Framers’ understandings about a military draft — as might the recognition that the Civil War consolidated power in the national government more generally, and that most powerful nation-states in the nineteenth century had large standing armies.

But the fact that constitutional amendments were adopted under the auspices of the (formerly) conscript army was just a fortuity. It is hard to see why that should matter at all — let alone why it should be the decisive factor. Many Republicans in Congress thought that the Fourteenth Amendment was redundant; they sought its adoption only to secure power that they thought they already had, under other provisions of the Constitution, against a hostile President Andrew Johnson and a potentially hostile Supreme Court.<sup>58</sup> Is it really plausible to suppose that conscription would still be unconstitutional today if President Johnson had been less hostile, and Republicans in Congress had decided that the Fourteenth Amendment was unnecessary? Or if effective civilian governments had been established in the defeated South, making military occupation unnecessary after the War?

---

<sup>57</sup> The Civil War draft, Amar believes, was justified by exigency; and the fact that the conscripts had been released from the Army after the Civil War — so that the occupying army in the South was nearly an all-volunteer army — did not alter the lesson to be drawn from the role the army played (p. 91).

<sup>58</sup> See, e.g., MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE* 91 (1986) (noting that for many Republicans in Congress, “the amendment was simply declaratory of existing constitutional law, properly understood”); Howard Jay Graham, *Our “Declaratory” Fourteenth Amendment*, 7 *STAN. L. REV.* 3 (1954).

---

---

If Amar's account of the Framers' understanding about the original Constitution is correct — and it seems persuasive — then there is an interesting story to be told about the unwritten Constitution: federal power was expanded in a dramatic way without a formal amendment. But the imperative for Amar seems to be, again, to put the document and the events surrounding it at center stage, no matter how much ingenuity that takes, and even if doing so risks obscuring much more important parts of the drama.

3. *The Nineteenth Amendment and the Violence Against Women Act.* — The federal Violence Against Women Act provided a civil remedy to women who were victims of gender-motivated violence. In *United States v. Morrison*,<sup>59</sup> the Supreme Court held this provision unconstitutional on the ground that it exceeded Congress's powers under both the Commerce Clause and Section 5 of the Fourteenth Amendment, which gives Congress the power to enforce the other provisions of that Amendment. Amar says that the lawyers defending the statute did not make the best argument (p. 285). They should instead have invoked the Nineteenth Amendment and "the unwritten principle of popular sovereignty" (p. 285).

Specifically, they should have urged, "as a basic precept of America's unwritten Constitution," the rule that "[w]hen the written Constitution can fairly be read in different ways, congressional laws that are enacted after the Nineteenth Amendment and are designed to protect women's rights merit a special measure of respect because of their special democratic pedigree" (pp. 281–82). The premise of this argument is that the Nineteenth Amendment amounted to an admission that women should never have been disenfranchised. The parts of the Constitution that were adopted without the participation of women should, therefore, be interpreted in a way that gives greater weight to their interests.

This is, again, an ingenious argument, but again it is quite vulnerable. The Nineteenth Amendment provides that "[t]he 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" and that "Congress shall have power to enforce this article by appropriate legislation."<sup>60</sup> It does not, by its terms, expand Congress's power in any other way. Amar does not show that the Nineteenth Amendment reflected a judgment that women should never have been disenfranchised — as opposed to a judgment that times had changed so that it had become appropriate to enfranchise women, even though it had not been before. Nor does he show that the Amendment was understood to expand

---

<sup>59</sup> 529 U.S. 598 (2000).

<sup>60</sup> U.S. CONST. amend. XIX.

---

---

congressional power generally to protect women, or that it would have been ratified if it had been understood in the way he proposes.

The constitutional protection of women actually presents an excellent example of unwritten constitutionalism: the text of the Constitution is invoked, but the substance of the law comes from unwritten sources. The Equal Protection Clause, which the Supreme Court has used to invalidate discrimination against women,<sup>61</sup> was not understood as a general prohibition against sex discrimination when it was adopted — no one, I believe, seriously questions that proposition. The Equal Rights Amendment, which would have forbidden discrimination on the basis of sex, was proposed to the states by Congress but was not ratified by three-quarters of the states and so did not become part of the Constitution (pp. 295–96). Against that background, the Supreme Court developed a set of principles protecting women against discrimination — effectively acting as if the Equal Rights Amendment had been adopted, not rejected. This was, quite plainly, a nontextual development.

If you have to find some bit of text to support this development, I suppose the Nineteenth Amendment is your best bet, even though it refers only to voting, and even though it was adopted a half century before the general antidiscrimination principles developed. You would have to be willing to overlook the most striking parts of the story — notably, the Supreme Court’s effective “ratification” of an Amendment that was rejected in the Article V process. And you would be making — as Amar does — pretty extravagant claims about what the Nineteenth Amendment accomplished. It does not seem useful to strain so much to identify this very questionable textual basis, when the unwritten Constitution has taken care of the problem pretty well.

4. *Juries and the Fifteenth Amendment.* — In a series of decisions beginning with *Strauder v. West Virginia*,<sup>62</sup> the Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment forbids racial discrimination in jury selection.<sup>63</sup> Amar believes the Court should have relied on the Fifteenth Amendment, which forbids racial discrimination in voting (p. 441). His reasoning is that jury service, like voting, was regarded as a political right when the Fourteenth Amendment was adopted and the understanding at that time was that political rights, unlike civil rights, were not protected by the Fourteenth Amendment (p. 287).

What’s notable here is that *Strauder* itself — which relied on the Fourteenth, not the Fifteenth, Amendment — was decided just twelve

---

<sup>61</sup> See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996).

<sup>62</sup> 100 U.S. 303 (1880).

<sup>63</sup> See, e.g., *Norris v. Alabama*, 294 U.S. 587, 589 (1935) (citing *Carter v. Texas*, 177 U.S. 442, 447 (1900)); *Strauder*, 100 U.S. at 309.



years after the Fourteenth Amendment was adopted, and ten years after the Fifteenth.<sup>64</sup> If Amar is characterizing the original understandings correctly, the lesson seems to be that lawyers and judges who were intimately familiar with those understandings just did not care very much about which clause they relied on. Since *Strauder*, as far as I know, the Supreme Court has never relied on the Fifteenth Amendment in its cases involving race discrimination in jury selection, nor on the Nineteenth Amendment in cases involving measures that kept women from serving on juries. Perhaps what Amar's account of jury discrimination suggests is not that this well-established body of law has been built from the beginning on the "wrong clause" (pp. 193, 288), but that American constitutional law is not very attentive to the text and is primarily responsive to nontextual forces.

5. *The Privileges or Immunities Clause and the Incorporation of the Bill of Rights.* — The Supreme Court routinely says, and has for some time, that the Due Process Clause of the Fourteenth Amendment is the textual provision that "incorporates" the Bill of Rights — that is, that applies the Bill of Rights (with some exceptions) to the states. Amar believes that the Privileges or Immunities Clause, not the Due Process Clause, is the appropriate vehicle (pp. 156–61). The Privileges or Immunities Clause protects only "citizens," unlike the Due Process Clause, which applies to "persons." In that respect, using the Privileges or Immunities Clause as the basis for incorporation might allow states to infringe aliens' rights in ways that would be unacceptable today. Assuming, though, that there are ways to avoid that conclusion, Amar's view is attractive. As a verbal matter, the idea that the Due Process Clause protects substantive rights is notoriously troubling. By contrast, it seems natural to say that the rights guaranteed by the Bill of Rights are "privileges or immunities of citizens of the United States."<sup>65</sup> Amar's position also has better support in the drafting history, and it was the position of Justice Hugo Black, the great champion of applying the Bill of Rights to the states.<sup>66</sup>

But the idea that the Privileges or Immunities Clause is the basis of incorporation simply has not taken root. In fact, when that position

---

<sup>64</sup> Although *Strauder* is unclear about whether the defendant's or the jurors' rights were at stake, passages in the opinion do say fairly clearly that the Court thought discrimination against African American potential jurors violated the Equal Protection Clause. *See, e.g.*, 100 U.S. at 308 ("The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color . . . is practically a brand upon them, affixed by the law, an assertion of their inferiority . . ."). Later decisions unequivocally held that racial discrimination against potential jurors violates the Fourteenth Amendment. *See, e.g.*, *Powers v. Ohio*, 499 U.S. 400, 406–09 (1991); *Carter v. Jury Comm'n*, 396 U.S. 320, 329–30 (1970).

<sup>65</sup> U.S. CONST. amend. XIV, § 1.

<sup>66</sup> *See Duncan v. Louisiana*, 391 U.S. 145, 166 (1968) (Black, J., concurring).

was recently urged in the Supreme Court, as part of the case for applying the Second Amendment to the states, it was explicitly rejected by eight of the Justices, including all but one of those who favored the incorporation of the Second Amendment.<sup>67</sup> In oral argument, Justice Antonin Scalia, the Court's leading self-proclaimed devotee of the text and the original understandings, ridiculed the advocate who made the argument.<sup>68</sup>

For Amar, this should be, I believe, both a datum and a problem. It is a datum because it reveals something about our constitutional system that Amar resists so strongly: sometimes the words of the text just do not count for so much. It is a problem because it is hard to say that a position that has been consistently and explicitly rejected by the courts is still the law. It is not impossible to defend such a position, but if the principal defense rests on the text and the original understandings, we need some account of why those are the overriding criteria. It is not clear that Amar gives us such an account.

6. *Reapportionment and the Guarantee Clause.* — A series of Warren Court decisions, generally associated with the phrase “one person, one vote,” declared that state legislative districts of all kinds must be apportioned according to population and, in addition, declared unconstitutional many restrictions on voting in state elections. These reapportionment decisions relied on the Equal Protection Clause. Amar says that the Equal Protection Clause has nothing to do with voting — a position, urged by the dissents in the Warren Court cases, that again has strong textual and historical support (pp. 185–87).

Amar believes that the Court should instead have relied on the clause requiring “[t]he United States” to “guarantee to every State in this Union a Republican Form of Government.”<sup>69</sup> He recognizes that the Guarantee Clause, when adopted, did not authorize the federal government to reconstitute state governments and certainly did not enshrine the principle of “one person, one vote.” But Amar argues that the process leading to the ratification of the Fourteenth Amendment “created a plausible enactment-based precedent for reading the republican-government clause extremely broadly to allow the national government to hold each state to the highest standard of democracy operating anywhere in America” (p. 190). The basis of this argument is that the Reconstruction Act, which made ratification of the Fourteenth Amendment a precondition of the Confederate states’ readmission to

<sup>67</sup> Compare *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3021, 3030–31 (2010) (plurality opinion), *id.* at 3089 (Stevens, J., dissenting), and *id.* at 3132 (Breyer, J., dissenting), with *id.* at 3059 (Thomas, J., concurring in part and concurring in the judgment).

<sup>68</sup> Transcript of Oral Argument at 6–7, *McDonald*, 130 S. Ct. 3020 (No. 08-1521).

<sup>69</sup> U.S. CONST. art. IV, § 4.

the Union, constituted a substantial federal intervention into the organization of state governments (p. 88).

The Warren Court's reapportionment decisions are, in many ways, an amazing chapter in American constitutional history. Those decisions defied both the text of the provision on which the Court relied and the original understandings. They had to overcome the powerful analogy of the United States Senate. They required that the basic governing institutions of every state be reconstituted. They were enormously controversial when they were decided. Yet within a few years they were generally accepted, and they seem inviolable today. The Warren Court identified something in American political culture — perhaps the long evolutionary expansion of the franchise toward an ideal of equality — that trumped many of the conventional sources of constitutional law.

One could certainly argue that the Guarantee Clause is a better textual home for “one person, one vote” than the Equal Protection Clause is. The original understanding of neither provision supports what the Warren Court did, but at least as a textual matter, the Guarantee Clause works a little better. But it is not plausible to say — as Amar's argument seems to say — that because Congress reconstructed the governments of states that had rebelled against the Union, therefore the Warren Court could impose on every state its views about “the highest standard of democracy.” The Court is not like Congress and, to state the obvious, malapportioned legislatures are not comparable to secession and rebellion.

One might justify certain Warren Court decisions by saying that the Court was engaged in a process that echoed Reconstruction — although the reapportionment decisions would be hard to justify in that way, because they swept much more broadly. And that would, in any event, be an argument based on an appeal to a kind of precedent, a truly unwritten aspect of constitutional law. Amar, characteristically, wants to base his arguments on the document; so his claim is that all of this has to do with the process by which the Fourteenth Amendment was ratified — and that that process amended (or at least “glossed” (p. 88)) the Guarantee Clause. This seems remote both from what was really going on in the “one person, one vote” cases and from the best justification of those cases.

7. *The Right to Vote and Section 2 of the Fourteenth Amendment.* — Amar also says that Section 2 of the Fourteenth Amendment supports some of the decisions the Warren Court made about voting rights (pp. 187–89). Section 2 provides that when a state denies the right to vote in federal or state executive, judicial, or legislative elections to any male citizens who are twenty-one or older, the state's rep-

resentation in the House of Representatives “shall be reduced” proportionately.<sup>70</sup> This provision has never been enforced.

Amar’s argument is that since it has never been enforced, no state may limit the right to vote: “Section 2 says that there shall be no disfranchisement without apportionment penalty. If no apportionment penalty is actually assessed, then there can be no disfranchisement imposed upon the group of presumptive voters textually specified by section 2” (p. 189). He adds that because of the Nineteenth Amendment, enfranchising women, and the Twenty-Sixth Amendment, enfranchising eighteen-year-olds, the class of “presumptive voters” includes those groups, not just twenty-one-year-old males (p. 189). Amar recognizes that the courts would be ill-equipped to enforce Section 2 according to its terms; if Congress fails to enforce it, he says, the courts must do something they are equipped to do, which is to disallow any restriction on the franchise (pp. 188–89).

This argument — which is again entirely novel — seems to present several difficulties. It is not clear which decisions it is supposed to justify.<sup>71</sup> It is also a very questionable way to read Section 2. Section 2 authorizes one institution, Congress, to impose a certain sanction — reducing a state’s representation. Amar wants to read Section 2 to authorize a different institution, the Court, to impose a different sanction — enfranchisement — that the Fourteenth Amendment very clearly did not contemplate. Indeed the point of Section 2 was precisely to give states an option not to enfranchise citizens, if they were willing to pay the price.

\* \* \*

Most of these arguments are quite unconventional. Except for the argument about the Privileges or Immunities Clause and the Bill of

<sup>70</sup> U.S. CONST. amend. XIV, § 2.

<sup>71</sup> Professor Amar offers it mainly to justify the decisions in *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), and *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969) (pp. 184–85). *Kramer* was about the right to vote in an election for a local school board, 395 U.S. at 622, which is not in the category of elections mentioned in Section 2. That was the striking thing about the decision in *Kramer*: while no one would say that a local school board has to be elected, the Court nonetheless held that if it is elected, the electorate cannot be restricted. So Section 2 cannot justify *Kramer*. *Harper* held that a state could not require people to pay a poll tax as a condition of voting in a state election. 383 U.S. at 666. The poll tax did prevent some people from voting for the offices identified in Section 2, so Amar’s argument, if it were otherwise sound, might support *Harper*. But even that is not clear. If one is confining oneself to the text — and not resorting to unwritten principles — *Harper* faced the problem that the Twenty-Fourth Amendment, which forbids poll taxes in federal elections, had recently been adopted. The failure to extend the Twenty-Fourth Amendment to state elections would, under ordinary principles of interpretation, provide a good (although not foolproof) argument against *Harper* — and against interpreting an earlier enactment, Section 2 of the Fourteenth Amendment, to bring about the extension that the Twenty-Fourth Amendment did not.

Rights, I do not think any of them appear in Supreme Court opinions, and I suspect that few of them were advanced by advocates. At the same time, though, these arguments do not call for dramatically different results. Amar thinks that *Morrison* was wrongly decided, and would handle the incorporation of the Bill of Rights a little differently from existing law. But in all the other instances, Amar has provided a different justification, usually a highly novel one, for well-established principles.

What these justifications have in common is that Amar's new rationales would bring existing law closer to the written Constitution. The pattern, as Amar says in connection with Warren Court decisions on voting and jury service, is that the Court "reached the right result. It simply used the wrong clause" (pp. 287–88). The mission of *America's Unwritten Constitution*, again, seems to be to secure the preeminence of the written Constitution: to show that apparently unwritten aspects of the American constitutional system can, with enough ingenuity, be found right there, in the Constitution.

There are important discussions in the book in which Amar does show an unwritten Constitution in action. This is true, in particular, in his chapter on the "Institutional Constitution," which traces the evolution of Presidential power and certain powers of Congress over its own affairs (pp. 333–87). In this area, he says, "institutional practice routinely goes beyond the written Constitution" (p. 335). The text is "underspecified," and the institutional arrangements can be understood "only if [the] text is viewed through the prism of practice" (p. 335). "[L]ongstanding usage" can support a practice — the recess appointment of Article III judges is the particular example — even though "text [and] structure" do not (p. 345).

These passages in the chapter on the "Institutional Constitution" are outliers, though. In most of the rest of the book, the theme is that what might appear to be an unwritten constitutional practice — one with a tenuous connection to the text — actually has a secure basis in the text itself, as long as you pick the right clause and read the text the right way. To be fair, Amar's erudition is so great, and the book is so consciously unsystematic, that many different kinds of arguments come into play. There are episodes from history, insights drawn from close readings, surprising but convincing accounts of how earlier generations thought about the issues of their day. But in the end, it is the written Constitution that emerges triumphant.

### *B. Conclusion: The Dangers of Documentarianism*

Amar's approach is admirable in several ways, but one stands out. Too often, people choose an approach to constitutional interpretation, consciously or unconsciously, because that approach will give them the results they want. That is not what is happening in this book. One of

the striking things about *America's Unwritten Constitution* is the juxtaposition of highly creative arguments with relatively conventional conclusions. The fact that this combination seems unusual is a compliment to Professor Amar and, maybe, an adverse reflection on others. Amar's commitment is to the method; he is determined to show the viability, and the correctness, of a certain approach to the Constitution. Some results will change, but that is not his agenda.

But the method — which places the document front and center — gives rise to two questions: one about foundations, and the other about consequences.

The question about foundations is: what is the justification for this approach? Why is it important, or useful, to connect legal principles to the document in the way Amar does? The answers that people usually give for asserting the primacy of the document do not seem to apply to Amar's distinctive method.<sup>72</sup> One might say, for example, that the document is equivalent to an authoritative command from a sovereign. The People made certain decisions and encoded them in the document, and we have an obligation to adhere to those decisions until the document is amended.

But that does not seem to be Amar's premise, and in any event it cannot be. His account is full of "unintended entailments" (p. 286) — instances in which constitutional provisions have implications that the people who adopted them did not contemplate. Amar routinely, and with great ingenuity, finds meanings in constitutional text that were not what people at the time would have understood. In fact, the list of "wrong clause[s]" for the right results shows that even subsequent advocates and judges — who had every incentive to find the provision, and the interpretation, that would best support their cause — were, according to Amar, not able to do so.

If the reason for following the Constitution is not that the document is the People's authoritative command, then what is the reason? The key to understanding the approach of this book, I believe, is in a phrase Amar uses when he is entertaining the idea that the original Constitution — in the Bill of Attainder and Titles of Nobility Clauses — might have outlawed racial segregation. Obviously the people who adopted these provisions did not think they were making a decision to do that. But, Amar suggests, the Clauses might support that conclusion if they were given an "idealistic reading" (p. 144).

Idealistic reading is, I think, what Amar does throughout. He approaches the written Constitution with certain ideals in mind, and he

---

<sup>72</sup> See Adrian Vermeule & Ernest A. Young, Commentary, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730, 744–48 (2000) (making this criticism of Amar, *Intratextualism*, *supra* note 2).

shows how the document vindicates those ideals. If you believe in free speech, or racial or gender equality — and there are plenty of reasons to believe in those things! — you can find support in the text (if you read it in a certain way), in the ratification proceedings, and in the structure. That is what this book demonstrates, about many issues. There is nothing necessarily wrong with this form of argument. It is common in political debates, for example, to try to show that one's position has deep roots in the nation's history and traditions. Martin Luther King Jr.'s "I Have a Dream" speech, one of the "icon[s]" in "America's Symbolic Constitution" (p. 269), is a paradigm of this kind of argument: out of a history that was, needless to say, far from uniformly favorable to his cause, King identified principles that supported the moral claims he was making. Amar, similarly, mobilizes the document in support of important ideals.

But as a legal argument, this approach is incomplete, and perhaps even dangerous. It is incomplete in ways I mentioned earlier. It is not fully adequate as a description, because the law is not determined just by the document. Amar's account, while variegated, tends to emphasize decisive, turning-point moments: generally, the events surrounding the adoption of the Constitution and key amendments like the Fourteenth and the Nineteenth. But while there are key moments, much of American constitutional history is a three-steps-forward, two-steps-backward slog. That is certainly the story of race and sex equality and of free speech, for example.

Also, just as a descriptive matter, it is a problem for Amar's approach that advocates and judges so often use the wrong clause. Amar suggests that they do this because they are in the grip of established precedent, which has invoked the wrong clause. That precedent, he says, ought to yield to the Constitution, which is supreme. But the reason to discuss an unwritten Constitution at all is to determine how much of constitutional law is properly attributable to the text. Is the text more like the Queen, or more like an instruction manual? If, in the actual practice of law, the precise wording of the text is not so important, then that is a significant fact. At some point, if judges and advocates are consistently treating the Fourteenth Amendment, rather than the Fifteenth, as the basis for the right to serve on a jury, or treating the Due Process Clause as the basis for applying the Bill of Rights to the states, then those are not the wrong clauses.

Perhaps more important, the approach exemplified in *America's Unwritten Constitution* is not fully adequate as a justification. That is because the idealistic reading is not the only reading. If it were the only reading, then it wouldn't take Amar's extraordinary skill to uncover it. And, again, if Amar's readings were the only plausible readings, all those advocates and judges would not keep using the wrong clause, even when they reach the right result.

You can't read a text idealistically unless you have certain ideals, and, necessarily — because other readings of the text and history are possible — the ideals do not come from the document alone. The ideals themselves have to be justified. Many of the ideals with which Amar approaches the document — racial and sex equality, a commitment to democracy and free expression — are widely shared today and, at least at a high level of generality, no longer need to be justified. But other people will have different ideals and will read the Constitution in light of their ideals.

*America's Unwritten Constitution* has a chapter on “America's Feminist Constitution” (ch. 7) and on the Warren Court Constitution (ch. 4), but it does not have chapters on the Economic Freedom Constitution, or the Anti-Tax Constitution, or the States' Rights Constitution, or the Nativist Constitution. My book wouldn't either, but someone else's book would. They would read the Constitution, its history, and its ratification processes in light of their ideals. And they would find support for their ideals. Amar, I'm sure, would say that he has the better case. But, as I have argued, the text, history, and structure — taken in isolation — do not even provide unequivocal support for such fixtures of our constitutional order as *McCulloch*, *Brown*, and the familiar principles of free speech.

There are, I think, two dangers associated with an approach that puts the document front and center. The first is that it obscures the fact that a dispute about the meaning of the document and its history will often be a dispute about ideals. Disputes about ideals are fine, but they should be done openly. The ideals should be defended as the speaker's own, for which the speaker is seeking support in history. If you have a view about, for example, the limits of the federal government's power to regulate the economy, it's not necessarily a bad thing that your view influences how you understand the Constitution. But avow the view, defend it on the merits, and explain how far you think you can go in importing that view into constitutional law. Don't just attribute that view to the Framers on the basis of various passages in the document and the history — which you will undoubtedly be able to find — that support your antecedent commitments.

The second danger is that making the document the focal point of disputes raises the stakes. It is a familiar observation that American culture, a strand of it anyway, treats the Constitution as a kind of sacred document. Debates in which people enlist the sacred document on their side can take an unhealthy turn. Too many questions become too easy: after all, the answers are *right there*, in the document. Existing practices and institutions can be rejected without considering whether they reflect accumulated trial-and-error wisdom. One's opponent becomes a blasphemer or a heretic. It would be a final irony, and a shame, if this learned and humane book, which shows none of those vices, contributed to a climate in which they prevailed.