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## *America's Constitution* and the Yale School of Constitutional Interpretation

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

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

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

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1. AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* (2005).

2. Readers seeking such a digest might profitably consult any number of reviews and summaries already in print. See, e.g., Keith E. Whittington, *Clothed with the Legitimate Authority of the People*, 91 VA. L. REV. 2023 (2005) (book review); Gordon S. Wood, *How Democratic Is the Constitution*, N.Y. REV. BOOKS, Feb. 23, 2006, at 25. They might also scan my own postscript, in which I try to distill some of my book's most distinctive claims. See AMAR, *supra* note 1, at 465-77.

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

### I. BICKEL'S LEAST DANGEROUS BRANCH

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

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

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3. The words "books" and "core curriculum" are significant. I shall not discuss in any detail the countless important and interesting constitutional law articles authored by Yale professors. Nor shall I analyze many other interesting Yale books that are not yet part of the established or emerging constitutional law canon for the academy, the profession, or the bench.
  4. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).
  5. 1-2 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953).
  6. Julius Goebel, Jr., *Ex Parte Clio*, 54 COLUM. L. REV. 450 (1954) (book review); Ernest J. Brown, Book Review, 67 HARV. L. REV. 1439 (1954); Henry M. Hart, Jr., *Professor Crosskey and Judicial Review*, 67 HARV. L. REV. 1456 (book review). For an incisive account of these reviews, see PHILLIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 17-21 (1982).
  7. CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT* (1960).

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

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

As for the issues at the heart of Bickel's book—issues directly concerning the judicial branch—here, too, my account differs markedly from Bickel's. For example, I try to cast light on the history and structure of the process of judicial nomination and confirmation. Bickel's book says almost nothing about this process<sup>8</sup>—an odd omission for a work that seeks to analyze the Supreme Court in a broad political context. Odd, too, was Bickel's equation of the Supreme Court with the entire federal judiciary, an equation evident not only in the book's full title—*The Least Dangerous Branch: The Supreme Court at the Bar of Politics*—but also in its opening sentence: “The least dangerous *branch* of the American government is the most extraordinarily powerful *court* of law the world has ever known.”<sup>9</sup> In my book, by contrast, I note both similarities and differences between the Supreme Court and other federal tribunals. For

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8. For passing references, see, for example, BICKEL, *supra* note 4, at 31-32, 90. See also ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 3-4 (1978).

9. BICKEL, *supra* note 4, at 1 (emphasis added).

example, while the Supreme Court's size has shifted only marginally in two hundred years—from six to nine Justices,<sup>10</sup> the size of the federal judiciary as a whole has skyrocketed. Today, there are roughly fifty times as many Article III judges as at the Founding.<sup>11</sup> Or to put the point another way, in the 1790s there were roughly seven House members for every lower federal court judge, whereas today there are two federal judges for every House member. My Yale Law students are far more likely to clerk for federal judges than to intern for members of Congress. With these basic facts in mind, we can begin to see some interesting aspects of the rise of the Framers' third branch over the centuries.

Another question raised by the distinction between the Supreme Court and the third branch: Why did Article III allow lower federal courts to try various cases that were off limits to the Supreme Court when sitting in original jurisdiction? This, of course, was the technical issue underlying *Marbury v. Madison*.<sup>12</sup> Bickel opened his book with an extended analysis of *Marbury*, but he said virtually nothing about various jurisdictional and procedural issues at the heart of the case. Instead, Bickel focused on the great question of judicial review.<sup>13</sup> While I, too, have much to say about judicial review, I also analyze the technical issue of original jurisdiction. That issue, I argue, gives us a window onto grand historical and structural themes at work at the Founding—in particular, how certain geographic considerations drove many of the do's and don'ts that became part of the Constitution of 1787-1788. For example, the original jurisdiction rules of Article III were, I argue, largely motivated by venue considerations and the felt need to safeguard local juries, who played a much larger role in the Founders' world than do juries today. Because the Supreme Court would sit in the nation's capital while other federal courts would hold trials in the hinterlands, any expansion of the Court's original jurisdiction would threaten to cut local juries out of the loop and would compromise other important venue values.<sup>14</sup>

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

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10. This is after briefly peaking at ten in the mid-nineteenth century.

11. See AMAR, *supra* note 1, at 216-17.

12. 5 U.S. (1 Cranch) 137 (1803).

13. See BICKEL, *supra* note 4, at 1-14.

14. See AMAR, *supra* note 1, at 231-33.

constitutional law, no single book (or author) can do everything, and methodological choices must be made. For better or worse, my own methodology places me much closer to Bickel's towering Yale colleague, Charles Black, and to his most famous Yale students—John Hart Ely and Bruce Ackerman—than to Bickel himself.

## II. CHARLES BLACK'S STRUCTURE AND RELATIONSHIP

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

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

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

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15. CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

16. 17 U.S. (4 Wheat.) 316 (1819).

17. BLACK, *supra* note 15, at 13-14.

18. *Id.* at 14.

to regulate commerce; to declare and conduct a war; and to raise and support armies and navies.”<sup>19</sup>

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

Now let’s take this structural insight and use it to parse a clause that has generated some noteworthy case law of late, namely the clause empowering Congress “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>20</sup> Here is how I begin my discussion of this clause in my book:

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

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

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

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19. AMAR, *supra* note 1, at 110 (quoting *McCulloch*, 17 U.S. at 408, 407).

20. U.S. CONST. art. I, § 8, cl. 3.

21. AMAR, *supra* note 1, at 107 (citing entries from the *Oxford English Dictionary*).

but the word “affairs” dropped out when the delegates opted to fold the Indian clause into the general interstate and international “Commerce” provision. Without a broad reading of “Commerce” in this clause, it is not entirely clear whence the federal government would derive its needed power to deal with noneconomic international incidents—or for that matter to address the entire range of vexing nonmercantile interactions and altercations that might arise among states.<sup>22</sup>

I conclude my discussion with the following thoughts:

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

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

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

*Id.* at 542 n.18.

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

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

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

Whatever object of government is confined, in its operation and effects, within the bounds of a particular state, should be considered as belonging to the

While the above passages obviously feature a smattering of textual and historical arguments, the animating impulse is structural, à la Black (and, dare I say it, Marshall). The Constitution was structured in order to create a central regime that could competently handle all affairs—whether or not economic—with Indians and foreign nations. A closely related Founding purpose was to create a central governmental structure that would handle all genuine conflicts and controversies—all intercourse and affairs—that might arise between rival states, lest the aggrieved parties be tempted to take matters into their own hands and thereby imperil continental peace and prosperity. While some clausebound textualists-originalists<sup>24</sup> have mustered various snippets of history to support a purely economic reading of “commerce” in Article I, Section 8, their approach fails to give due weight to the fact that the Constitution was not ratified by the American people clause by clause, but as a whole. Each of the document’s clauses must be read not in isolation, but through the prism of the Constitution’s overarching structures and purposes. That is how Americans in fact ratified the so-called Commerce Clause, and that is how sensitive and sensible interpreters today should read it.<sup>25</sup>

Similar structural analysis can help illuminate the basic contours of Articles II and III. The President’s power to act unilaterally in a grave national emergency so as to preserve the nation as an ongoing operation can be read into the opening clause of Article II, vesting the President with a residuum of “executive power” above and beyond the specific presidential powers enumerated elsewhere in Article II.<sup>26</sup> A textualist might further note that

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government of that state; whatever object of government extends, in its operation or effects, beyond the bounds of a particular state, should be considered as belonging to the government of the United States.

2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 424 (Jonathan Elliot ed., 1836).

24. See, e.g., Raoul Berger, *Judicial Manipulation of the Commerce Clause*, 74 TEX. L. REV. 695 (1996); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987); Grant S. Nelson & Robert J. Pushaw, *Rethinking the Commerce Clause: Applying First Principles To Uphold Federal Commercial Regulation but Preserve State Control over Social Issues*, 85 IOWA L. REV. 1 (1999). In the case law, see *United States v. Lopez*, 514 U.S. 549, 584-602 (1994) (Thomas, J., concurring).
25. It also bears note that none of the leading clausebound advocates of a narrow economic reading of “commerce” has come to grips with the basic inadequacy of their reading as applied to Indian tribes, or has squarely confronted the originalist implications of the Indian Intercourse Act of 1790, in which the First Congress plainly regulated noneconomic intercourse with Indian tribes. See Act of July 22, 1790, ch. 33, 1 Stat. 137 (entitled “An Act To Regulate Trade and Intercourse with the Indian Tribes” (emphasis added)).
26. In certain situations, unilateral presidential action may need to be confirmed by a subsequent congressional statute in order to continue to be lawful after the legislature has

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

A lower-stakes example of sensible structural analysis: The text of the Advice and Consent Clause makes no distinctions between presidential nominations to cabinet positions on the one hand and Supreme Court openings on the other. But, structurally, it makes a huge difference whether the Senate is being asked to approve an executive branch subordinate who will take orders from the President and will leave office when the President leaves, or is instead being asked to confirm a judicial officer who is independent of the President and who may linger in judicial office long after the nominator has left the White House. Ever since the Founding, the Senate has understood this obvious structural distinction and has treated the two types of nominations differently, with much more deference to a President's cabinet picks than to his judicial nominations. Charles Black himself called attention to this distinction long ago, and I reiterate it in my book, with detailed data of actual Senate practice from the late eighteenth and early nineteenth centuries.<sup>27</sup>

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been duly convened and has had time to consider the matter. For a discussion of Lincoln's understanding of and conformance to this principle at the outset of the Civil War, see AMAR, *supra* note 1, at 132-33 & 546 nn.4-6.

27. Compare Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657, 659-60 (1970), with AMAR, *supra* note 1, at 194 & 565 n.42. Consider another set of issues implicating the Presidency, the Judiciary, and the Senate—namely, impeachment. Once again, structural analysis is helpful:

In making Congress the pivot point, the Constitution structured impeachment as a system of national accountability. Because the president would uniquely represent the American people as a whole, the decision to oust him could come only from representatives of the entire continent. Though the Constitution did

Consider, finally, the issue of judicial review. Let's imagine that we deal with a constitutional principle that applies against both state and federal governments—say, the Article I rule that neither government may enact a bill of attainder. Black argued that whatever deference federal judges in a close case might properly pay to Congress as a coordinate branch elected by the entire national citizenry, no similar deference was due to a single state legislature.<sup>28</sup> I offer a similar analysis, relying, once again, primarily on structural argumentation of a Blackian sort. I begin by noting that:

Although the Constitution shielded individual judges against politically motivated salary cuts or attempted removals, it left the Court as a whole open to political restructuring. For example, the political branches could detour around an obstinate Court majority by expanding the size of the Court and appointing new justices more likely to defer.<sup>29</sup>

I then make a key structural contrast:

Unlike Congress and the president, state governments would have no formal say in determining the Court's general contours or in making the specific decisions about whom to put on it or pull off it. A state whose laws were declared unconstitutional could detour around the existing justices only by convincing the other federal branches that its

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not expressly say so, its basic structure afforded a sitting president temporary immunity from ordinary criminal prosecution during his term of office. All other impeachable officers, including vice presidents, cabinet secretaries, and judges, might be tried, convicted, and imprisoned by ordinary courts while still in office. But as Hamilton/Publius passingly implied in *The Federalist* Nos. 69 and 77 and Ellsworth and Adams reiterated in the First Congress, America's president could be arrested and prosecuted only after he left office. Unlike other more fungible or episodic national officers, the president was personally vested with the powers of an entire branch and was expected to preside continuously. Faithful discharge of his national duties might render him extremely unpopular in a particular state or region, making it essential to insulate him from trumped-up local charges aiming to incapacitate him and thereby undo a national election. (Imagine, for example, some clever South Carolina prosecutor seeking to indict Lincoln in the spring of 1861 and demanding that he stand trial in Charleston.) Thus, only the House, a truly national grand jury, could indict, and only the Senate, a national petit jury, could convict, a sitting president. Of course, the people of the nation could also remove a sitting president at regular quadrennial intervals. Once out of office, an ex-president might be criminally tried just like any other citizen.

AMAR, *supra* note 1, at 201-02 (footnotes omitted). Here, too, I follow in Black's footsteps. See CHARLES L. BLACK, JR., *IMPEACHMENT: A HANDBOOK* 40-41 (1974).

28. BLACK, *supra* note 15, at 72-78.

29. AMAR, *supra* note 1, at 212.

grievance had merit. The Constitution's structure thus emboldened the Court to vindicate national values against obstreperous states even as it cautioned the justices to avoid undue provocation of Congress.

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

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

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

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30. AMAR, *supra* note 1, at 213-14. For Black's meditations on Congress's powers over the Court, see BLACK, *supra* note 5.

continue to live on as a vital part of the twenty-first-century Yale School of Constitutional Interpretation.

### III. JOHN HART ELY'S *DEMOCRACY AND DISTRUST*

"You don't need many heroes if you choose carefully." So wrote John Hart Ely as he memorably dedicated his great book, *Democracy and Distrust*, to his hero Earl Warren.<sup>31</sup> Ely himself was one of my heroes and his book has been an inspiration.<sup>32</sup>

Perhaps more than any other scholar of his era, Ely reminded us that political liberals no less than political conservatives may properly lay claim to be the rightful heirs of the Constitution; liberals, no less than conservatives, Ely urged, could and should aspire to be faithful interpreters of the document's text, history, and structure.<sup>33</sup>

Like Professor Black before him, Professor Ely championed a particularly holistic brand of constitutional interpretation. Certain open-textured constitutional clauses, Ely famously argued, required interpreters to attend to the larger themes implicit in the Constitution as a whole. But Ely also urged interpreters to pay great heed to the document's specific words and to the original intent underlying those words—always remembering, as Ely took pains to stress (in his own italics) that "*the most important datum bearing on what was intended is the constitutional language itself.*"<sup>34</sup> Throughout my own work, I have tried to pursue a brand of interpretation closely akin to Ely's.

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

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31. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW*, at dedication (1980).

32. By the time that *Democracy and Distrust* was published, Ely had joined the Harvard Law School faculty, but the book was the product of many years of reflection, much of which occurred at the Yale Law School, where Ely studied and began his professorial career.

33. As Ely noted in his opening paragraphs, "It would be a mistake to suppose that there is any necessary correlation between an interpretivist approach to constitutional adjudication and political conservatism." ELY, *supra* note 31, at 1. Ely went on to draw attention to the mighty contributions of Hugo Black, a liberal lion and a confessed textualist-originalist. *Id.* at 2-3.

34. *Id.* at 16.

Ely pointed out, the Founders were the world's leading liberal democratic reformers: "The very process of adopting the Constitution was designed to be, and in some respects it was, more democratic than any that had preceded it."<sup>35</sup> It turns out that Ely was even more right than he knew when he penned this profound and profoundly important sentence—as I try to show with detailed data in the opening pages of my own book documenting how at least eight states used specially inclusive voting rules during the unprecedented ratification-convention elections held in 1787-1788.<sup>36</sup>

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

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

And as Ely observed later in his book:

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

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35. *Id.* at 5.

36. AMAR, *supra* note 1, at 5-7 & 503-05 nn.1-2. To my knowledge, no previous scholar has ever brought these important data to light.

37. ELY, *supra* note 31, at 6-7.

38. *Id.* at 99.

Much as Black highlighted his own distinctive brand of constitutional argument, so too did Ely. Call Ely's approach the argument from constitutional trendline. In Ely's words: "In judging the propriety of . . . a line of growth it is surely appropriate, indeed I should think it imperative, to look to the ways our constitutional document has developed over the . . . centuries . . ." <sup>39</sup>

As I point out in the concluding pages of my book, the textual configuration of the Constitution's amendments—in chronological order—draws attention to the document's general trendline.<sup>40</sup> To be sure, trendline analysts must be wary of overgeneralization; history rarely travels in only one direction, and Ely himself reminded us of two amendments—Prohibition and its repeal—that in effect cancelled each other out. Indeed, after providing readers with a "brisk" tour of the entire Constitution (in rough textual order, from the Preamble to the twentieth-century amendments), Ely took care to caution that "our Constitution is too complex a document to lie still for *any* pat characterization."<sup>41</sup> In my own rather less brisk tour of the Constitution, I have tried to remember Ely's warning, even as I have tried, in true Elysian fashion, to identify various larger constitutional themes and trends.

#### IV. HAROLD KOH'S NATIONAL SECURITY CONSTITUTION

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

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

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. . . America's geographical separation from the rest of the world, which played a crucial role in fostering its liberal political tradition,

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39. *Id.* at 123.

40. AMAR, *supra* note 1, at 459-63.

41. ELY, *supra* note 31, at 87-101.

figured equally prominently in the development of America's constitutional traditions.<sup>42</sup>

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

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

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

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42. HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 74-77 (1990).

measure designed in part to prevent the English from supporting the Confederacy; Prohibition passed as a war measure; and none of the five amendments in the 1950s and 1960s can be fully understood without appreciating the background of World War II and the Cold War. Also, many of the provisions of the Founders' Constitution were drafted so as to encourage immigration and westward expansion for geostrategic and national security reasons; and several other provisions were designed to prevent foreign monarchies and aristocracies from undermining free and fair American elections. In a sense, then, virtually our entire Constitution could be described, à la Koh, as "The National Security Constitution."<sup>43</sup>

## V. BRUCE ACKERMAN'S *WE THE PEOPLE*

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

My disagreements with Ackerman lie close to the surface of *America's Constitution*. In his epic trilogy-in-progress, *We the People*, Ackerman has argued that the Founding itself was flagrantly illegal—most obviously, in its disregard of the Articles of Confederation's rules for proper amendment of that document.<sup>44</sup> I dispute Ackerman's legal characterizations here, as I make clear in my opening chapter.<sup>45</sup> In my view, the Articles of Confederation were a mere treaty whose repeated violations by virtually all states legally justified exit from the Articles if a supermajority of states so agreed, as provided by the Constitution's Article VII. Ackerman also thinks that in the process of adopting the Thirteenth and Fourteenth Amendments, Reconstruction Republicans "played fast and loose" with the Founding document and acted in ways "that simply cannot be squared" with the amendment-procedure rules laid down by Article V.<sup>46</sup> Here, too, I disagree, and indeed I spend several pages making the case for the Article V legality of these Amendments and giving readers lots of historical evidence and legal arguments that they will not find in *We the People* (or anywhere else, for that matter).<sup>47</sup> As for Ackerman's notorious third "constitutional moment"—the (nontextual) New Deal Amendment ratified

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43. For more discussion of the points summarized in this paragraph, see AMAR, *supra* note 1, at 17, 67-70, 164-66, 271-72, 356-59, 376, 395-400, 416, 424-25, 436, 440, 446-48.

44. 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 32-68 (1998).

45. See AMAR, *supra* note 1, at 30-32 & 518-19 n.72.

46. See 2 ACKERMAN, *supra* note 44, at 100, 109, 111.

47. See AMAR, *supra* note 1, at 364-80.

(outside Article V) in the late 1930s—this amendment does not appear in my copy of the Constitution, nor does it appear in my biography of the document. Conversely, I pay a good deal of attention to various Progressive-era Amendments that Ackerman glosses over; and I also attend to the Twenty-Seventh Amendment, which Ackerman claims is invalid because it failed to comply with his own theory of constitutional change<sup>48</sup> even though it did satisfy the strict letter (and, I would argue, the spirit) of Article V. Finally, my general interpretive method is far more textual and conventional and far less abstract than Ackerman's.

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

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48. See 2 ACKERMAN, *supra* note 44, at 490-91 n.1.

the meanings of different constitutional texts adopted by different generations of We the People.

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

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

About my colleague Jed Rubenfeld and his two books, I shall say very little in this Introduction. Some of what I have to say I have already said before: "Jed Rubenfeld is the most gifted constitutional theorist (not to mention the most elegant legal writer) of his generation."<sup>49</sup> And much of what I want to say, I hope to say in the Amar-Rubenfeld (or is it the Rubenfeld-Amar?) dialogue that follows. So, dear reader, read on. The Yale School of Constitutional Interpretation remains open and in session.

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