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How To Interpret the Constitution (and How Not To)

INTRODUCTION: IS ORIGINAL MEANING MEANINGFUL?

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

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

I thus begin with the book about the Constitution’s words and phrases, and their original meaning. Part I considers *America’s Constitution*, embracing many of Professor Amar’s specific conclusions and championing his approach to the study of the Constitution. Part II critiques the *Revolution by Judiciary* advocated by Professor Rubenfeld and concludes with a prescription for

reconciling—or, perhaps more precisely, for *not* reconciling—the Constitution’s original meaning with modern constitutional practice that departs from that meaning. Professor Amar’s book does not truly offer such a prescription, though its implicit message is that something has got to give. My contention will be that it is the practice that must give way, not the original meaning of the Constitution. Professor Rubinfeld’s book offers a different prescription—a wrong one, in my view: the Constitution must give way to practice, at least some of the time, in the manner Rubinfeld thinks indicated by his novel grand theory of constitutional law.

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

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

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

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

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

slightest. It is, other than *The Federalist*, the best book on the U.S. Constitution ever written, bar none, bound to become a standard reference for constitutional scholars for decades to come. It beats out for second place on the all-time constitutional hit list such distinguished rivals as Joseph Story's three-volume *Commentaries on the Constitution of the United States* (1891) (#3) (comprehensive and brilliant, but often tendentious); Alexis de Toqueville's *Democracy in America* (Vol. I) (1838) (#4) (not as comprehensive in its discussion of the Constitution, but unfailingly sound); and James Kent's four-volume *Commentaries on American Law* (1826-1830) (#5) (excellent but lengthy and imperfect).¹

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1. Rounding out my personal top-ten list are: (#6) 1-2 DAVID CURRIE, *THE CONSTITUTION IN THE SUPREME COURT* (1985-1990); and (#7) 1-5 DAVID CURRIE, *THE CONSTITUTION IN CONGRESS* (1997-2001). These works comprise the best modern systematic discussion of constitutional doctrine, as developed by the Supreme Court and by Congress, and not incidentally, some of the best analysis of the Constitution itself ever written.

(#8) DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* (1978). This is the best book ever written about a single Supreme Court case and, more than that, an amazing explication of antebellum constitutional law and legal thought, with special focus on the signal constitutional issue of the day, slavery. Though there are many books about constitutional law that are limited to specific subjects, I think this the best of the bunch, and the only one worthy of inclusion on a list of the ten best books about *the Constitution*.

(#9) JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1996). This is an outstanding book about the ideas behind the Constitution, but less good in its framing chapters about "originalist" interpretive method, and, because of its period limitation, not as broad-gauged as *America's Constitution*.

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

Honorable mentions include Alexander Bickel's *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962), which remains the most eloquent, and best liberal defense of a moderately activist role for the Supreme Court in molding the Constitution, and must be ranked a very good book about the Constitution (which stars in a supporting role only); John Hart Ely's *Democracy and Distrust: A Theory of Judicial Review* (1980) is in much the same vein, less eloquent, but more charming and more concerned with the Constitution's text (to a point); Christopher Wolfe's *The Rise of Modern Judicial Review* (1994) is the best conservative critique of the rise of judicial doctrine and corresponding fall of the document and is, indirectly, an excellent book about the latter; Harry Kalven, Jr.'s *A Worthy Tradition: Freedom of Speech in America* (Jamie Kalven ed., 1988) is a magnificent book about First Amendment doctrine in the Supreme Court; Paul Brest and Sanford Levinson's *Processes of Constitutional Decisionmaking* (2d ed. 1983) is the best of the modern casebooks in its serious treatment of constitutional text and history, and in attention to

An admission of bias, which may lead some to discount my praise a few notches: Akhil Amar is an old friend of mine. We were accidental roommates at Yale Law School during our second year of law school, a little over twenty years ago. (His scheduled roommate didn't show up; I was transferring in and needed a room.) We talked and argued much that year and the next (Amar is a liberal Democrat; I am a conservative Republican) and have remained in touch since then. I have been a fan of his career and his scholarship—perhaps more so than many of our generation, whose views should be discounted, too, for latent envy and resentment: Amar tends to make the rest of us look like decidedly dimmer bulbs. In defense of my credibility, I have said harsh things about him in print before, and would not hesitate to do so again.² Like the skunk at a picnic, nothing would give me greater pleasure than to stink him up in the pages of his home law journal, if I thought he deserved it.

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

interpretations by institutions other than the Supreme Court, though its later additions suffer from creeping doctrinalism.

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

2. I reviewed one of Amar's earlier books, three-fourths favorably, but with some pointed attacks. Michael Stokes Paulsen, *Dirty Harry and the Real Constitution*, 64 U. CHI. L. REV. 1457 (1997) (reviewing AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997)) [hereinafter Paulsen, *Dirty Harry*]. At a symposium for the thirtieth anniversary of *Roe v. Wade*, I savaged his absurd concurring opinion and called him (in print and in public) "a coward and a collaborator" in acquiescing to a moral and constitutional travesty on the most flimsy and highly idiosyncratic reasoning imaginable. See Michael Stokes Paulsen, *Paulsen, J., Dissenting*, in *WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION* 196, 213, 216-17 n.9 (Jack M. Balkin ed., 2005) [hereinafter Paulsen, *Paulsen, J., Dissenting*].

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

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

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

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

A. Amar's Project

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

Surprisingly, one can think of few books about the U.S. Constitution that focus on the document itself, other than treatises—and not all treatises even do

this.³ Most books about the Constitution are not about the Constitution, but about judicial doctrine, institutional practice, or specific constitutional issues. Thus, part of what makes it relatively easy to rank Amar's book so high on the all-time list of books about the Constitution is that there are so few of them. Amar's book is treatise-like in its organization, breadth, and comprehensiveness, but immensely superior in terms of readability and accessibility: Imagine a treatise that reads like a great historical narrative—or, as Amar's subtitle not inaccurately advertises, "a biography." The combination of excellent textual exegesis and good historical storytelling make this volume singular.

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

Amar covers virtually everything of importance in the Constitution in a relatively compact book (477 pages of text, with another 180 of notes, appendices, and index).⁴ On issue after issue, Amar takes complicated, seemingly intractable issues and masterfully distills them into a few pages or even a few paragraphs. On some points he offers a sharp viewpoint, sometimes original and sometimes an encapsulation of received wisdom he accepts. On

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

4. I note below some small concerns with the relative thinness of the coverage of the Bill of Rights and the Fourteenth Amendment. See *infra* note 13 and accompanying text.

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

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

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

Amar's exposition of Article II's grant of "the executive Power" to a single, unitary President with control over all executive subordinates, broad power as military Commander-in-Chief, and a constitutional interpretive power of "executive review," parallel to the courts' power of judicial review, is absolutely marvelous. This is perhaps the only rigorous, principled defense of a strong constitutional executive penned by a liberal Democrat in half a century. Amar's insights into the President's powers of treaty formation, termination, and application, and the status of treaties in the "supreme law of the Land" hierarchy of Article VI, are novel and interesting.⁵ Overall, Amar's treatment of

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

the Presidency is one of the best constitutional analyses I have ever read, including Alexander Hamilton's.⁶

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

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

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

former students. See Vasana Kesavan, *The Three Tiers of Federal Law*, 100 NW. U. L. REV. (forthcoming 2006).

6. There is a small chink when Amar discusses the constitutional standard for impeachment, however: Amar wrote in defense of President Clinton during Clinton's impeachment; though he does not discuss the Clinton case specifically in this book, one senses a slight trimming of Amar's analysis to fit his earlier academic advocacy. AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 198-204 (2005).
7. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985).
8. AMAR, *supra* note 6, at 220.
9. For a critique of this somewhat too conventional position, see Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 GEO. L.J. 217 (1994) [hereinafter Paulsen, *The Most Dangerous Branch*]; and Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81 (1993).
10. See Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988) [hereinafter Amar, *Philadelphia Revisited*]; Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994).

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

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

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

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

12. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 135-230 (1998); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 *YALE L.J.* 1193 (1992).

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

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

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

13. AMAR, *supra* note 12. That earlier book was good but does not make my top ten list.

14. In addition to discussion in *The Bill of Rights*, Amar collected his earlier academic scholarship on the criminal procedure amendments into his fine first book entitled *The Constitution and Criminal Procedure: First Principles*. See Paulsen, *Dirty Harry*, *supra* note 2.

15. Even *The Federalist* gets some things wrong. Hamilton wrote that the President could not remove subordinates without Senate confirmation of the firing (No. 77), and that a Bill of Rights was unnecessary because federal powers could not plausibly be construed to reach most individual rights (No. 84). Both views were unpersuasive and wrong—as Amar shows, in getting both issues right. See AMAR, *supra* note 6, at 192-95 & 565 n.40 (discussing appointments and removals and explaining Hamilton's error in *The Federalist* No. 77); *id.* at 119-27, 315-29 (discussing the need for a Bill of Rights).

16. *Id.* at 328.

17. *Id.* at 329.

alter or abolish their form of government—the natural right of “the people” that propelled the American Revolution.¹⁸ Here, however, Amar appears to embrace to-be-discovered rights beyond those of the collective people and ends up with a mushy balancing test that sounds distressingly close to modern, Harlanesque substantive due process formulations:

Modern judges (and others) seeking to discover and declare unenumerated rights of “the people” should look for rights that the people themselves have truly embraced—in the great mass of state constitutions, perhaps, or in widely celebrated lived traditions, or in broadly inclusive political reform movements. In short, judges seeking guidance on the real rights of “the people” must give due weight to the very sources and sorts of legal populism that helped generate the Bill of Rights itself.¹⁹

Thus does the Ninth Amendment (rather than the Due Process Clause) become Amar’s activist Trojan Horse, a gift that, if taken in, could be the undoing of all else. Secreted in the belly of Amar’s view of the Ninth Amendment is a license for marauding judges to depart from the text as they think best—in the name of the text.²⁰

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

18. Amar, *Philadelphia Revisited*, *supra* note 10, at 1050.

19. AMAR, *supra* note 6, at 329.

20. Is there any reason to believe that, under Amar’s vague rendering of the Ninth Amendment, Chief Justice Taney’s atrocious substantive due process holding in *Dred Scott* (a holding and reasoning that Amar rightly condemns, *id.* at 264-66, could not be sustained on the alternative ground of the Ninth Amendment? After all, Taney premised his decision on Amar-like criteria: entrenched state constitutional and statutory provisions (in certain regions), sustained by a constitutional tradition of protection at the national level, supported in substantial measure by the text itself (as Amar persuasively shows), building on popular understandings and movements (at least in certain regions of the nation), and sustained by popular democratic judgment, repeated over many years (and embraced as recently as the 1856 election of President Buchanan, who was inaugurated two days before the decision was announced). The problem with Amar’s reading of the Ninth Amendment (aside from its indefensibility as a matter of textual interpretation) is that it permits essentially any result a court can plausibly concoct out of whatever textual extrapolation or extratextual interpolation it chooses. Taney might well have been pleased. Armed with Amar’s pliable Ninth Amendment, who needs substantive due process?

few possessed against state governments, set forth in Article I, Section 10), was not to work a pro tanto repeal of state law rights possessed against state governments. Such a disclaimer was necessary (if at all) only to counter Federalist arguments (like Hamilton's) that adopting a Bill of Rights might be construed to have such an effect, thereby enlarging federal power and diminishing individual rights. The text of the Amendment, its political context, and historical evidence of its meaning and purpose all confirm this reading.²¹

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

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

B. A Biography of a Written Constitution

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

21. For further development, see Paulsen, *Paulsen, J., Dissenting*, *supra* note 2, at 198-99.

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

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

22. AMAR, *supra* note 6, at 458-63.

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

24. Jed Rubenfeld's book, which I discuss below, is deeply unsatisfactory on precisely this point. See *infra* Part III.

does not invariably support their preferred substantive outcomes either. One may recognize that originalism is frequently hijacked by its own purported adherents for their own political purposes; and one may recognize that originalism sometimes does not dictate clear answers but merely frames the legitimate bounds of disagreement, without rejecting the methodology itself. *America's Constitution: A Biography* is no defense of words-as-springboards "living constitution" judicial activism. It is a defense of the Constitution's text.

C. *How To Teach the Constitution*

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

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

That is the problem with most constitutional law courses in American law schools today, and with most (if not all) casebooks used in such courses.²⁵ They choose pretty much the same cases (and omit the same hugely important

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

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

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

Imagine it: A course whose only cases are whole-text (or nearly so) versions of what are arguably the most important constitutional decisions of all time: The Alien and Sedition Acts, the Virginia and Kentucky Resolutions, and James Madison’s “Report of 1800”; *Marbury v. Madison*; *McCulloch v. Maryland*; *Gibbons v. Ogden*; *Luther v. Borden*; *Prigg v. Pennsylvania*; *Dred Scott v. Sandford*; Lincoln’s First Inaugural, July 4, 1861 Message to Congress, and Emancipation Proclamation; *Ex Parte Merryman*; *The Prize Cases*; *Ex Parte Milligan*; *Slaughter-House Cases*; *The Civil Rights Cases*; *Plessy v. Ferguson*; *Giles v. Harris*; *Debs v. United States*; *Lochner v. New York*; *United States v. Darby* and *Wickard v. Filburn*; *Korematsu v. United States*; *Ex Parte Quirin*; *Youngstown Sheet & Tube v. Sawyer*; *Brown v. Board of Education*; *Baker v. Carr*; *Mapp v. Ohio*; *Miranda v. Arizona*; *United States v. O’Brien*; *New York Times Co. v. United States*; *Nixon v. United States*; *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*; *Regents of the University of California v. Bakke*; *Texas v. Johnson*; *Rosenberger v. University of Virginia*; *United States v.*

Lopez; *United States v. Morrison*; *Bush v. Gore*; and *Lawrence v. Texas*. One or two big cases a week (unedited) for fifteen weeks, with corresponding assignments of *The Federalist* and *America's Constitution: A Biography*. What a fascinating way to teach constitutional law! (For those who would miss all of the "note" cases, think of how brilliant a scholar you will seem to your students by filling them in with a lecture about all the wrinkles and variations left open by the great cases, or show them what a masterful imagination you have by using them as "hypotheticals.")²⁶

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

II. STRAWMAN: JED RUBENFELD AND GRAND THEORY

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

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

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

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

A. Rubenfeld's Problem and Solution

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

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

....

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

....

. . . There is no law of constitutional interpretation.

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

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

27. JED RUBENFELD, *REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW* 4-5 (2005).

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

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

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

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

28. *Id.* at 71-124.

29. *Id.* at 14-18, 20-68, 99-107.

30. 290 U.S. 398 (1934).

31. RUBENFELD, *supra* note 27, at 67.

by a fair amount of constitutional practice—should be stopped and reversed, and should not be treated as a new paradigm.³²

In addition, a number of decisions by the Rehnquist Court since 1990, in the areas of federalism, commerce power, sovereign immunity, affirmative action, and freedom of expressive association, cannot be explained by this model, Rubinfeld explains. But this is because those decisions reflect a vicious and lawless right-wing agenda that should lead us to ask whether constitutional law has “stopped making sense” because of the nonconformity of these conservative decisions with Rubinfeld’s explanatory model.³³

The book is devoted to explication of this general thesis. Now, it’s not a *completely* ridiculous idea. But it suffers from a classic Yale School problem: A really bright fellow superimposes a construct of his own invention on the corpus of constitutional law decisions, seeking to justify them (or most of them) under a newfangled rubric that explains what is otherwise inexplicable. Sure, not everything fits within the new rubric, but that just proves that what does not fit is wrong. Bickel’s *The Least Dangerous Branch* is the most graceful and sophisticated (and, not coincidentally, the least extravagant) book in this grand-theory Yale tradition. Ely’s *Democracy and Distrust* provided a valiant attempt to rationalize the Warren Court’s work, but not the 1970s’ more untenable extensions.³⁴ Bruce Ackerman’s *We the People* three-volume project is another example, with a much grander, more creative, and marvelously entertaining (if deeply vulnerable) meta-theory of his own, seeking to explain the New Deal era and other results he likes.

Jed Rubinfeld’s effort cannot quite keep up, in grandeur, eloquence, or sophistication, with these other works. But the more fundamental problem is with the genre itself—with its twin premises that there is a problem that needs solving concerning constitutional interpretation and that the solution to this problem lies in some grand new political or philosophical theory extrinsic to the Constitution itself. Is it really the case that interpreting the Constitution is so inexplicably complex that it requires a Yale professor (or several of them) to devise equally complex grand theories to explain constitutional law?³⁵

32. *Id.* at 68.

33. *Id.* at 145–202.

34. I count John Hart Ely as a Yale Law School product, even though Yale improvidently kicked him out by denying him tenure.

35. Different readers will have different assessments of the degree to which Rubinfeld’s project succeeds on its own terms. Space does not permit, and time and interest do not commend, a page-by-page discussion of the case descriptions and doctrines that Rubinfeld employs in developing his account of constitutional law today and its consistency with his construct. But readers should employ a critical eye: I found Rubinfeld to be the proverbial Unreliable

B. Applying Ockham's Razor to Grand Constitutional Theory

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

My un-grand but radical position (within the small world of academic constitutional theoreticians) is simply this: The enterprise of constitutional interpretation—of discerning the document’s meaning—consists of giving to the Constitution’s words and phrases the meaning they would have had, in context, to informed readers of the language at the time of their adoption as law, within the relevant political community. Contrary to Rubinfeld’s assumption, and that of many other academic theorists, this seems to be the interpretive method prescribed by the Constitution itself. The straightforward internal textual argument for original-meaning textualism is that the Constitution is a written document; that it specifies “this Constitution” as the thing that is to be considered supreme law; that the default rule for textual interpretation was, at the time of the Constitution’s adoption, the natural and original linguistic meaning of the words of the text; and that any argument for anachronistic interpretations of the text—that is, for substituting a personally idiosyncratic, nonstandard, or time-changed meaning in preference to the one that would have been understood at the time, and in the context, in which the text was adopted—ends up substituting some other words for the words chosen in “this Constitution.” In short, the Constitution is written law, and the

Narrator in the doctrinal sections of the book, see RUBENFELD, *supra* note 27, at 3-68, disagreeing repeatedly with descriptions of a case holding or a characterization of an opponent’s argument or evidence, and questioning many an unexplained premise or debatable assumption. (For some illustrations, see *infra* notes 27, 31-33 and accompanying text.)

meaning of a written legal instrument is the original meaning of its words, not a different meaning substituted by someone else.³⁶

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

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

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

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

38. For a short defense of this principle, see Paulsen, *The Most Dangerous Branch*, *supra* note 9, at 332-37.

will have core areas of agreed meaning and application, but leave legitimate room for disagreement about the periphery. The interesting and difficult cases concern the periphery.³⁹

But that's really pretty much all there is to it. Constitutional law, while greatly interesting, is not a deeply mysterious thing. It takes a Yale professor to make it one. Most grand theories of constitutional adjudication that seek to erect an elaborate superstructure feel like professors' attempts to justify decisions they like but that are not explainable in such conventional terms, to criticize the ones they dislike but that are not easily impeachable in such conventional terms, and to argue their preferred positions in the ones that remain up for grabs.⁴⁰

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39. There will be easy cases that fall within the core of agreed understanding about the original meaning of particular constitutional provisions. And there will be more difficult cases in which the document's meaning is more ambiguous or its application to a particular problem is less clear, leaving difficult questions on the margin of whether a court properly may hold that a rule or standard supplied by the text actually exists to displace the rule otherwise supplied by political action.

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

40. This general description certainly applies to Professor Rubinfeld's project. As noted, Rubinfeld derives his construct from a long excursion into philosophy. RUBINFELD, *supra* note 27, at 71-141. The discussion is interesting, but its relevance in describing constitutional law is dubious. All of which suggests a philosopher Rubinfeld overlooks: William of

Rubinfeld is driven to his construct by a caricature of originalism. Rubinfeld does not understand the method as it is understood by most of its adherents today, conflating it (whether intentionally or not) with a version of crude intentionalism that focuses on the specific subjective intentions or expectations of individuals as to how a provision might be applied—that is, subjective individual interpretations of the document (of a historical period)—rather than focusing on the objective linguistic meaning of the words of a text (taken in historical context).

This distinction, subtle but central to all good understandings of originalism today (and abundantly present in the scholarly literature in the field), is essential. It is a distinction that has long been familiar in law. As then-Professor Oliver Wendell Holmes put it more than a century ago, “We do not inquire what the legislature meant; we ask only what the statute means.”⁴¹ Or, as Professor Gary Lawson has stated it more recently:

Originalist analysis, at least as practiced by most contemporary originalists, is not a search for concrete historical understandings held by specific persons. Rather, it is a hypothetical inquiry that asks how a fully informed public audience, knowing all that there is to know about the Constitution and the surrounding world, would understand a particular provision. Actual historical understandings are, of course, relevant to that inquiry, but they do not conclude or define the inquiry—nor are they even necessarily the best available evidence.⁴²

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

41. Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899). For a colorful reprise on Holmes’s aphorism, see *In re Sinclair*, 870 F.2d 1340, 1342 (7th Cir. 1989), in which Judge Easterbrook wrote, “the search is not for the contents of the authors’ heads but for the rules of language they used.” I have developed this point in other writing. See Paulsen, *The Most Dangerous Branch*, *supra* note 9, at 227 n.23 (“There is a logical and important difference between the content of a legal rule and the expected consequences of the rule in the minds of (some of) its drafters and advocates.”).
42. Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 398 (2002). Rubinfeld writes: “Originalism is intention-based, holding that all the intentions formed by the relevant agents at the relevant time have equal normative status.” RUBENFELD, *supra* note 27, at 99. It is difficult to conceive of a more wooden and misleading formulation of original-meaning textualism. I know of no thoughtful modern originalist who would subscribe to such a position.

This distinction between objective, original linguistic meaning and subjective particular intentions—not Rubinfeld’s distinction between “intentions” and “commitments”—explains most (but not all) of the cases and doctrines that Rubinfeld finds inexplicable on his strawman version of originalism. Much (but not all) of modern First Amendment doctrine makes a fair degree of sense if one is applying the original linguistic meaning of the terms “speech,” “the freedom of” speech, and “no law abridging” such freedom, rather than specific subjective historical beliefs about blasphemy, vulgarity, and seditious libel.⁴³ So too the result in *Brown v. Board of Education*, striking down government-prescribed discrimination on the basis of race (and overruling *Plessy v. Ferguson* to the extent of its inconsistency with *Brown*) makes entire sense if one focuses on the original linguistic meaning of the Fourteenth Amendment rather than on the mistaken subjective views or expectations of some individuals at the time that the Amendment’s principle did not extend to segregated education.⁴⁴

Rubinfeld’s treatment is an extreme instance of the common phenomenon of positing a strawman version of originalism, exaggerating the extent and consequences of its supposed conflict with present practice, and then setting up a false dilemma: “choose my theory or choose the unmitigated disaster of originalism.” To be sure, a considerable amount of our constitutional practice is not consistent with the original meaning of the Constitution.⁴⁵ But a

43. For a brief textualist map of the First Amendment freedom of speech and association, see Michael Stokes Paulsen, *Scouts, Families, Schools*, 85 MINN. L. REV. 1917, 1919-22 (2001). Under such an understanding, the freedom of expressive association of groups is a logical consequence of the fact that individuals are permitted to band together to express a common message, and that the group therefore possesses a corollary freedom to control the content of its own message as a group. *Id.* at 1922-35. Rubinfeld finds this idea inconceivable as an application of originalism and intolerable as a political matter, RUBINFELD, *supra* note 27, at 4, 6, 146-47, 170-83, but does not engage the textual, structural, and historical arguments that have been marshaled to support it.

44. See Paulsen, *The Most Dangerous Branch*, *supra* note 9, at 227 n.23 (collecting authorities). Rubinfeld also passes over, far too briefly, RUBINFELD, *supra* note 27, at 41 & 214 n.85, Michael W. McConnell’s powerful historical case that *Brown*, not *Plessy*, better captures both the original meaning and original understandings of the Fourteenth Amendment. See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995). In light of McConnell’s important scholarship, Rubinfeld’s flat assertion that “[c]ertainly the Fourteenth Amendment was originally intended to permit segregation,” RUBINFELD, *supra* note 27, at 100, is simply insufficient.

45. In such cases, practice should be changed to conform to the Constitution, not the other way around. This is how we should treat the departure in practice from the Constitution’s allocation of war powers, which Rubinfeld recognizes as problematic, but for which his grand theory has no good answer. RUBINFELD, *supra* note 27, at 68. As I have written elsewhere, the Constitution does vest Congress with the decision to take the nation into a

considerable amount of our practice is consistent with the Constitution, too, if one has the patience (and inclination) to read the text carefully and faithfully.⁴⁶

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

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

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

46. Among the most common canards in critiques of originalism is that, under the original meaning of the Constitution, the issuance of paper money as legal tender would be unconstitutional, sending our economy into disarray. But what is the basis for such a senseless charge? Congress possesses power to "coin money" and to regulate "commerce," plus the power to enact measures it fairly deems necessary and proper for carrying into execution such powers. If creation of a national bank falls within the scope of Congress's power to pass laws it deems necessary to execute other powers, it is hard to see why issuance of paper money would not also fall within the scope of Congress's powers. (Professor Amar makes a version of this argument quite persuasively. See AMAR, *supra* note 6, at 123.) The same can be said in response to objections that originalism would lead to vastly lessened national legislative powers. See *id.* at 105-19; see also Michael Stokes Paulsen, *A Government of Adequate Powers* (Apr. 1, 2006) (unpublished manuscript, on file with author) (arguing that the original meaning of the text of Congress's enumerated legislative powers supports broad national power). A principled originalism would indeed lead to overturning many present practices, but not these.

Rubenfeld is scarcely the only, nor even the worst, offender in this regard. See, e.g., CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* (2005) (arguing, speciously, that originalism would abolish paper money, repeal most national legislation since the New Deal, undo the application of the Bill of Rights to the states through the Fourteenth Amendment, and accomplish many other terrible things).

interpretation. The existence of reasonably firm criteria makes it easier to check up on originalist interpretations for the soundness of their reasoning and their adherence to correct principles. Nonoriginalism, on the other hand, means never having to say you're sorry.

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

C. *Pay No Attention to the Man Behind the Curtain*

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

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

47. On this big point, which is scarcely original to me, see Professor Gary Lawson's brilliant little article, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823 (1997).

The Constitution does take this limited stance, however: The bare fact of being a written Constitution prescribing rules of superior authority to ordinary current political choices implies a position that a fundamental decision made in the past sometimes can and ought to be binding as against today's political—and judicial—decisions that depart from that fundamental decision. That was the first premise of Chief Justice Marshall's reasoning in *Marbury v. Madison* and of Alexander Hamilton's reconciliation of judicial review with democracy in *The Federalist* 78.⁴⁸ In a sense, this could be said to be the background political theory behind written constitutionalism. Hear Marshall on constitution-making:

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.⁴⁹

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

48. See Paulsen, *supra* note 23 at 2712-13; see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803); THE FEDERALIST NO. 78, at 440 (Alexander Hamilton) (Isaac Kramnick ed. 1987).

49. *Marbury*, 5 U.S. at 176. Rubenfeld gets this point right, with an important insight: “Treating democracy as government by present popular will severs the dimension of time from the enterprise of self-government. It offers little or no conceptual space for the authority of past acts of lawmaking.” RUBENFELD, *supra* note 27, at 141, 75-98, 135-41. At some level, Rubenfeld accepts the idea of constitutionalism as a legitimate check on present political decisionmaking.

But have we not, over time, overthrown in fact what was established in theory?⁵⁰ Do we not in fact live in a de facto different constitutional regime than that established by the written constitution, so that those who do constitutional law should be understood as swearing an oath not to the document but to the changes produced by judicial practice over the years? Marshall and Hamilton rightly cautioned, as a matter of political theory, that we, the people, should not adopt constitutional regime change lightly or accidentally. Moreover, they insisted as a matter of constitutional law that it is wrong to presume, or permit, an unauthorized power of government institutions under the Constitution to change the regime of the Constitution, in the name of the people.⁵¹ If there is to be an exercise of the inalienable political right of the people to alter or abolish their form of government when it fails any longer to serve their happiness, then (putting to one side amendment by the modes provided for in the document itself) such change by definition occurs outside the Constitution. In the meantime, any other departures from the Constitution by actors exercising authority under the Constitution are simply unconstitutional.⁵²

It follows that the true problem of constitutional law these days reduces to this: A fair amount of current constitutional practice cannot be reconciled with the original meaning of the Constitution and we tend to treat judicial decisions that depart from the Constitution as nonetheless authoritative, at least sometimes—a practice itself inconsistent with the original meaning of the Constitution.⁵³

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50. Cf. *Marbury*, 5 U.S. at 177 (noting that for courts to defer to errant misinterpretation of the Constitution by subordinate authority under the Constitution would “overthrow in fact what was established in theory”).
51. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 48, at 440-41 (“Though I trust the friends of the proposed Constitution will never concur with its enemies in questioning that fundamental principle of republican government which admits the right of the people to alter or abolish the established Constitution whenever they find it inconsistent with their happiness; yet it is not to be inferred from this principle that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing Constitution, would, on that account, be justifiable in a violation of those provisions; . . . Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually . . .” (citations omitted)).
52. For an extended argument that this is the meaning of *Marbury*, with many notable applications that challenge current practice, see Paulsen, *The Irrepressible Myth of Marbury*, *supra* note 23.
53. I have developed this theme in other work. See, e.g., *id.* at 2731-34; Michael Stokes Paulsen, *Nixon Now: The Courts and the Presidency after Twenty-Five Years*, 83 MINN. L. REV. 1337, 1349-51 (1999) (arguing that the notion of judicial supremacy is inconsistent with all evidence of the original meaning of the Constitution).

But there is a straightforward low-theory answer to this riddle, too. When a prior interpretation of the Constitution, by any branch of government, including the courts, has departed from the meaning of the Constitution, one must always prefer—if one is truly interpreting and applying the Constitution—the objective, original linguistic meaning of the Constitution’s words and phrases to past departures from that meaning.⁵⁴

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

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

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

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

55. See Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1570-82 (2000) (arguing that stare decisis, in the sense of deliberate adherence to erroneous prior constitutional decisions, is clearly not constitutionally required and cannot be justified on originalist grounds by Article III’s assignment of the judicial power to the courts).

its beautiful, imaginative constructs. But if we wish to live in Oz, we cannot keep pretending that it is the Constitution we are expounding.

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