

H. JEFFERSON POWELL

Grand Visions in an Age of Conflict

INTRODUCTION

Last spring Professor Laurence H. Tribe commented that federal constitutional law is in a state of intellectual disarray: “[I]n area after area, we find ourselves at a fork in the road—a point at which it’s fair to say things could go in any of several directions” and we have “little common ground from which to build agreement.”¹ No doubt fortuitously, two of our most formidable constitutional scholars, Akhil R. Amar and Jed Rubenfeld, have recently published systematic studies that implicitly challenge Tribe’s conclusion that “ours [is] a peculiarly bad time to be going out on a limb to propound a Grand Unified Theory—or anything close.”² With admirable boldness, Professors Amar and Rubenfeld have done precisely that—gone out on a limb, or rather two very different limbs, to propound their own accounts of what American constitutionalism is, or should be. Amar’s *America’s Constitution* and Rubenfeld’s *Revolution by Judiciary* are alike in that each is its author’s synthesis of a remarkable effort, sustained over a number of years, to develop a comprehensive vision of the Constitution. We have much to learn from their successes as well as from the points at which they are, I believe, in error.

I. AMAR’S CONSTITUTION

A. *The Constitution of Text and Structure*

Readers familiar with the prolific work of Akhil Amar will find in *America’s Constitution* a fitting capstone to two decades of erudite and wide-ranging

1. Laurence H. Tribe, *The Treatise Power*, 8 GREEN BAG 2D 291, 292 (2005).

2. *Id.* at 293 (emphasis omitted).

scholarship. From his first major article, *Of Sovereignty and Federalism* (published in 1987),³ Amar's work has been characterized by an unusually close attention to the text of the Constitution, to the structure of the instrument as a document, and to the Federal Republic as a system of government. An intense interest in history, backed up by exhaustive research, and an admirable willingness to think outside the confines of what passes in constitutional law for ordinary science have also been salient elements in the Amar oeuvre. His lively mind and facile pen have made his work unavoidable for anyone interested in constitutional law, including many aspects of the law of the Constitution, such as criminal procedure, that are now treated by almost everyone else as separate areas of research and writing.

America's Constitution crystallizes both Amar's general approach and his substantive themes. He comments almost at the beginning that his goal is "to reacquaint twenty-first-century Americans with the written Constitution" rather than to contribute to the endless discussion of "legal dictums and doctrines that appear nowhere in the Constitution itself."⁴ Almost at the end of the book's text, he comments that he "ha[s] tried to give the reader facts and figures—lots of them,"⁵ and he certainly cannot be faulted on either score. *America's Constitution* is not exactly a line by line review of the instrument's provisions, but I know of no other book in many years as comprehensive in its treatment of all parts of the constitutional text. It is, furthermore, full of historical information, some of it likely to surprise even the most informed reader, and all of it arranged so as to lure the reader on rather than deter her.

Amar's interest in structural matters bears fruit repeatedly in discussions of the origins of constitutional language and of American governmental practice that are of the greatest interest. I will not stop to give details, but Amar's treatment of the pervasive role of slavery in the Constitution of 1787, and (on that topic and others) his industry in asking—and answering—questions about the practical consequences of constitutional arrangements are excellent examples of how fascinating his work can be.⁶ Furthermore, Amar's zest for this sort of fine-grained and imaginative consideration of structural arrangements is infectious: When he remarks at the end that he thinks a "well-

3. 96 YALE L.J. 1425 (1987).

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

5. *Id.* at 469.

6. For specific examples, see his discussion of the 1787 Constitution's attribution to slave states of representation based on a formula counting each slave as three-fifths of a free inhabitant, *id.* at 88-98, his shrewd insight into the historical significance of the Necessary and Proper Clause's wording for separation of powers, *id.* at 110-13, and his observations about the Twelfth Amendment, *id.* at 149-52, 336-47.

chosen number can be every bit as interesting as a well-chosen quote,”⁷ I suspect that a great many readers will feel, as I did, that Amar chose well.

B. The Secondary Role of History

America’s Constitution is a learned and in some respects even a brilliant book, but it is also deeply problematic. Perhaps the briefest way to identify my concern is that I fear this is a book, and maybe an author, unsure of what the subject under discussion really is. The result, I think, is that in too many places the reader not caught up entirely by Professor Amar’s facts and figures may find herself unable to say precisely what sort of conclusions Amar is offering us.

The full title of Amar’s book is *America’s Constitution: A Biography*, and one might expect the final noun to define, even if metaphorically, the book’s genre. The 1787 text that we refer to as the (original) Constitution has a history in several senses: It is a historical document and an enormous amount can and has been said about its antecedents, the history of its drafting by the Philadelphia Framers, and the debates and political maneuvering by which it came to be accepted as the constitutive legal instrument of the American Republic. Similar enquiries can be made about the later bits of text that together with the 1787 document make up the Constitution to be found in casebooks on federal constitutional law. It would make obvious if nonliteral sense to term a historical study of some aspect of these matters “a biography.” It would be clear the author’s claims were assertions of political history (i.e., this is how Alexander Hamilton and company turned a clear Anti-Federalist majority into the losing side on the issue of ratification in New York) or intellectual history (i.e., this is what Alexander Hamilton thought the term “direct Taxes” meant). Amar gives us a considerable amount of detail about the politics behind various constitutional provisions and the constitutional opinions of various historical actors. Furthermore, in the last paragraph of the book he claims that his goal has been “to understand precisely what the document did and did not mean to those who enacted and amended it,”⁸ suggesting that he is indeed writing intellectual history. However, while it is dangerous to reject a scholar’s own explanation of his methods and goals, I believe that this statement is in reality erroneous: it is, as I shall argue, quite contrary to Amar’s actual practices in justifying claims about constitutional

7. *Id.* at 469.

8. *Id.* at 477.

meaning in *America's Constitution*. Despite all its historical detail, political and intellectual, *America's Constitution* is not, in the end, a book of history.

Consider, as an example, the lengthy discussion of the Constitution's Preamble to which Amar devotes the first chapter of *America's Constitution*. As in many other chapters, Amar uses his focus on a particular constitutional provision as the vehicle for a discussion of other, more broad-ranging themes. Chapter one returns to questions Amar has thought about for many years: the nature of the Union and the locus of sovereignty within that Union. Amar quickly and correctly reminds the reader that debate over such matters loomed large in the antebellum history of the United States. Hamiltonians and Jeffersonians fought over the scope of congressional power, Webster and Story squared off against the nullifiers, and Unionists and secessionists alike justified the Civil War—all in terms of an interminable debate over whether the states or the Union was originally sovereign, what the various events since independence might have done to the original arrangements, and (finally) whether individual states had the legal right to leave the Union.

There are many historical enquiries one can make into this history of debate, but to be historical enquiries they must address issues about what the individuals and groups involved meant or did, or about what the ordinary person of the time would have thought about the matter (often a hard question to answer with confidence, but not in its nature ahistorical). But Amar's real interest lies not in the history of antebellum opinion but in what he evidently thinks of as the answer to a normative or legal question. Speaking in his own voice, he tells us that "both before and after ratifying the Articles [of Confederation], the people of each state—and not the people of America as a whole—were sovereign";⁹ "[a]lthough states would enter the Constitution as true sovereigns, they would not remain so after [a] ratification" that "would itself end each state's sovereign status and would prohibit future unilateral secession";¹⁰ it is an error to claim "that none of the thirteen original states had ever been truly sovereign."¹¹ Each of these assertions was entirely familiar to antebellum constitutionalists. Thomas Jefferson and Jefferson Davis agreed with the first and last while denying the second; John Jay and Abraham Lincoln held the opposite view . . . and Professor Amar is willing to explain to us where each was wrong and each right, and why.¹²

9. *Id.* at 26.

10. *Id.* at 33.

11. *Id.* at 39.

12. I mention Jay only because his discussion of the locus-of-sovereignty question in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which Amar never discusses on this issue, is an especially clear statement of the nationalist position at a point in time immediately after

It is rather fun to see a twenty-first-century scholar answer nineteenth-century questions and chastise nineteenth-century statesmen, but if this were meant to be history, the attempt to do so would be a category error: The views of historical figures on a question of constitutional interpretation in dispute among them cannot be right or wrong when the question at hand is what the historical meaning of the document was. They are witnesses to the question of historical meaning, whereas the issue of who was right and who wrong is a normative matter of law or politics or morality. Unless one adopts a strongly originalist approach to constitutional interpretation, the attempt to adjudicate between the opinions held by these historical figures mixes intellectual apples and oranges. The difficulty is not ameliorated even if we shift our attention to what Amar later calls “the meaning inherent in the basic *acts* of constitution.”¹³ It is true that President Lincoln thought (and Professor Amar believes) that the inherent meaning of the ratification process of 1787-1788 entailed the merger of the states’ individual sovereignties into an indivisible nation, but President Jefferson and many others have thought that inherent meaning was quite the opposite.¹⁴ Once again, history cannot prove the correct answer to the normative question either way, and assertions about the normative answer are not history.

I slipped in a qualification in the middle of the preceding paragraph. It is perfectly sensible to argue, for example, that the historical evidence shows that most Founding-era Americans thought Jefferson wrong and the antebellum nationalists right on the locus of sovereignty after ratification—though I personally doubt that the evidence can be marshaled either way. If one stipulates a strictly originalist view of constitutional interpretation (one formulation: the normative meaning of a constitutional provision is that which most competent interpreters would have thought it meant when it was made law¹⁵), then a convincing historical argument on that question of intellectual

ratification. While Amar makes little use of Supreme Court opinions, it is striking that he ignores Jay while quoting John Marshall’s opinion in the much later case of *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

13. AMAR, *supra* note 4, at 470.
14. While the question of secession is, I assume, permanently off the table, one need only read Justice Clarence Thomas’s opinion for four justices in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 845 (1995) (Thomas, J., dissenting), to see that Jefferson’s understanding of 1787-1788 as leaving the states’ individual sovereignties intact at a basic level is alive and well.
15. There have been many attempts to fine-tune a definition of constitutional originalism. I am employing the one that seems to me the most plausible, but resolving this definitional matter is irrelevant for present purposes for, as stated in the text, Professor Amar is not a strict originalist.

I am indebted to my friend and colleague Walter Dellinger for the adjective. Dellinger has long argued that the existence of a written Constitution necessarily makes a moderate

history would answer the normative question of constitutional meaning as well.

Professor Amar, however, is clearly not a strict originalist. Proofs of this in *America's Constitution* are legion: The Commerce Clause, for example, may provide a constitutional basis for federal regulation of “all forms of intercourse in the affairs of life, whether or not narrowly economic . . . if a given problem genuinely spill[s] across state or national lines”;¹⁶ Article V may not be the exclusive means of amending the Constitution;¹⁷ and there may be Ninth Amendment rights that “might not be inferable from the Constitution’s text and structure but that nevertheless might deserve constitutional status.”¹⁸ Amar cannot explain the use of history and law in *America's Constitution* on strict-originalist grounds because he does not practice that approach to constitutional interpretation.

Professor Amar’s conclusions about sovereignty are not historical assertions, nor are they propositions of strict-originalist constitutional law. Still less are they presented as interpretations of standard legal doctrine, the usual grist for constitutional mills but an enterprise that (as we have seen) Amar expressly puts to one side in *America's Constitution*. In form and logic, they bear little resemblance to the sorts of empirical, economic, and institutional enquiries that interest most contemporary political scientists. Here, as at many other points in the book, Amar’s answers to what “the Constitution” means simply do not speak to the sorts of questions historians, lawyers, and political scientists raise. So exactly what kind of answers is Professor Amar giving us – and to what questions?¹⁹

originalism an indispensable starting point for anything that can plausibly claim to be American constitutional law: A refusal to use original meaning to establish the starting point for the words the document uses would render the text infinitely manipulable. Dellinger, Amar, and I are all moderate originalists in this sense.

16. AMAR, *supra* note 4, at 107-08.
17. *Id.* at 295-99. Amar cites only James Wilson from the Founding era as possibly supporting this idea, and his earlier scholarship to the same effect points to little else relevant to an originalist. See, e.g., Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994). Here, as elsewhere when he diverges radically from the more usual views, in *America's Constitution* Amar tends to avoid direct statements and to present his argument as a matter of interpretive possibility: “shouldn’t Article V . . . be read as nonexclusive?” AMAR, *supra* note 4, at 297. My point is that Amar has no a priori objection to accepting as correct constitutional arguments that cannot be defended on strict-originalist grounds.
18. AMAR, *supra* note 4, at 328.
19. Just to be clear: I am not criticizing Amar in the least for his decision not to load the text down with “quibbling qualifiers.” AMAR, *supra* note 4, at 470. He is quite clear from the beginning that *America's Constitution* is “an opinionated biography.” *Id.* at xii. The problem

C. *The Textualism of Real Meaning*

The answer to our conundrum, according to Professor Amar himself, is that he is “a constitutional textualist”²⁰: He is not, therefore, so much interested in what any individual, whether founder or twenty-first-century American, thought or thinks about the meaning of the written Constitution, but rather in what the Constitution means in itself. At the beginning of his discussion of the questions of national unity and state sovereignty, Amar comments that “[i]n word and deed, the Constitution yielded its own answers to these epic questions.”²¹ What Amar seeks to explain, then, is the Constitution’s own resolution of the issues that divided Hamilton and Jefferson, Lincoln and Davis. His license to adjudicate between these historical figures—to tell us when Lincoln was right and Davis wrong—stems from the Constitution itself, which has its own intrinsic meaning that is quite distinct from the views of even its most distinguished makers and interpreters. From this perspective, furthermore, concerned as it is with the written Constitution rather than with matters that “appear nowhere in the Constitution itself,”²² issues such as whether most people in 1788 or 1868 would have agreed with Amar’s conclusions are secondary.

Amar is not, of course, a narrow literalist—recall his invocation of “the meaning inherent in the basic *acts* of constitution.”²³ He writes: “I myself do not believe that all of American constitutionalism can be deduced simply from the document.”²⁴ A sophisticated textualism of the sort he intends to employ must take account of “both constitutional politics (how did the text come to be enacted?) and constitutional law (what did the enacted text mean?).”²⁵ To do so fully, Amar believes, requires one to transgress the disciplinary boundaries that, he rather clearly thinks, handicap the work of most other scholars. “Law, history, and political science—these three disciplines form the legs of the stool on which this book rests.”²⁶ Amar’s ambition is “to synthesize” these three disciplines in writing his account of the Constitution since “each discipline in

with the locus-of-sovereignty discussion in chapter one, a problem that I believe appears recurrently in *America’s Constitution*, is that it is unclear what Amar is giving his opinions about.

20. *Id.* at 470.

21. *Id.* at 21.

22. *Id.* at xi.

23. *Id.* at 470.

24. *Id.* at 477.

25. *Id.* at 469.

26. *Id.* at 467.

isolation may be faulted²⁷: The lawyer's attention to the logic and normative implications of the text's provisions, the historian's knowledge of the conflicts that shaped the text, and the political scientist's interest in how political structures interact are all necessary if we are to understand in an appropriately sophisticated way the meaning of the written Constitution.

Amar is not, furthermore, an exegete of isolated clauses. Despite his deliberate focus at many points on the meaning of particular constitutional terms, Amar's practice of constitutional textualism is an enquiry into the meaning of the Constitution—including all of its amendments—as an integrated and coherent whole. Amar's textualism is not a clause-bound interpretivism but a broad enquiry into how the “various provisions . . . intermesh to form larger patterns of meaning and structures of decision making.”²⁸ Amar sometimes refers to “the larger pattern”²⁹ evidenced by distinct provisions and the “general . . . vision inform[ing] much” of the Constitution's “overall structure and many of its specific words.”³⁰ He is intensely interested in what he sees as the “multiple textual harmonies at play”³¹ among different provisions—including provisions written and adopted at different times—and in the “keys and cues” to be found in the details of “the Founding act and text,”³² which, in his judgment, reveal the underlying meaning of the Constitution viewed as a unified whole. The underlying assumption in all this, of course, is that the Constitution in fact has a coherent overall meaning, and that its individual provisions, including provisions enacted at widely separated points in time, can be put side by side to yield meanings that separately they would not have. But this is the theory: How does Amar's textualism work in practice?

Before answering that question, I need to be clear about a few matters over which Professor Amar and I have no dispute. No one doubts that specific constitutional arrangements (the structuring of the legislative process in Article I, for example) were intended to produce coherent, or at least workable, governmental procedures.³³ It makes good historical sense to attempt to discern how the makers of a particular constitutional arrangement meant it to work, it is worthy political science to examine how the Constitution's

27. *Id.* at 466-67.

28. *Id.* at xii.

29. *Id.* at 301.

30. *Id.* at 51.

31. *Id.* at 326.

32. *Id.* at 472 n.*.

33. Equally, however, no one believes that the Constitution's various makers always succeeded in doing so—no one including Professor Amar. His unhappiness with the Article V amendment process is especially striking.

governmental procedures work and have worked in practice, and it is one of the lawyer's quintessential tasks to harmonize clashing or discordant provisions in a binding legal instrument. But Professor Amar's theoretical "aspiration [is] to holism . . . to unite law, history, and political science [and] to view the document over its entire life span."³⁴ His disciplinary tools are meant to serve a task—the search for the actual meaning of the Constitution—that transcends them all. As I shall suggest, this search leads to less obvious, and less obviously correct, results than one might expect. I have space to deal at length with only one example.

Amar criticizes "modern observers" for slighting "the significance of geographic/geostrategic considerations that loomed large in the Federalist vision"³⁵ and regards *America's Constitution* as a creative and even novel correction to this error. The implicit but unmistakable claim to novelty is overstated: It is hard to imagine that many scholars would disagree with the proposition that the Founders were concerned about creating a federal government capable of addressing the foreign policy and national security needs of the Republic.³⁶ However, it is certainly the case that important aspects of Professor Amar's presentation of this commonplace are original. In his view, for example, the Founders' "geostrategic vision of union [was] distilled in the Preamble,"³⁷ by which he means that the Preamble's words reveal that the Constitution as a whole has as its inherent purpose the creation of "an island nation . . . where foreign powers would be far removed and where internal borders would be demilitarized."³⁸ This is a singular assertion: There is, as far as *America's Constitution* shows or I am aware, no evidence that anyone in the Founding era thought that the Preamble did any such thing other than in the general and almost trivial sense that it was a statement of the Constitution's goals.

There is a similar problem with Professor Amar's "distinctive claim[]" that the Preamble's "proper place [was] the Founders' foundation" and that other

34. *Id.* at 469.

35. *Id.* at 472-73.

36. In fact, the scholarly literature is full of attention to the role of what Amar terms "geostrategy" in the making and early interpretation of the Constitution. For a provocative recent example, see Robert J. Delahunty, *Structuralism and the War Powers: The Army, Navy and Militia Clauses*, 19 GA. ST. U. L. REV. 1021 (2003). Our overall understanding of the role such considerations play in the making of a constitutional order has been enormously enriched by PHILIP BOBBIT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* (2002). Professor Amar mentions the work of neither Delahunty nor Bobbitt.

37. AMAR, *supra* note 4, at 106.

38. *Id.* at 44.

scholars have ignored this fact.³⁹ The claim is distinctive but unpersuasive. The Preamble's language was cast in the common idiom of American political discourse and in many respects ("Justice . . . common defense . . . general Welfare") that of all Western political discourse. On occasion, to be sure, constitutionalists and politicians have quoted its particular phrases but the scarcity of such usages is unsurprising: The common law treated preambular material in a legal instrument as without direct legal force, and for that and other reasons the Preamble has understandably played little role in discussion of a document universally treated as law.⁴⁰ Amar's claim that the particular use of this language in the Preamble was of great importance historically, or that it sheds much light on the legal interpretation of the rest of the Constitution or on the institutional dynamics of our political system is, at best, unproven in *America's Constitution*.

Given Professor Amar's frequent stress on the importance of verbal parallels, it is appropriate to examine a specific instance of the manner in which he attempts to use such parallels to show the importance of the Preamble. We are told that Article I, Section 8 begins with words that show that the Preamble's "geostrategic vision" informs the Constitution's grant of powers to Congress: "section 8 began by echoing the Preamble almost verbatim, in language affirming the need to 'Provide for the common Defence and general Welfare.'"⁴¹ The "echo" is, however, no more exact than the "[s]imilar phraseology" which, as Amar properly acknowledges at once, is found in Article VIII of the Articles of Confederation. Indeed, the language of section 8 ("provide for the common Defence and general Welfare") seems to me closer as a verbal matter to that of the Articles ("incurred for the common defense or general welfare") than it is to that of the Preamble, which breaks the two nouns into separate infinitive phrases. Why then doesn't Section 8 show that it

39. *Id.* at 471.

40. In 1791, the first Federal Attorney General, Edmund Randolph, rejected reliance on the Preamble in constitutional argument in advising President Washington that the national bank bill was invalid:

"The Preamble to the Constitution has also been relied on as a source of power. To this, it will be here remarked, once for all, that the Preamble if it be operative is a full constitution of itself, and the body of the Constitution is useless; but that it is declarative only of the views of the convention, which they supposed would be best fulfilled by the powers delineated; and that such is the legitimate nature of preambles."

Walter Dellinger & H. Jefferson Powell, *The Constitutionality of the Bank Bill: The Attorney General's First Constitutional Law Opinions*, 44 DUKE L.J. 110, 125 (1994) (quoting Randolph's unpublished opinion).

41. AMAR, *supra* note 4, at 106.

embodies the geostrategic vision distilled in the Articles, the language of which it echoes almost verbatim? The answer, one fears, is that *America's Constitution* posits a sharp contrast between the Articles and the Constitution in this and other matters, and that the inconvenient parallel in word choice between Section 8 and the Articles does not serve to advance this contrast. I agree entirely with any reader inclined to dismiss all of this as insignificant verbal quibbling—but Professor Amar cannot rightly do so because he puts great weight on such “textual harmonies.”

If this were an isolated example of how Amar's textualism works, one might properly set it aside as a slip, but the passage is, I believe, exemplary of how his textualism often plays out in practice. I will give a few other examples briefly, but to gauge the fairness of my criticism the reader must read *America's Constitution* itself. Professor Amar assures us that the Constitution rests on “a clear commitment to people over property.” Perhaps, but the observation that the expression “private property” never appears in the 1787 document and that the noun's only occurrence refers to government property⁴² does little to advance the claim; slavery, the importance of which to the 1787 Constitution Amar details at length, never appears as a verbal matter either. Although Article I “borrow[ed] the name of confederate America's central organ—‘Congress’—it promised a quite different institution,” in part (we are told) by expressly granting to the constitutional Congress “legislative Powers” and referring to its power to make “Laws”;⁴³ true enough about the Constitution's terminology, but the second provision of the Articles referred to “every power, jurisdiction, and right . . . delegated to” the Confederation Congress, and that body designated its own enactments as “ordinances.” Do the verbal differences mean that much?⁴⁴ That the Second, Fourth, and Seventh Amendments “aimed to protect popular rights [as opposed to sheerly individual ones] via institutions (the militia and the jury) that would embody ‘the people’ themselves” is indicated, Amar believes, by the occurrence of “security” in the Second, “secure” in the Fourth, and “securities” in an early draft of the Seventh

42. *Id.* at 17.

43. *Id.* at 57.

44. The first definition of “ordinance” in Dr. Johnson's dictionary is “Law, rule, precept.” The *Federalist* describes the enactments of the Confederation Congress as “laws” and asserts, in the course of minimizing the difference between that body and the legislature proposed by the 1787 instrument, that the old Congress “have as compleat authority” as the new Congress would to make its pronouncements legally binding. See, e.g., THE FEDERALIST NO. 21 (Alexander Hamilton), NOS. 37, 45 (James Madison). The point is not that Amar is wrong to see a significant difference between the two bodies, but rather that his verbal observations, here as elsewhere, often do little to advance his conclusions.

Amendment.⁴⁵ *America's Constitution* abounds in this type of ingenious but unconvincing exegesis of the Constitution's wording.⁴⁶

D. An Underlying Problem of Method?

When an eminent constitutionalist writes that the 1787 document's concern with protecting the territorial integrity of the United States "informed . . . its pointed Article VI language describing the Constitution as the law of 'the Land'",⁴⁷ it is clear that something has gone wrong. How could such a learned and industrious scholar make such a claim, or the other, similarly remarkable assertions that abound in *America's Constitution*? I believe that at least part of the answer lies in Professor Amar's desire to craft a new and more sophisticated textualism employing the three disciplines of history, law, and political science. His goal, of course, is to reach a richer understanding of the text by melding these disciplines. All too often, unfortunately, the result is that his textualism escapes the constraints of all three, and Amar offers us readings of the text that are indefensible as history, law, or political science.

As a historical matter, the Supremacy Clause of Article VI was obviously using the familiar language of the Magna Carta. No competent lawyer would argue in a brief or opinion that the reference to "the land" in the clause sheds any light on the powers or responsibilities of the federal government (and certainly not any reference to protecting the territorial jurisdiction of the Republic), and a political scientist would be interested in the role of federal law

45. AMAR, *supra* note 4, at 326-27. Professor Amar points out, fairly enough, that the Second and Fourth Amendments refer to "the right of the people" and that Madison's draft of what became the Seventh has the same expression with "rights" in the plural. The problem—besides the odd reliance on a draft that was very substantially modified before it was proposed and adopted—is, as with his use of the Preamble, that these phrases are the common coin of Founding-era political discussion. Without more, their use proves only the truism that the Bill of Rights is cast in the language of the era that created it. The use of words at various points with the common root "secure" is, I think, of no interpretive significance whatever.

46. Attorney General Randolph, whom I quoted earlier, pointed out in 1791 the ironic error in putting this sort of weight on the precise wording of the constitutional text:

"Whosoever will attentively inspect the Constitution will readily perceive the force of what is expressed in the letter of the convention, 'That the Constitution was the result of a spirit of amity and mutual deference & concession.' To argue, then, from its style or arrangement, as being logically exact, is perhaps a scheme of reasoning not absolutely precise."

Dellinger & Powell, *supra* note 40, at 128 (quoting Randolph's unpublished opinion). Over-precision in constitutional textualism, in other words, can lead to legal imprecision!

47. AMAR, *supra* note 4, at 51.

supremacy in enabling the Republic to safeguard the interests of the whole, not in what amounts to a pun. Other than as a joke—which he plainly does not intend it to be—Amar’s reference to the language of the Supremacy Clause fits into no obvious area of discourse.

America’s Constitution would have been a more persuasive book if Amar had actually written the work that his words occasionally suggest—an encyclopedic examination of the text’s original meaning informed by his deep interest in institutional dynamics. But that would have been merely to write history, and Amar’s deep ambition goes beyond history or law or political science. The 1787 document, as he so often reminds the reader, begins with the words “We the People,” and Amar the textualist takes that bit of text with alarming seriousness. In *America’s Constitution*, the real story is not his often illuminating discussions of the political struggles that lay behind the various provisions, enacted at various times, which we collectively refer to as the Constitution. It is instead the story of a text that has a unity transcending the limits of history and chronology,⁴⁸ a story in which the real actor, the actual creator of the Constitution, is a People whose identity is not bound by time.⁴⁹ It is an imaginative story, told well, but the reader should take it *cum grano salis*.

II. RUBENFELD’S REVOLUTION

A. *The Form of the Argument*

In 1989 a young lawyer then in private practice published a remarkable article entitled *The Right of Privacy*.⁵⁰ *Roe v. Wade* has had many defenders, but those who are academic lawyers have often acted as such with an uneasy conscience, fearing that the great John Hart Ely was right in rejecting the decision as one that “is *not* constitutional law and gives almost no sense of an obligation to try to be.”⁵¹ Indeed it is arguable, as Ely himself feared, that the

48. Professor Amar’s search for echoes and harmonies in the language of constitutional provisions ranges forward and backward in time: He is as critical of “historians of the Founding” for “often fail[ing] to show much interest in the intense secession debate that occurred many decades later,” as he is of “Civil War historians [who] are not always fluent in the facts of the Founding.” *Id.* at 472 n.*.

49. See, e.g., *id.* at 10 (“The people had taken center stage and enacted their own supreme law” in 1788); *id.* at 468 (“We the People eventually abolished slavery and promised equal rights to blacks and, later, women”).

50. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989).

51. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1973).

desperate wish to protect the outcome in *Roe* has led many of its proponents essentially to abandon the effort to distinguish constitutional decisions by the Supreme Court from political decisionmaking by Congress or the state legislatures.⁵² Jed Rubenfeld, on the other hand, made it clear in 1989, once and for all, that he will have none of that. The Court got the law of the Constitution right in *Roe* in his view, and for that reason—and only so—the Court should adhere to the decision. Rubenfeld’s article was the single most sustained and powerful legal justification for *Roe* that had ever been written, and his work since then has combined a forthright adherence as a general matter to the Court’s “liberal” decisions with an unrelenting insistence that judicial review is legitimate only as the exercise of the power to interpret and apply law and not as a simple form of political choice. In *Revolution by Judiciary*, Rubenfeld has given us his clearest account to date of how the Court ought to decide constitutional cases, and how in doing so it is interpreting the Constitution rather than imposing the political preferences of the Justices.

Revolution by Judiciary divides into three parts of roughly the same length. The third and final section is an incisive critique of the Rehnquist Court’s constitutional legacy, which Rubenfeld identifies as the pursuit of an unacknowledged and indefensible agenda of opposition to the anti-discrimination principles that the Court and Congress appropriately enforced in the past.⁵³ Important and interesting as his arguments on that score are,⁵⁴ I believe that Rubenfeld’s fundamental contribution to constitutional law lies in the discussion, mostly though not entirely in the book’s first section, of how constitutional decisions are and ought to be reached. In this Commentary I shall focus my attention on that discussion, although I shall conclude my consideration of *Revolution by Judiciary* with some comments on the arguments in the second section of Rubenfeld’s book, which offers a theory of why constitutional law has normative force.

B. *The Missing Law of Constitutional Interpretation*

There are two background presuppositions to the argument of *Revolution by Judiciary*. The first is that the history of constitutional law is one of “radical

52. See John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures*, 77 VA. L. REV. 833 (1991).

53. JED RUBENFELD, *REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW* 175-83 (2005).

54. Among many possible examples, see his excellent, sharply critical discussion of the Court’s adoption of strict scrutiny as the proper form of review for race-based affirmative action. *Id.* at 195-201.

judicial reinterpretation” of the Constitution: the repeated episodes in which the Supreme Court has rejected established understandings of the Constitution and replaced them with novel principles and conclusions of its own devising.⁵⁵ The Court and its defenders often explain such radical reinterpretation with a “rhetoric of restoration” (what seems novel is in fact the recovery of an earlier constitutional vision that has been lost) or the claim that all that has changed are the circumstances of decision and not the constitutional principles the Court employs. In Professor Rubenfeld’s opinion these are charades that serve only to obscure the truth that in such situations the Court is “creat[ing] . . . genuinely innovative constitutional law – decisions that break profoundly from both past understandings and present doctrines.”⁵⁶ *Brown v. Board of Education* didn’t recover the lost truth about the meaning of the Equal Protection Clause: It introduced a new and creative understanding of equal protection into American constitutional law.

Rubenfeld’s second presupposition is that American constitutional law “has no account of radical reinterpretation.” He asks, “What, if anything, makes it legitimate for judges to re-read the Constitution radically What, if anything, guides or structures this power? What, if anything, limits it?”⁵⁷ Even worse, if possible, lawyers and scholars cannot explain how judges are to go about making constitutional decisions even when they intend no revolutionary change. “There is no law of constitutional interpretation”; constitutional law thus “has nearly nothing to say about the connection between the Constitution and the enormous web of doctrine spun judicially around that document.”⁵⁸ This poses no problem, to be sure, for a self-proclaimed pragmatist like Judge Richard Posner who sees constitutional “law” as the creation of outcomes “well adapted to the country’s needs” without regard to any duty to “abide by constitutional or statutory text.”⁵⁹ One takes the Posnerian route, however, only by giving up on the traditional understanding that constitutional law is

-
55. “Radical reinterpretation is, precisely, a new interpretation of the basic principles or purposes behind a constitutional provision. Through this act of reinterpretation, new constitutional purposes or principles replace the original ones.” *Id.* at 9.
56. *Id.* at 8-9. “Constitutional law has utterly rejected originalism” as the limiting criterion for judicial decisionmaking. *Id.* at 65. I will note below the sense in which one could view Rubenfeld as a kind of originalist.
57. *Id.* at 3.
58. *Id.* at 5.
59. *Id.* at 10. Rubenfeld is quoting Judge Posner’s denial of the existence of such a duty in Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 739 (2002), surely one of the most remarkable statements ever to be made by a sitting federal judge. Rubenfeld’s response to Posner is, I believe, utterly convincing. See Jed Rubenfeld, *A Reply to Posner*, 54 STAN. L. REV. 753, 767 (2002).

authoritative precisely because the judges who make it see their “first duty” to be “to abide by the Constitution: to deliver a just reading of that document according to interpretive criteria.”⁶⁰ Pragmatism in Judge Posner’s sense is simply the abandonment of law altogether, and that Rubinfeld is unwilling to do.

Fortunately for those of us less intrepid than Judge Posner, according to *Revolution by Judiciary* we have no need to give up on constitutional law as law in the sense I have just quoted. Despite the existence of radical change in constitutional law, and the nonexistence of a shared explicit understanding about how to do constitutional law properly, “[t]he extraordinary fact” is that virtually all of constitutional law—including almost all the many instances in which the disparate and often political “approaches, motives, and biases” of the justices have been on display—has been worked out “within a determinate interpretive structure.”⁶¹ Although neither the courts nor anyone else has been consciously working within that structure, Rubinfeld believes that he can show the existence of an internal logic to constitutional decisionmaking, one that is continuously at work both in decisions about the Constitution’s grants of power and in ones concerning individual rights. The first part of the book is a summary and restatement of the work Rubinfeld has long been doing in uncovering and explaining what his subtitle calls “the structure of American constitutional law.”

C. Does Constitutional Law Have an Implicit Logic?

The key to understanding the implicit logic of constitutional law lies in what Professor Rubinfeld calls the “impossibly simple distinction”⁶² between the historical understanding of what a constitutional provision addresses and historical understandings about those matters that the provision does not address.

Let us say, as a shorthand, that a prohibitory [provision] *applies* to those actions it prohibits, and that it does *not apply* to those actions it does not prohibit. So I will call specific understandings of what a constitutional right prohibits *Application Understandings*, and of what it does not prohibit, *No-Application Understandings*. . . .

Similarly, with respect to constitutional power-granting provisions (such as the commerce clause), which authorize certain actors to take

60. RUBINFELD, *supra* note 53, at 10.

61. *Id.* at 21.

62. *Id.* at 13.

certain actions, I [distinguish] specific understandings of what such a provision authorizes [from] specific understandings of what such a provision does not authorize.⁶³

Rubinfeld's strong claim is that constitutional law has almost invariably respected the historical understanding of those issues to which a constitutional provision applies—the specific actions the Free Speech Clause historically was thought to forbid or the specific regulations the Commerce Clause historically was thought to authorize. With respect to historical understandings about the concerns a provision addresses, even the most radical judicial reinterpretations have preserved the historical understanding of the text's applications. Furthermore, the “*foundational or core applications*”⁶⁴ of a provision—its central or most universally shared “Application Understandings”—have acted not only to anchor radical reinterpretation in a faithfulness to the text, but also to “serve as *paradigm cases* [that] provide the reference points for the construction of doctrinal frameworks.”⁶⁵ In other words, judges use the historical understanding about the issues a provision addresses to ground their reasoning in applying the provision to specific controversies. These paradigm cases thus define the conceptual universe within which constitutional law is debated and made. “The foundational paradigm cases are preinterpretive. They precede interpretation; they define its limits and its objects.”⁶⁶

But how then does one explain the demonstrable fact that the Supreme Court has again and again declared a principle to be the law of the Constitution when the makers and early interpreters of the provision in question would have been astounded—or shocked—to hear as much? Rubinfeld's answer is that while the Court has almost always observed Application Understandings, it has felt entirely free to reject other historical understandings addressing matters as to which the provision was originally thought to have no application. The Free Speech Clause was historically understood to prohibit government censorship and prosecutions for seditious libel, and as Application Understandings those twin prohibitions are the paradigm cases which subsequent free speech doctrine has respected and revolved around. In contrast, the Free Speech Clause was not historically thought to apply to prosecutions for blasphemy,

63. *Id.* at 14. The matter is complicated by the fact that a provision that is a grant of exclusive power to, say, Congress, has a prohibitory function as well: It forbids other actors such as the President from wielding what is put exclusively within Congress's sphere. Rubinfeld carefully works out this point. *Id.* at 48-49.

64. *Id.* at 14.

65. *Id.* at 15-16.

66. *Id.* at 132.

but the Court long ago repudiated that No Application Understanding as a guide to the proper interpretation of the First Amendment.⁶⁷ In a parallel fashion, Commerce Clause doctrine has maintained its fidelity to the paradigm cases of what the clause was historically understood to authorize Congress to do, while the Court has repeatedly upheld exercises of the Commerce Clause to regulate matters to which the founders would not have thought it applicable.⁶⁸

Grasping the fact that constitutional law treats only understandings about a provision's applications, not expectations about what it would not apply to, as the controlling paradigm case(s) is the key to understanding the remarkable combination of deep continuity and profound change that according to Rubinfeld is the "characteristic mark of American constitutional interpretation."⁶⁹ The Court has not hesitated to reach decisions "at odds with original No-Application Understandings,"⁷⁰ while even the most radical reinterpretations have "labor[ed] under the continuing obligation to do justice to the paradigm cases—or, more precisely, to do justice to the text in light of its paradigm cases."⁷¹ It therefore would be possible to call Rubinfeld's theory a form of originalism, for he insists that what renders constitutional law a coherent and workable form of law, an interpretation of the text of the Constitution and not an untethered exercise of power by unelected judicial politicians, is this obligation to build judicial doctrine and decision around historically determined paradigm cases. But those who usually call themselves originalists go further and insist that the Court is obliged to follow original understandings about what constitutional provisions do not address (No Application Understandings) as well—a practice that the Court has never followed and that, if one truly accepted it, would render most of modern constitutional law both erroneous and unintelligible.⁷² Rubinfeld, true

67. *Id.* at 25-29.

68. *Id.* at 53-56.

69. *Id.* at 47.

70. *Id.*

71. *Id.* at 17.

72. "What the originalists fail to see is that [the Court's] selective treatment of historical meaning is neither arbitrary nor unusual. It is part of the basic structure of American constitutional law." *Id.* at 31.

Professor Rubinfeld's position is further distinguished from that usually thought of as originalism in that he believes that under certain circumstances a new understanding of a provision's applications, one not actually entertained when the provision was adopted, can become "a 'fixed star' or reference point by which future interpretations are measured." *Id.* at 122. In short, a new paradigm case. He points as examples to the processes by which the Sedition Act of 1798 became a paradigm case of what the First Amendment prohibits and by which *Brown v. Board of Education* became a paradigm case of what equal protection

conservative that he is, declines to follow would-be originalists into this interpretive radicalism.

If Rubinfeld's description of the paradigm-case method of constitutional interpretation is persuasive, it thus solves at one and the same time the intellectual puzzles created by the existence of radical reinterpretation and the absence of a law of constitutional interpretation. Radical reinterpretation respects the true paradigm cases while treating freely other historical understandings; the Court has followed this pattern of decision with great fidelity and it is only now in a time of great intellectual disarray (I go beyond Rubinfeld's words) that Rubinfeld's articulation of our law's implicit logic has become necessary. And it does so without discarding law as interpretation altogether (Judge Posner) or delegitimizing the history of judicial decisionmaking since the founding (the originalists).

D. The Success of the Paradigm-Case Method

This claim is so bold as to be breathtaking, but has Professor Rubinfeld pulled it off? In my opinion, the answer is, bluntly, yes. The reader can properly reach her own judgment only by going through Part I of *Revolution by Judiciary* herself, but let me indicate why I think Rubinfeld has made good on his claim. First, while one could quibble about details and *Revolution by Judiciary* does not attempt a comprehensive examination of constitutional law issues, I believe that Rubinfeld is justified in his historical assertion that the Court has seldom if ever rejected what Rubinfeld calls the paradigm case(s) informing a provision of the text. The endless examples one can give of the Court clearly reaching results contrary to the expectations and intentions of the text's makers will turn out, almost invariably, to concern No Application Understandings; in other words, the discarded historical understanding concerned an issue to which the right or the grant of power was not thought to apply. Merely to have observed this apparent pattern in our constitutional law is a stunning achievement, and even those who reject Rubinfeld's overall argument are obligated to see the observation as one that they must recognize

requires. *Id.* at 122-23. Rubinfeld's view of such after-the-fact understandings is carefully nuanced: "[S]ubsequently developed Application Understandings . . . have a status close to that of a foundational paradigm case," but not identical, and "[n]one of them is beyond the Court's power to undo, but the Court would be under an obligation to demonstrate compelling justifications for doing so." *Id.* at 123.

and deal with in offering their own accounts of constitutional decisionmaking.⁷³

A second reason for my belief that Rubinfeld has succeeded is that his description of constitutional law as reasoning from the text's paradigm cases addresses constitutional law as the Justices and others have actually practiced it; his method, if not his terminology, is recognizable as a description of the type of basically common law reasoning that American lawyers and judges have employed in interpreting the Constitution since the founding.⁷⁴ In his conclusion, Rubinfeld remarks that "[t]he purpose of constitutional theory is, and always has been, to hold the mirror up to constitutional law," while immediately conceding that any theory will to some degree distort its subject.⁷⁵ That has to be correct, at least if the term "constitutional theory" is to denote any real connection to the constitutional law that goes on in the courts. A besetting problem in much highly ambitious constitutional scholarship is its remoteness from the practice of constitutional law, and in particular the impossibility of imagining anyone other than the scholar himself being able to

73. Professor Rubinfeld admits the possibility of two counter-examples: the Contracts Clause, as to which the Court's 1934 decision in *Home Building & Loan Ass'n v. Blaisdell*, 90 U.S. 398 (1934), arguably upheld a clear example of the sort of law prohibited by the clause's paradigm case; and the use of military force by the President in the absence of a congressional declaration of war. As to *Blaisdell*, Rubinfeld suggests that if the decision did in fact violate the Contract Clause's paradigm case the Court should overrule it; with respect to the Declare War Clause, he asserts that "American courts have never officially retreated from the principle that the President may not unilaterally declare war." RUBINFELD, *supra* note 53, at 67-68. Well, no they haven't—although that formulation of the constitutional issue is, I think, uncharacteristically imprecise and misses the point made by some scholars (me included) that there is a plausible or even persuasive original understanding that the President may make unilateral use of military force in some situations and that the courts have not erred in failing to rule otherwise. But if my doubts about Rubinfeld's brief discussion are justified, it only supports his historical claim that the paradigm case theory explains the patterns of continuity and change by eliminating one of the two counter-examples.

74. In addition to the historical claim that he has identified what in fact the Court has been doing for the past two centuries, Professor Rubinfeld properly notes that his account of constitutional law reasoning systematizes the old common law approach to the interpretation of a normative instrument. He is also aware, of course, of the important work of other distinguished constitutional lawyers who hold somewhat similar views of constitutional law. See RUBINFELD, *supra* note 53, at 205 n.1 (citing the work of Philip Bobbitt and Richard H. Fallon, Jr.); see also H. JEFFERSON POWELL, *THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM* 74-86 (1993) (arguing that traditional common lawyers looked to the concrete details of past controversies in interpreting the meaning of legal rules). "For classical common lawyers, rules were discovered in, debated in terms of, and decided with reference to stories of past situations and decisions." POWELL, *supra*, at 78.

75. RUBINFELD, *supra* note 53, at 201.

employ the tools supposedly on offer. (How would one know what counts as a textual harmony and what is a mere chance parallel in terminology?) Part I (and Part III as well) of *Revolution by Judiciary* are strongly marked by Rubinfeld's keen interest in showing, both by reflection and by example, the specifically legal character of constitutional interpretation.

I also think that Rubinfeld has rebutted the major criticisms of his legal argument that have been or might be made. A critic, first, might worry that the problem with Rubinfeld's paradigm-case account of constitutional law is not that it distorts the history or the legal character of constitutional law but that it fails to shed much light on how constitutional law ought to be done. If this is so, the account fails to address the questions raised by what Rubinfeld identifies as the presuppositions of *Revolution by Judiciary*.⁷⁶ As he himself readily admits, to identify constitutional law with reasoning on the basis of paradigm cases does not transform the enterprise into a deductive science.

Paradigm cases do not dictate unique answers to most constitutional questions. Different judges will see the paradigm cases differently; it will almost always be possible to capture the paradigmatic applications of a particular constitutional right or power within more than one interpretive paradigm. This means that five justices of the Supreme Court can, at any given moment, redetermine the basic meaning of the paradigm cases.⁷⁷

Second, and still more fundamentally, our critic might observe, there can be disagreement over what paradigm case is embodied in a constitutional provision—and even whether there was any foundational or core Application Understanding at all.⁷⁸ Third and finally, the fact that there can be good-faith disagreement over the nature and implications of the paradigm cases means

76. My colleague Erwin Chemerinsky advanced this concern in his review of an earlier version of Rubinfeld's account of the paradigm-case method. See Erwin Chemerinsky, *A Grand Theory of Constitutional Law?*, 100 MICH. L. REV. 1249, 1261-62 (2002) (reviewing JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* (2001)). For the reasons stated in the text, I think that *Revolution by Judiciary* provides a satisfactory answer to Professor Chemerinsky's criticism.

77. RUBENFELD, *supra* note 53, at 17.

78. Professor Rubinfeld admits that there is “[n]o a priori necessity dictat[ing] the existence of any specific, core, actuating, applications for the various rights and powers included in the American Constitution.” *Id.* at 119. In his judgment, however, “it just so happens that there were [such actuating applications] for just about every one of the Constitution’s most important rights and powers,” *id.*, so the point is largely theoretical. In the case of a provision with no paradigm case, the constitutional interpreter would simply be left with applying whatever “principle or proposition [is] set forth in the text” itself. *Id.* at 134.

that there can be bad-faith, manipulative arguments as well, which the method itself cannot distinguish on their face from intellectually honest ones.

This last, third point can be easily dealt with—as alluded to above, *Revolution by Judiciary* assumes from start to finish that the constitutional interpreter it is addressing acknowledges that her “first duty” as an interpreter is “to abide by the Constitution [and] to deliver a just reading of that document according to interpretive criteria.”⁷⁹ The scientific method doesn’t stop researchers from falsifying their results, but it would be silly to reject the method for that reason. In just the same way it is not an interesting criticism of the interpretive criteria Rubinfeld proposes that the criteria do not in themselves prevent an unscrupulous judge from manipulating them.

The second criticism, that in some instances we may not be able to find, or at least to agree on, a paradigmatic Application Understanding for a given provision is, I think, more serious, but only modestly so. As Rubinfeld implies,⁸⁰ there is in fact a lot of historical information about the perceived original purposes of most important constitutional provisions likely to come into controversy. Recall that a Rubinfeldian interpreter is interested only in specific Application Understandings, when they exist, and not in the broader question of what a provision’s original meaning in general was. This significantly reduces the difficulty of making (in an intellectually responsible manner) the historical assertions necessary to paradigm-case reasoning as compared to those required by a strict originalism: It is easier to conclude that the one thing the Fourteenth Amendment was unquestionably meant to do was to outlaw the black codes than it is to determine who is right about other, broader issues of original meaning. And—from my perspective if not (to the same extent, anyway) from Professor Rubinfeld’s—it causes no theoretical discomfort to admit that in the absence of a persuasive argument about what a provision’s paradigm case is, the provision simply doesn’t apply beyond whatever force can be given to its words.

Finally, our critic’s first worry over the indeterminacy left in place by Rubinfeld’s account of constitutional law is, I think, ultimately indistinguishable from worry over indeterminacy in the law generally. It is true, without any doubt, that at any given point in time there are a great many constitutional issues about which reasonable, good-faith interpreters can reach opposite conclusions, from identifying what the paradigm cases are and what principles they embody to determining how they apply to resolve contemporary disputes about very different issues. It is equally true, however,

79. *Id.* at 10.

80. *Id.* at 119.

that not all arguments are equally plausible, and that the very heart of Anglo-American law rests in making contestable judgments about which arguments are better and which worse whenever one happens to be arguing. It is a strength, not a weakness, of Rubinfeld's book that he avoids any suggestion that his own arguments, using what he believes to be the implicit logic of constitutional law, are invulnerable to contrary arguments that use the same logic more persuasively. What he has identified for us is the way in which we have made and should make arguments to one another in the shared task of interpreting the Constitution. We should not expect greater precision in executing our practices than the subject matter will allow.

E. Why Is Constitutional Law Binding? An Unnecessary Answer

In my judgment, then, *Revolution by Judiciary* is a tremendous contribution to our understanding of federal constitutional law. Professor Rubinfeld has identified a pattern in the almost infinitely complex and ever-changing substance of constitutional law that rescues the field from the charges of unintelligibility or sheer political choice. He has, furthermore, suggested what I believe to be an entirely satisfactory rationale of why judges should follow the traditional interpretive practices of our legal culture in making constitutional decisions: Those practices define what constitutional law is,⁸¹ and those who have undertaken as judges (or others) the obligation to make decisions according to constitutional law have a duty to act accordingly. Consider his 2002 comment on Judge Posner's denial that a judge has "some kind of moral or even political duty to abide by constitutional or statutory text, or by precedent"⁸²:

Unless Posner intends a distinction between abiding by the Constitution and abiding by "constitutional text" (and I don't think he intends this distinction), Posner's statement could be said to amount to an express repudiation of his oath of office. In fact, Posner's view seems to make the oath a kind of lark. The whole point of an oath is to create a moral or political duty.⁸³

No more is needed, I think, to explain the normative force for a constitutional judge of a correct account of constitutional decisionmaking: She is under a moral and political duty stemming from her acceptance of her public

81. See *id.* at 132-34.

82. Posner, *supra* note 59, at 739.

83. Rubinfeld, *supra* note 59, at 767.

office. The same is true of other citizens—legislators, executive officers, jurors—acting in public capacities. In defining for us what constitutional law is, Rubenfeld has suggested to us the reason why constitutional law has normative force.

A bit ironically, one person who would certainly dissent from my confidence in the persuasiveness and the completeness of Professor Rubenfeld's argument (as I have restated it) is Rubenfeld himself. For him, an account of why the law of constitutional law binds judges must go deeper, to wrestle with and solve what he calls "the paradox of commitment"—the philosophical problem generated by the oddity of treating as normative our past commitments when they conflict with our present preferences.⁸⁴ Most of the second section of *Revolution by Judiciary* builds on Rubenfeld's earlier work employing philosophy and game theory to address the relationship between constitutional law and democracy. Rubenfeld's work in this has led him for years to critique "presentist" understandings of democracy and to insist that self-government (whether an individual's or a society's) requires the making and maintenance of commitments over time.⁸⁵ My sense is that Rubenfeld's current formulation has achieved new levels of clarity and conceptual power.

And, in this context, I think, the philosophical work is unnecessary and distracting. Professor Rubenfeld forthrightly admits, at the beginning of the second section, that he is simply assuming "without ever proving, that what is true of individual commitments is true, mutatis mutandis, of constitutional commitments—that political self-government may be profitably understood by analogy to individual self-government."⁸⁶ Precisely: The theory of self-government set out in this book rests on a highly contestable analogy between the moral identity of individuals and the nature of a democratic and constitutional state. Many of his readers, myself included, will not find the analogy persuasive, and for us the attempt to ground constitutional law in the theory therefore fails to get off the ground. I think that Rubenfeld's analysis of the role of temporally extended commitments in our individual moral lives is potentially a major contribution to philosophical ethics, and I hope that he pursues this work further, unshackled by a felt need to relate the analysis to constitutional law. But he should also free his powerful and persuasive account of constitutional law from the link to a novel, highly contestable philosophical

84. See RUBENFELD, *supra* note 53, at 71-79.

85. It would be impossible to summarize Professor Rubenfeld's elegant argument in a footnote, and I will not try. *But see id.* at 88 (summarizing the solution to the paradox of commitment as lying in the necessity of being able to make and keep commitments to "self-government over time" if an individual or society is to enjoy autonomy).

86. *Id.* at 72.

theory. The law doesn't need the theory any more than the theory benefits from being forced to accommodate the law.

Professor Rubinfeld, I can imagine, might respond that there is a serious problem with my suggestion that he disconnect his legal theory from his philosophical one. With respect to judges and others with public duties they have voluntarily undertaken, he might concede that one can point to those voluntary undertakings as the basis for holding that they have a moral and political duty to act in accordance with the norms defining the practice of constitutional decisionmaking, but such reasoning does not address the duties, or lack thereof, of the vast majority of Americans, the vast majority of the time. Most of the time, most of us have undertaken no public duty and exercise no public office. What gives the Constitution normative force for us? Why should we, for example, obey constitutional laws enacted by Congress? These are profound questions, but they are (let it be noted) simply a peculiarly American twist on the great problem of political obligation, which goes back to Socrates if not before in the Western tradition alone. Many conflicting answers have been proposed, and American society has never had—and doubtless never will reach—a consensus on what the American answer is, or rather what it ought to be. That is, furthermore, a good thing: I think (and I believe Professor Rubinfeld thinks) that one of the most attractive features of American constitutionalism is the absence of prescriptions about “what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”⁸⁷ The question of what, if any, moral obligations we owe the Republic simply because we find ourselves within its jurisdiction and subject as a practical matter to the exercise of power by its public officials, is not, in the end, a matter of constitutional law at all,⁸⁸ and in turn constitutional law does not depend on or need a philosophical foundation. Like the Republic it structures, the practice of constitutional law is a political reality based not in theory but in history.⁸⁹ By rethinking and clarifying Rubinfeld's account of paradigm-case reasoning,

87. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

88. There is perhaps an exception: The Thirteenth Amendment purports—or so it has been interpreted by the Court, along with the right to travel interstate—to apply to private as well as governmental action, and one might expect then that private citizens would stand in the same position with respect to the enforcement of the Amendment that public officials stand with respect to all constitutional commands. As an empirical matter, however, I think most Americans would accept, from their varying moral perspectives, the existence of a moral prohibition on enslaving someone else, so the difficulty seems hypothetical.

89. “American constitutional law begins with specific commitments, sometimes written in blood. This is not a matter of a priori or conceptual necessity; it is a matter of history.” RUBENFELD, *supra* note 53, at 134.

Revolution by Judiciary makes a signal and highly welcome contribution to our understanding of the law of the Constitution.

CONCLUSION

America's Constitution and *Revolution by Judiciary* are very different books, but they share a robust confidence in the possibility of writing constitutional law in a grand manner even in an era in which almost everything in the field is "passionately contested, with little common ground from which to build agreement."⁹⁰ The books are marked by some strong similarities as well as striking differences. Both books rest on an almost medieval "realism" in talking about "We the People" that is startling to those of us of a nominalistic mindset; the reader of this Commentary will have gathered by now that I think both books are marred by misidentifying (as I see it) the language of American political discourse with a reality external to that language. Furthermore, and positively, both books take seriously the role of original understandings in American constitutionalism in ways that transcend the tired old originalism battles of the late twentieth century. Where the two books most sharply diverge is that *Revolution by Judiciary* has as its ultimate focus the actual practice of constitutional law, while *America's Constitution* is concerned with unveiling a set of textual meanings that are not finally rooted in history or law.

Perhaps most importantly, however, both these books suggest that the right response to the existing discord in constitutional law and scholarship is not to retreat to small-scale projects, but to seek with renewed zeal a grand vision of constitutional meaning. Professor Amar and Professor Rubinfeld have shown real moral courage in going out on Professor Tribe's limb to offer us broad-ranging attempts to speak about the whole of their respective, somewhat different, subjects. I have suggested some criticisms of each book out of the conviction that we honor a scholar when we take his or her work seriously enough to disagree.

H. Jefferson Powell is Professor of Law, Duke University. He is grateful to Erwin Chemerinsky and Jed Purdy for very helpful conversations on his thoughts on the books under consideration.

90. Tribe, *supra* note 1, at 292.