

# THE “UNWRITTEN CONSTITUTION” AND UNWRITTEN LAW

Stephen E. Sachs\*

*America’s Unwritten Constitution is a prod to the profession to look for legal rules outside the Constitution’s text. This is a good thing, as outside the text there’s a vast amount of law—the everyday, nonconstitutional law, written and unwritten, that structures our government and society. Despite the book’s unorthodox framing, many of its claims can be reinterpreted in fully conventional legal terms, as the product of the text’s interaction with ordinary rules of law and language.*

*This very orthodoxy, though, may undermine Akhil Amar’s case that America truly has an “unwritten Constitution.” In seeking to harmonize the text with deep theories of political legitimacy and with daily practice in the courts, the book may venture further than our conventional legal sources can support. To put it another way, anything the “unwritten Constitution” can do, unwritten law can do better; and what unwritten law can’t do, probably shouldn’t be tried. Yet whether or not we accept the idea of an unwritten constitution, by refocusing attention on America’s rich tradition of unwritten law, Amar performs a great service to constitutional scholarship.*

## I. INTRODUCTION

Everyone knows that America has “a written constitution, not an unwritten one.”<sup>1</sup> That’s a central feature of our law. And few have studied that Constitution with as much care and devotion as Akhil Amar.<sup>2</sup>

---

\* Assistant Professor of Law, Duke University School of Law. Thanks to William Baude, Joseph Blocher, Josh Chafetz, Marin Levy, David Pozen, and Amanda Schworke for advice and comments.

Particular thanks, also, to Akhil Reed Amar—who not only taught me “Reading the Constitution,” but also a great deal about reading the Constitution. I’m deeply grateful for his help as a teacher, mentor, and scholar, and I’m honored to participate in this Symposium on his work.

1. Michael Stokes Paulsen, *How to Interpret the Constitution (and How Not to)*, 115 YALE L.J. 2037, 2049 (2006).

2. See, e.g., AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* (2005); AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998).

But Amar's new book pursues another target: *America's Unwritten Constitution*.<sup>3</sup>

Beyond the “terse text,”<sup>4</sup> writes Amar, lie doctrines that “support[] and supplement[]” the document and “fill in its gaps.”<sup>5</sup> These include “the basic tools and techniques” of interpretation; “the practices, protocols, procedures, and principles that constitute the government”; and other “cherished principles of higher law.”<sup>6</sup> Together, these form America's “unwritten Constitution,”<sup>7</sup> a set of legal rules that range from the highly unorthodox (including a panoply of evolving and unenumerated rights)<sup>8</sup> to the wholly conventional (supporting the holdings, if not the reasoning, of nearly all of modern American case law).<sup>9</sup>

From a scholar committed to the document over the doctrine,<sup>10</sup> Amar's commitment to an unwritten constitution might seem surprising. In other ways, though, it's perfectly understandable. Most of the important parts of American law, “the basic ground rules that actually govern our land,”<sup>11</sup> really aren't in the Constitution's text.<sup>12</sup> And many of the rules that get called “constitutional” (and so get taught in Con Law classes) aren't spelled out there either. If the text is so incomplete, then shouldn't everyone, even a “hardcore textualist,”<sup>13</sup> start looking outside the Constitution's four corners?

Of course we should. But once we look beyond the “terse text,” the first thing we should see is the rest of the law: the vast array of ordinary legal rules that lack constitutional status, yet still play a crucial role in structuring our government and society.<sup>14</sup> Some of those rules are derived from written sources, like statutes, treaties, or regulations. Others are unwritten, like rules of common law, equity, and admiralty. These ordinary rules—unwritten, but also unmysterious—do much of the gap-filling and stabilizing work that might otherwise be attributed to an unwritten constitution.

In fact, despite the book's unconventional framing, Amar generally bases his claims about the unwritten constitution in these conventional sources of American law. Often the book supplies a label for existing le-

---

3. AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* (2012).

4. *Id.* at 481.

5. *Id.* at xi.

6. *Id.* at 481.

7. *Id.* at ix.

8. *Id.* at 103. Among other novel conclusions, Amar argues that popular acceptance can ratify incorrect judicial decisions, *id.* at 238; that popular sovereignty is an independent ground for otherwise unconstitutional statutes, *id.* at 282; and that the Fourteenth Amendment's apportionment provisions guarantee a fundamental right to vote, *id.* at 188–89.

9. *Id.* at 141.

10. See Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000).

11. AMAR, *supra* note 3, at ix.

12. See Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408 (2007).

13. AMAR, *supra* note 3, at 63.

14. See Young, *supra* note 12, at 411–12.

gal practices, binding them together as the “unwritten Constitution” while leaving their contents intact. When it does seek to change current doctrine, for the most part the book relies on rules already recognized as part of our law. Some of Amar’s arguments concern rules for reading the Constitution’s text properly, while others apply his preferred readings to existing facts. And still other claims are best understood as “constitutional backdrops”:<sup>15</sup> ordinary rules of unwritten law that the text, on its proper reading, has somehow insulated from change. With a few notable exceptions, then, Amar’s most surprising conclusions can be phrased in wholly orthodox terms.

This very orthodoxy, though, undermines the case that America has an unwritten constitution, at least in the legally binding sense. Applying that label to practices founded on existing law may mislead more than it enlightens—making nonconstitutional rules seem more binding than they really are, and real constitutional rules seem less so.

More importantly, at some point the resources of existing law run out. The book’s ambition isn’t just to relabel certain parts of our law, but to make them better, bringing our Constitution’s text into harmony with deep political theory as well as current judicial fashions. This kind of grand unified theory is a noble goal, but it’s also unattainable. The law doesn’t have to follow its own moral principles,<sup>16</sup> and it can’t stop lawyers and judges from making errors in practice. Allowing political theory and daily practice to supplement the text may be inconsistent with the social conventions defining the sources of our law. In other words, anything the “unwritten Constitution” can do, unwritten law can do better; and what unwritten law can’t do, probably shouldn’t be tried.

Even so, Amar’s provocative conclusions deserve fair consideration on their merits. And whether or not Amar convinces Americans that we have an unwritten constitution, the book’s greatest contribution may lie elsewhere: in reemphasizing the importance of unwritten law to our constitutional order, and the inseparability of our founding text from the seamless web of law that surrounds it.

## II. AMAR’S ORTHODOX CONSTITUTION

### A. *Three Preliminary Questions*

Before we can assess whether we have an unwritten constitution, we need to know what that means. What would it be like to have an unwritten constitution? If we did have one, how could we tell? And does Amar’s evidence support the claim that we do?

---

15. See generally Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813 (2012).

16. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

### 1. *What is an “Unwritten Constitution”?*

The phrase “unwritten constitution” can mean many things. That’s because constitutions do many things. Americans are used to the picture from *Marbury v. Madison* of constitutions as formal documents, “defin[ing] and limit[ing]” the “powers of the legislature.”<sup>17</sup> But other constitutions look very different. The United Kingdom doesn’t have a written constitution, but it has plenty of legal principles that regulate official action—including a healthy dose of parliamentary sovereignty.<sup>18</sup>

A political scientist, interested in how governments actually operate, might define “the constitution” in a functional way: say, “all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state.”<sup>19</sup> On that definition, America’s “constitution” includes a huge variety of legal sources, not just a single text.<sup>20</sup> Congressional committee structures, civil service laws, the Administrative Procedure Act, the organic statutes of a host of agencies, and the equivalent sources in fifty states (and also some territories and Indian tribes)—all these affect the distribution and exercise of power, even if they’re repealable at the drop of a hat.<sup>21</sup>

Thinking about a “constitution” this way can be useful, especially for scholars of comparative government. But it misses an important sense in which *lawyers* think about constitutions. In our legal system, unlike our society more generally, the significance of a constitution (state or federal) is more formal than functional. Whatever provisions get put in a constitution, however minor or functionally irrelevant,<sup>22</sup> they can’t be altered by ordinary legislation or the ordinary acts of officials. In *Marbury*, Chief Justice Marshall was certain that “all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation.”<sup>23</sup> Even if that’s not true always and everywhere, it’s certainly been true of the United States. In our system, a “constitution” refers to a particular document containing particular constitutional rules, and a legal rule gets to be called “constitutional” only if it trumps any conflicting legal rules that aren’t.

Are any of our constitutional rules, viewed in this sense, “unwritten”? As Blackstone explained long ago, “unwritten” laws can still be written down in various places, like the case reports or scholarly treatises-

---

17. 5 U.S. (1 Cranch) 137, 176 (1803).

18. See SEC’Y OF STATE FOR JUSTICE & LORD CHANCELLOR, THE GOVERNANCE OF BRITAIN, 2007, CM 7170, ¶ 211 (U.K.), <http://www.official-documents.gov.uk/document/cm71/7170/7170.pdf>.

19. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 22 (8th ed. 1915).

20. See generally Young, *supra* note 12.

21. See *id.* at 417.

22. See, e.g., ALA. CONST. amend. 634, § I (adding an extra \$40 to Conecuh County’s court costs to fund a new jail).

23. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); accord AMAR, *supra* note 3, at 205.

es.<sup>24</sup> What makes them “unwritten” is that “their original institution and authority are not set down in writing, as acts of parliament are, but they receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom.”<sup>25</sup> In other words, like the rules of grammar—and unlike the rules of Monopoly<sup>26</sup>—unwritten laws have no single and authoritative textual *source*, no pedigree tracing their validity back to a written ancestor. So we might stipulate a definition of an “unwritten constitution,” in our system, as a body of unwritten law with legal force and effect like that of the Constitution’s written text.

## 2. *How Could We Tell?*

If that’s the right way to think about unwritten constitutions, then how do we know if we have one?

As any good positivist knows (and as Amar accepts),<sup>27</sup> law is a matter of social convention.<sup>28</sup> Only contemporary acceptance by officials and the public explains why, say, Congress gets to make law for the United States and the Queen-in-Parliament doesn’t.

And as it happens, our social conventions don’t acknowledge any “unwritten Constitution”—at least not right now, and not in those terms. (Otherwise we wouldn’t need a book to persuade us.) Americans do recognize a variety of sources of law. Some are laid out in particular texts: treaties with foreign nations, say, or federal and state constitutions, statutes, regulations, and rules of court. Others lack textual foundations, such as customary international law or admiralty law, or principles of common law and equity. And all these sources stand in various relations to each other: written law generally trumps unwritten law, and within a given system (state or federal), constitutions trump everything else.<sup>29</sup> But the Constitution of the United States, the only one we’ve got, is a written document, and one that describes itself as such.<sup>30</sup>

---

24. 1 WILLIAM BLACKSTONE, COMMENTARIES \*63 (“When I call these parts of our law *leges non scriptae*, I would not be understood as if all those laws were at present merely *oral*, or communicated from the former ages to the present solely by word of mouth.”).

25. *Id.* at \*64.

26. See *Monopoly: Parker Brothers Real Estate Trading Game*, HASBRO, <http://www.hasbro.com/common/instruct/monins.pdf> (last visited June 23, 2013).

27. See AMAR, *supra* note 3, at 205.

28. See generally H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994). I don’t use “social convention” here in any technical sense. Cf. Richard H. Fallon, Jr., *Precedent-Based Constitutional Adjudication, Acceptance, and the Rule of Recognition*, in THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 47, 54 n.36 (Matthew D. Adler & Kenneth Einar Himma eds., 2009) (distinguishing various forms of conventions and related entities).

29. Cf. Kent Greenawalt, *The Rule of Recognition and the Constitution*, in THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION, *supra* note 28, at 1, 36–37 (describing a hierarchy of sources of American law).

30. See Christopher R. Green, “*This Constitution*”: *Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 N.D. L. REV. 1607, 1607 (2009) (arguing that the Constitution presents itself as “composed of language”).

Some scholars see this hierarchy as incomplete. Thomas Grey has suggested that courts can enforce higher law, including “contemporary moral and political ideals not drawn from the constitutional text.”<sup>31</sup> David Strauss has argued for constitutional “understandings that evolve over time” and that aren’t “derived from some authoritative source.”<sup>32</sup> And Richard Fallon has written that Supreme Court “precedents can sometimes lawfully prevail over what the Constitution would otherwise demand,” and that precedent is therefore “a constituent element of constitutional meaning—just as the original understanding is an element of constitutional meaning.”<sup>33</sup> These arguments aren’t founded on the conventional sources listed above. Rather, they’re direct appeals to social convention, presenting new bodies of law as independently supported by our rules of recognition, and as carrying legal authority that rivals or exceeds that of the written Constitution.

### 3. *Where Does This Fit?*

Given this typology, where does Amar’s theory fit? What kind of unwritten constitution is he envisioning, and on what is his argument based?

It might seem unfair to stipulate a definition of “unwritten constitution” that differs from Amar’s usage, and then to criticize the book for failing to meet it. Amar deliberately widens his focus; he includes in the “unwritten Constitution,” for example, the “practices [and] protocols . . . that constitute the government” in the political-science sense described above, whether or not they’re repealable by ordinary legislation.<sup>34</sup> But if the book were only about these practices and protocols, it’d be far less controversial, and far less interesting. Amar’s most significant claim is that there are *legal* rules, of (roughly) constitutional stature, that we can’t find within the text.

In the same way, it might seem unfair to demand that Amar defend his views by using the language of rules of recognition. (Alas, few people do.<sup>35</sup>) Still, it’d be good to know whether his claims can be defended by reference to already-accepted legal rules, or whether they need to be separately grounded in American social conventions instead.

As it turns out, many of Amar’s claims can be phrased in a fully orthodox way, as the natural product of the written text and already-accepted unwritten law. For example, Amar includes in the “unwritten Constitution” our rules for reading the Constitution’s written text. But

---

31. Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 706 (1975).

32. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996).

33. Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1077 (2010).

34. AMAR, *supra* note 3, at 481.

35. See Matthew D. Adler, *Social Facts, Constitutional Interpretation, and the Rule of Recognition*, in THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION, *supra* note 28, at 193, 193; Matthew D. Adler, *Interpretive Contestation and Legal Correctness*, 53 WM. & MARY L. REV. 1115 (2012).

those rules may or not be rules of law (much less constitutional law); they might just be rules of English grammar, or of common legal usage at a particular time.

Additionally, as I've discussed in prior work, the Constitution often interacts with unwritten law without actually turning it into constitutional law—whether by incorporating unwritten law by reference, by insulating unmentioned law from change, or by using defeasible language that can be defeated by legal rules the legislature can't alter.<sup>36</sup> Many of the rules in Amar's "unwritten Constitution" take one of these forms. And in each of these cases, the Constitution's text might "intertwine" with unwritten law in some way.<sup>37</sup> But that doesn't mean we have to view that unwritten law as part of an unwritten constitution. Rather, it's just ordinary unwritten law; the only thing that makes it special is the Constitution's written text.

### B. Rules for Reading the Text

The Constitution can't be read in a vacuum. To have written law, you always need something else outside the text. On Amar's view, that something is the unwritten constitution, which includes "the basic tools and techniques by which faithful interpreters tease out the substantive meaning of the written Constitution."<sup>38</sup> And some of the tools and techniques championed by Amar—such as "liquidating" the text through practice, or reading the Constitution holistically—have deep and wide-ranging consequences.

Our interpretive tools are obviously crucial to our constitutional law. But that doesn't make them part of the Constitution, written or unwritten. They might just be rules of language, or similar conventions used by lawyers in a particular place and time. That we need these tools doesn't show that our society, much less every society with a written constitution, has an unwritten constitution too.

#### I. Are the Rules for Reading in a Constitution?

No one reads the Constitution's text in isolation. We can always imagine a "hardcore textualist," who treats the document as "a crisply defined text with a neatly bounded and universally identifiable set of words," refusing to "ventur[e] even an inch beyond [its] four corners."<sup>39</sup> But that *sola Scriptura* approach<sup>40</sup> makes language incomprehensible.<sup>41</sup>

---

36. See Sachs, *supra* note 15.

37. AMAR, *supra* note 3, at 20.

38. *Id.* at 481.

39. *Id.* at 63.

40. See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 889 (1985) (describing the Reformers' rejection of interpretation).

41. See Larry Alexander & Saikrishna Prakash, "Is That English You're Speaking?": Why Intention Free Interpretation is an Impossibility, 41 SAN DIEGO L. REV. 967 (2004).

Text alone can't establish that the text is in English (as opposed to an artificial language deceptively similar to English),<sup>42</sup> that it's a form of communication rather than a random pattern of marks,<sup>43</sup> that it's properly taken as binding law rather than as a proposal, parody, or prose poem,<sup>44</sup> and so on. To use texts as law, we also need broad social agreement on those texts' accurate content and legal validity, neither of which can be established by the texts themselves.<sup>45</sup>

We don't, though, need an unwritten constitution. To understand the Constitution properly, you need to understand late-eighteenth-century English—down to the very last detail about the semicolon.<sup>46</sup> Yet rules of English grammar aren't rules of law, and so they certainly aren't rules of constitutional law—written or otherwise.

The same goes for many of the communicative practices specific to law, the “settled nuances or background conventions that qualify the literal meaning” of a legal text.<sup>47</sup> Most of these are really just rules of legalese, as opposed to English. But others may count as “law” under our rules of recognition. The common law, for example, provides that the repeal of a repealing statute revives the original act.<sup>48</sup> (For federal statutes, that's been abrogated by 1 U.S.C. § 108.) Legal rules like these don't have to be constitutional rules, even if they're used to read a constitutional text. We can use common-law rules to construe statutes and constitutions, without pretending that the rules themselves suddenly gain the stature of statutes or constitutional provisions. They're just common-law rules, which happen to offer clues as to a text's meaning at the time it was written. That's why, for example, we care about how the interpretive rules stood when a provision was enacted, not how they stand as a matter of law today. (If the common-law rule about repealing statutes evolved back and forth over time, we'd have to read new repeals differently, but we wouldn't keep reconstructing old ones, discarding or resurrecting various ancient statutes as we go.)

Think of it this way. When reading the Constitution, we might use the canon of *expressio unius*—for example, to conclude that the enumer-

---

42. See *id.* at 974–75.

43. See *id.* at 976–77.

44. See Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1825–26 (1997).

45. Cf. AMAR, *supra* note 3, at x (noting that we couldn't even “properly identify the official written Constitution” without some degree of extratextual agreement).

46. See, e.g., Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CALIF. L. REV. 291, 334–52 (2002) (explaining the importance of semicolons for the existence of West Virginia).

47. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2393 (2003); see also ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 51–339 (2012) (describing various canons of interpretation); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003) (discussing the importance of interpretive conventions).

48. 1 BLACKSTONE, COMMENTARIES \*90.



ated heads of the Supreme Court's original jurisdiction are exclusive.<sup>49</sup> Even if that canon can fall out of favor over time, and even if Congress can get rid of it for federal statutes, these changes wouldn't stop us from using it to read the Constitution. But that doesn't make *expressio unius* part of an unwritten constitution, outside the text but still superior to legislation. Whatever justifies us in using the canon in the first place (say, because it was part of the legal and linguistic understandings of those who framed and ratified the document) is also what stops Congress from inserting a different rule in its place. If the Constitution started off saying *X*, Congress can't tell us it now says *Y* instead, whether the issue is canons of construction or semicolon use. These are historically determined features of the Constitution's meaning, not separate rules of constitutional law. Whether the Constitution was written to be read holistically or piecemeal,<sup>50</sup> or by analogy to statutes, treaties, or private contracts,<sup>51</sup> is very important to know; but any legal conclusions we draw from that are just conclusions about the original import of the text.

Moreover, the social acceptance of a particular text as binding law—though crucially important—isn't part of an unwritten constitution either. Obviously a text can't just declare itself to be law and expect to be taken seriously. So the text's validity, as well as its meaning, depends on factors outside the text. To positivists, though, foundational texts that aren't the product of other legal rules might get their validity from social conventions expressing our rules of recognition. These conventions aren't themselves legal rules; their job is to ground law in observable, *nonlegal* phenomena. And if every legal system with a written constitution has to have an unwritten constitution too—*every* system, no matter what its content, no matter how differently it's structured, no matter whether it wants such a constitution or not—then “unwritten constitution” has to be a largely empty concept.

## 2. *What Rules for Reading Can Do*

While rules for reading needn't be part of an unwritten constitution, they can still give rise to legal consequences that aren't fully spelled out in the text. The discussion below focuses on two of Amar's examples, liquidation and holistic interpretation, to show that our choice of rules could be very significant indeed—and could support many of the conclusions Amar attributes to the unwritten constitution.

---

49. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (“Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all.”).

50. See AMAR, *supra* note 3, at 408.

51. See Powell, *supra* note 40, at 896.

a. Liquidation by Practice

Article II is famously opaque; it vests “[t]he executive Power” in “a President of the United States of America” without saying what that means.<sup>52</sup> Is it just the handful of powers enumerated in Sections 2 and 3? Is it a separate residuum of authority? Does the Vesting Clause let the President remove executive officers, or maybe recognize foreign nations?

Amar holds that the Vesting Clause does “confer . . . a general residuum of ‘executive Power’ above and beyond [the] various specific presidential powers and duties” listed in the rest of Article II.<sup>53</sup> On Amar’s account, however, the Clause’s opaqueness was intentional: the presidency was “undertextualized” precisely so that George Washington, the most respected American of his day, could fill in the details through practice.<sup>54</sup> In other words, “the framers and ratifiers were deputizing Washington to clarify the Executive Article, subject to the broad advice and consent of the other branches and the American people.”<sup>55</sup> Based on Washington’s conduct and on debates in Congress during his term, Amar concludes that the President does have unilateral power to remove “individual department heads” at will.<sup>56</sup>

These claims might seem surprising on first glance. But Amar’s supporting arguments fall within a wholly conventional framework. One interpretive convention that may have been used at the Founding was to resolve contested issues in light of subsequent practice, through a process known as “liquidation.” In *The Federalist Papers*, Madison suggested that “[a]ll new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”<sup>57</sup> Hamilton, too, wrote that courts would have to “liquidate and fix [the] meaning and operation” of conflicting legal texts.<sup>58</sup> Caleb Nelson has suggested that liquidation may have been a widely shared component of “the founding generation’s own interpretive intentions”: should part of the text have an indeterminate meaning, “they expected subsequent practice to liquidate the indeterminacy and to produce a fixed meaning for the future.”<sup>59</sup>

Perhaps the most famous case of a supposed liquidation is the “Decision of 1789,” in which the House of Representatives debated the re-

---

52. U.S. CONST. art. II, § 1, cl. 1.

53. AMAR, *supra* note 3, at 310.

54. *Id.* at 313.

55. *Id.*

56. *Id.* at 322.

57. THE FEDERALIST NO. 37, at 236 (James Madison) (Jacob E. Cooke ed., 1961).

58. THE FEDERALIST NO. 78, *supra* note 57, at 525 (Alexander Hamilton).

59. Nelson, *supra* note 47, at 547.

moval of executive officers.<sup>60</sup> At the time, Madison suggested to his colleagues that their debate would serve as a “permanent exposition of the constitution.”<sup>61</sup> And, as Amar describes it, “Congress squarely acknowledged presidential authority to remove certain kinds of executive appointees at will.”<sup>62</sup>

The recognition power gets a similar treatment. Some have grounded that power in the President’s authority to “receive Ambassadors and other public Ministers,”<sup>63</sup> and so to decide whether to recognize the governments sending them.<sup>64</sup> But Amar grounds it in the practices of the Washington Administration, which chose to recognize the revolutionary government in France without consulting Congress, as presidents have done ever since.<sup>65</sup> If it was unclear who held this power at the Founding, perhaps Washington’s example liquidated the obscurity and settled the issue “beyond all doubt.”<sup>66</sup>

These claims might be right or wrong. In form, however, they don’t actually represent part of an unwritten constitution, or an invisible Delegation-to-Washington Clause. If the Framers thought Washington would likely be the first President, and also that the first President would end up doing a lot of liquidating, then they may well have expected Washington to have an outsized personal influence on the Constitution—without thinking that the document actually conferred that power on him, explicitly or implicitly.

More generally, if liquidation was part of the interpretive conventions under which the Constitution was written, then it may be a legitimate aspect of what the Constitution *is*—a document designed to be liquidated in a certain way, just as a treaty, contract, will, or deed is written with certain kinds of interpretive rules in mind.<sup>67</sup> Getting the interpretive conventions wrong could lead to a misreading of the document, just like mistakes about when it was written, or what language its authors and audience spoke. And if the liquidation convention really took account of practice in the way Amar describes, then we may well have to look to early practice to see which questions have already been liquidated, and which were left open for us to decide.

So, even if liquidation were mandated by original interpretive conventions,<sup>68</sup> that wouldn’t make it part of an unwritten constitution. On this picture, we can’t understand the text correctly without considering

---

60. See generally Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021 (2006) (describing these debates).

61. 1 ANNALS OF CONG. 495 (1789) (Joseph Gales ed., 1834).

62. AMAR, *supra* note 3, at 322.

63. U.S. CONST. art. II, § 3.

64. See, e.g., *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1428–29 (2012) (discussing a party’s argument).

65. AMAR, *supra* note 3, at 316.

66. *Id.* at 315–16.

67. See Nelson, *supra* note 47, at 561–69; Powell, *supra* note 40, at 896.

68. Nelson himself is skeptical on this point. See Nelson, *supra* note 47, at 552–53.

post-Founding practice, because that's just the kind of text it is. And these post-Founding facts, though important, still wouldn't have any independent legal authority; the only reason we'd pay attention to them would be that the (written) Constitution, properly understood, required it.

b. Holistic Interpretation

Amar is well known for reading the Constitution holistically.<sup>69</sup> Echoing *M'Culloch v. Maryland*, he writes that “we must never forget that it is a Constitution—a single rational document, as opposed to a pile of unconnected clauses—that we are expounding.”<sup>70</sup> Though the text may be a “bundle of compromises,”<sup>71</sup> struck at various times across the centuries, Amar urges us to read it as a unified whole, composed to serve a coherent set of “general purposes.”<sup>72</sup> Even amendments added hundreds of years apart can exert “a powerful, albeit unwritten, gravitational pull that invites reinterpretation . . . so that the Constitution as a whole coheres as a sensible system of rules and principles.”<sup>73</sup>

Amar's holism yields some of his most surprising conclusions. For instance, he suggests that “[a]t a certain point,” the repeated references to specific rights to vote in various constitutional amendments<sup>74</sup> have established a general right to vote, against which “all other disfranchisements [are] presumptively suspect.”<sup>75</sup> He contends that the Twenty-Fourth Amendment's reference to “primary . . . election[s]”<sup>76</sup> must be “interpolate[d]”<sup>77</sup> back into the representation-penalty provision of Section 2 of the Fourteenth Amendment, which doesn't mention primaries.<sup>78</sup> And he argues that the latter provision, though explicitly limited to a state's “male inhabitants . . . being twenty-one years of age,”<sup>79</sup> has been implicitly amended by the Nineteenth and Twenty-Sixth Amendments to include women and eighteen-year-olds as well.<sup>80</sup>

---

69. See generally Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) (describing this interpretive approach).

70. Compare AMAR, *supra* note 3, at 408, with 17 U.S. (4 Wheat.) 316, 407 (1819).

71. MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 201 (1913) (internal quotation marks omitted).

72. AMAR, *supra* note 3, at 26.

73. *Id.* at 408.

74. U.S. CONST. amend. XIV, § 2; *id.* amend. XV, § 1; *id.* amend. XIX, § 1; *id.* amend. XXIV, § 1; *id.* amend. XXVI, § 1.

75. AMAR, *supra* note 3, at 191.

76. U.S. CONST. amend. XXIV, § 1.

77. AMAR, *supra* note 3, at 408.

78. U.S. CONST. amend. XIV, § 2 (discussing “the right to vote at any election for the choice of electors for President and Vice President,” etc.).

79. *Id.*

80. See AMAR, *supra* note 3, at 189, 408 n.\*.

Whether or not we accept these claims (or holism in general),<sup>81</sup> there's nothing in them that suggests an unwritten constitution. Amar includes among various “unwritten sources” for interpretation the “principles and purposes implicit in various patches of constitutional text,” as well as “structural deductions from the constitutional system viewed holistically.”<sup>82</sup> These principles, purposes, and deductions may not be listed in the text, but they also don't constitute unwritten law in the sense used here, because they have no independent legal force. (Think of a statutory analogy: the fact that Congress intended *X* or *Y* isn't itself a rule of law, but a fact potentially relevant to interpreting the law they did pass.) The only source of law here is the text, read intelligently and in a single sitting. Should the Nineteenth Amendment be read as a narrow rule, banning only discrimination in the franchise? Or should it be read broadly, as providing that “no law”—including prior constitutional amendments—“could henceforth treat males and females differently in the domain of voting rights”?<sup>83</sup> Amar's broad reading could be right or wrong; in any case, the only piece of law being applied is the Nineteenth Amendment.

The same is true of other readings urged by Amar. Do the voting-rights amendments confer only “a right to vote for legislators,” or also “a right to vote within a legislature” by running for office and standing for election?<sup>84</sup> Is the Fourteenth Amendment's Citizenship Clause<sup>85</sup> merely a rule of nationality, or is it also an anti-caste rule, forbidding the government from “heaping disabilities or dishonor upon any citizen by dint of his or her birth status”?<sup>86</sup> These questions are deep ones, but they don't go deeper than the text itself. Answering them, one way or another, is part of the ordinary project of constitutional interpretation. And once we've answered them, we'll simply apply the rules we've found in the Constitution, not any exotic rules of unwritten law.

Nor is a commitment to holism itself required by unwritten constitutional law. If the Constitution, or any particular amendment, had been originally understood not to be a holistic document—if holism were imposed on it “from the outside,” so to speak—then we'd need some independent source of legal authority for reading it that way, over and above our usual method of reading old texts. That source of authority (whatev-

---

81. For objections to holism, see generally Adrian Vermeule & Ernest A. Young, Commentary, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730 (2000). Precise texts serve numerous conflicting purposes at once, none of which should be advantaged; holism can be the enemy of perspicuity or ease of application; holism places an impossible burden on drafters; there's no reason to expect coherence from texts composed at separate times; and so on.

82. AMAR, *supra* note 3, at 20.

83. *Id.* at 287.

84. *Id.* at 288. I don't know if Amar would extend this argument to the Twenty-Sixth Amendment, overturning the age requirements for service in Congress.

85. See U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”).

86. AMAR, *supra* note 3, at 150.

er it is) might make it appropriate to call holistic interpretation a rule of unwritten constitutional law. But Amar quite clearly believes that structural coherence *was* expected at the Founding,<sup>87</sup> even if the Founders failed to “underst[an]d the logical implications of the new American system.”<sup>88</sup> This historical claim, too, could be right or wrong. But if it’s right, then holistic interpretation simply gives effect to a text according to the rules prevailing at the time for interpreting such texts. That’s a pretty standard way of handling written law, and it suggests that holistic interpretation doesn’t come from an unwritten constitution.

### C. *Rules Explicitly Incorporated by Reference*

A written constitution sometimes incorporates unwritten law by reference. When that happens, the unwritten law acts *like* a constitutional rule, but it isn’t actually contained in the Constitution, and doesn’t have any constitutional status of its own. I’ve previously described such rules as a type of constitutional backdrop—a rule of law that’s not really constitutional in nature, but that’s protected by the text from certain ordinary means of change.<sup>89</sup>

Consider the Seventh Amendment. On the conventional reading, the “right to trial by jury” that the Amendment “preserved” is the right as it existed at Westminster in 1791.<sup>90</sup> If so, the ancient common-law rules of jury trial might be beyond Congress’s power to alter. But that doesn’t make them part of any constitution, written or unwritten. They’re just ordinary common-law rules—and a different rule, one that *is* found in the text, requires us to keep using them. (Amar’s alternate reading of the Seventh Amendment makes the point even more clearly: if the Amendment “preserve[s]” in federal courts the jury right as it currently exists under state law,<sup>91</sup> then the jury rules themselves aren’t part of any constitution, being revisable through ordinary state legislation.)

Incorporation by reference lets the text do a great deal very quickly, without having to spell everything out. In fact, several portions of Amar’s unwritten constitution are better understood this way. Consider three examples: the “lived Constitution,” the rights of jurors, and the judiciary’s enforcement powers.

#### 1. *Incorporation and the “Lived Constitution”*

On Amar’s view, the “lived Constitution” protects Americans’ unenumerated rights.<sup>92</sup> The Supreme Court has protected such rights in the name of “substantive due process,” which Amar describes as “bor-

---

87. *Id.* at 27 (discussing *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)).

88. *Id.* at 286.

89. *See generally* Sachs, *supra* note 15.

90. *See, e.g.*, *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996).

91. *See* AMAR, *supra* note 3, at 166 n.\*.

92. *Id.* at 132.

der[ing] on oxymoron.”<sup>93</sup> But, he argues, the Court usually got to the right place in the end. Amar grounds many of the fundamental rights identified by the Court—such as the right to use contraceptives in *Griswold v. Connecticut*,<sup>94</sup> or of defendants to give sworn testimony in *Ferguson v. Georgia*<sup>95</sup>—in two provisions: the Ninth Amendment’s rule against construing enumerated rights “to deny or disparage others retained by the people,”<sup>96</sup> and the Fourteenth Amendment’s ban on states’ abridging “the privileges or immunities of citizens of the United States.”<sup>97</sup>

To Amar, the “lived Constitution”<sup>98</sup> is composed of rights “that the American people . . . have in some way or another endorsed.”<sup>99</sup> These include a wide variety of unenumerated rights “that the people themselves live out” and “that the citizens themselves treat as fundamental in their rhythms and routines.”<sup>100</sup> One “core unenumerated right[,]” for example, is the right “to discover and embrace new rights and to have these new rights respected by government, so long as the people themselves do indeed claim and celebrate these new rights in their words and/or actions.”<sup>101</sup> So, “[a] strongly held belief by 55 percent of Americans that they have a constitutional right against abusive practice Y” could, in Amar’s view, “suffice as a textual matter” for the right to be recognized “as a truly unenumerated right of ‘the people.’”<sup>102</sup> Amar concludes that broadly accepted atextual rights (like those in *Griswold* or *Ferguson*) have actually attained constitutional status, even if they weren’t recognized at the Founding. By contrast, unenumerated rights that have “never won the broad and deep support of the American people”—he suggests the Fourth Amendment exclusionary rule<sup>103</sup>—haven’t made the list.

This all strays rather far from current doctrine. But, in another sense, Amar’s claims are perfectly orthodox forms of constitutional argument. Suppose that the Ninth Amendment simply said, “all rights that ordinary Americans, from time to time, regard as fundamental shall be enforced as such.” In that case, we’d have to go along, no matter how much uncertainty it caused. (That’d be the Founders’ fault, not ours.) As the facts then change on the ground, with ordinary Americans adopting or discarding various fundamental rights, judges who change the doc-

---

93. *Id.* at 119.

94. 381 U.S. 479 (1965); see AMAR, *supra* note 3, at 121.

95. 365 U.S. 570 (1961); see AMAR, *supra* note 3, at 107–08.

96. U.S. CONST. amend. IX.

97. *Id.* amend. XIV, § 1.

98. AMAR, *supra* note 3, at 110.

99. *Id.* at 103.

100. *Id.*

101. *Id.* at 108.

102. *Id.* at 136.

103. *Id.* at 115. That said, consider what happens to judicial nominees who openly disparage the exclusionary rule. See, e.g., 133 CONG. REC. S9188 (daily ed. July 1, 1987) (statement of Sen. Kennedy) (“Robert Bork’s America is a land in which . . . rogue police could break down citizens’ doors in midnight raids . . .”).

trine accordingly would just be doing their jobs: “recognizing new rights” wouldn’t be “amending the document,” but “applying it.”<sup>104</sup> Even Amar’s fifty-five percent rule, which grates most harshly on the lawyer’s ear, could be a perfectly rational response to a vague “regard as fundamental” standard.

For the same reasons, though, this hypothetical Ninth Amendment wouldn’t generate an unwritten constitution. Unenumerated rights would be protected precisely because a *written* Ninth Amendment referenced them. Incorporating ordinary Americans’ views on fundamental rights is no weirder, theoretically, than incorporating English jury rules under the Seventh Amendment, incorporating state property law under the Takings Clause, or incorporating the rules of algebra in calculating interest on tax debts.<sup>105</sup> The views of ordinary Americans don’t have any special legal force on their own; the only thing that would (hypothetically) make them binding would be the Constitution’s written text.<sup>106</sup>

Of course, all this skips over an important question: do the *actual* Ninth and Fourteenth Amendments say such things? Do they have an implicit Regard-as-Fundamental Clause? Amar’s reading is disputed, to say the least.<sup>107</sup> But whether it’s correct or not is a perfectly ordinary problem of interpretation. Because the “lived Constitution” lives or dies by a particular reading of the text, it isn’t really unwritten.

## 2. *Incorporation and the Jury*

In the Founders’ vision of government, the jury played a central role, allowing ordinary people to check and balance government power.<sup>108</sup> But that system, Amar argues, has now been lost. Today’s juries have fewer powers, less information, and a weaker capacity for decision making.<sup>109</sup> In particular, today’s doctrine denies juries the right to acquit against the evidence,<sup>110</sup> showing disagreement with the law or mercy for the defendant—even though “the very point of jury trial is to ensure that American penal policy, both in gross and in micro, commands broad support among the citizenry.”<sup>111</sup>

104. AMAR, *supra* note 3, at 136 (emphasis omitted).

105. See Leslie Green, *Legal Positivism*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta, ed., Fall 2009), <http://plato.stanford.edu/archives/fall2009/entries/legal-positivism> (offering the interest example).

106. The same is true of Amar’s analysis of the Equal Protection Clause. If ‘equal’ really means ‘equal, in light of contemporary social understandings of equality,’ then it’d be perfectly natural for courts to consider “broad understandings of social meaning.” AMAR, *supra* note 3, at 296.

107. For contrary views of both amendments, see, e.g., Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEO. L.J. 329 (2011); Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 895 (2008).

108. See generally AMAR, *supra* note 3, at 431.

109. *Id.* at 437–40.

110. *Id.* at 432–33.

111. *Id.* at 439.



On Amar's account, the Framers protected jury rights "in light of the post-Tudor history of the Anglo-American jury," when the jury's power to acquit against evidence was a crucial constraint on the Crown.<sup>112</sup> Though this history wasn't "explicitly written into the original Constitution or the Bill of Rights that immediately followed," Amar argues that it "surely formed part of the implicit understanding of the words 'jury' and 'grand jury' that did appear in these documents."<sup>113</sup> So, he concludes, the Constitution "is best read as presupposing an unwritten right of jurors" to nullify.<sup>114</sup>

If Amar is right about the history, are these jury rights part of an unwritten constitution? If the nullification power had been part of the linguistic meaning of "jury" and "grand jury" (or of "Trial . . . by Jury"<sup>115</sup> more generally), then nothing unwritten is involved; it's simply what the (written) Constitution requires. On the other hand, if the power to nullify had been merely an incidental feature of jury trials, rather than part of what the word "jury" *meant*, then maybe it wasn't written into the Constitution after all.

Amar understands nullification as an "unwritten[]" substratum of American constitutionalism.<sup>116</sup> But there's another possibility, namely that jury nullification (to the extent the history supports it) was a separate rule of unwritten law. As Amar notes, the Constitution's references to juries "did not describe wholly new institutions being conjured into existence."<sup>117</sup> Rather, the reference to "Trial...by Jury" may have codified and incorporated by reference a recognized bundle of common-law rights associated with jury trial, whether or not these rights were linguistic components of the word "jury." In other words, Article III and the Sixth Amendment might have worked like the Seventh Amendment, incorporating and preserving various rules not spelled out in the text. (Similarly, the First Amendment might protect "'the' freedom of speech and of the press" through incorporation by reference, "affirm[ing] and declar[ing]" a "preexisting right" rather than creating one afresh.<sup>118</sup>)

If that's right, then a jury today might have the power to nullify if and only if that power was recognized at common law—not because it's a freestanding unenumerated right, but because the Constitution incorporated it by reference. This reading aligns with Amar's intuition that tra-

---

112. *Id.* at 423.

113. *Id.* at 424.

114. *Id.* at 419.

115. U.S. CONST., art. III, § 2, cl. 3.

116. AMAR, *supra* note 3, at 419.

117. *Id.* at 424–25.

118. *See id.* at 54 (emphasis omitted); *see also* United States v. Stevens, 130 S. Ct. 1577, 1585 (2010) (construing "'the freedom of speech' codified in the First Amendment" to exclude various "historically unprotected" types of speech); Crawford v. Washington, 541 U.S. 36, 54 (2004) ("Rather, the 'right . . . to be confronted with the witnesses against him,' Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." (omission in original)); Sachs, *supra* note 15, at 1867.

ditional jury rights “would continue to operate . . . much as they had before—unless, of course, some other implicit or explicit element of the Constitution indicated otherwise on some particular issue of jury law.”<sup>119</sup> At the same time, this reading eliminates the need for a separate source of unwritten legal authority. The jury’s powers flow directly from the common law, accepted and safeguarded by the language of the Constitution.

### 3. *Incorporation and Judicial Remedies*

Incorporation by reference might also explain the remedial power that Amar sees Article III as conferring on judges. To Amar, one “hugely significant component” of the judicial power is the power “to implement the Constitution” by developing practical heuristics, rules of evidence, burdens of proof, and remedies that turn “abstract meanings” into “actual rules of decision.”<sup>120</sup> This is an enormous power. For example, Amar rejects much of the Court’s doctrine on universal suffrage; in his view, the Equal Protection Clause “as originally written and understood was categorically inapplicable to voting.”<sup>121</sup> But, he argues, because Section 2 of the Fourteenth Amendment calls on Congress to reduce the representation of states that restrict suffrage, and because Congress has never in fact imposed such a penalty, “judges are [now] justified in treating these disfranchisements as invalid” anyway, as a “simple matter of remedy law.”<sup>122</sup>

As startling as this conclusion may be, Amar’s reasoning claims to invoke perfectly ordinary rules of pleading and procedure. It is only because judges *usually* have power over such things, on his account, that they have power over them with respect to the Constitution. But that very ordinariness suggests that these rules aren’t part of any unwritten constitution.

Amar describes these procedural powers as conferred though Article III’s vesting of the “judicial Power.”<sup>123</sup> Yet perhaps the term wasn’t so specific in terms of linguistic meaning—so that, say, foreign courts that lacked power to develop their own heuristics or design their own reme-

---

119. AMAR, *supra* note 3, at 425.

120. *Id.* at 209.

121. *Id.* at 224.

122. *Id.* at 188. Note that many states still bar voting by mentally incompetent citizens, a category not excepted from Section 2. U.S. CONST. amend. XIV, § 2; *see also* Mo. Prot. & Advocacy Servs. v. Carnahan, 499 F.3d 803, 810 n.8 (8th Cir. 2007); Kimberly Leonard, *Keeping the ‘Mentally Incompetent’ from Voting*, THE ATLANTIC, Oct. 17, 2012, <http://www.theatlantic.com/health/archive/2012/10/keeping-the-mentally-incompetent-from-voting/263748>. This exclusion may never have affected enough people to change apportionment—but maybe the same could be said of the requirement of having property or children in a school district, *see* Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969).

123. U.S. CONST. art. III, § 1.

dies would have been using something other than “judicial Power.”<sup>124</sup> But the grant of judicial power might well have incorporated by reference a residuum of conventional judicial powers, powers that were incident to the judiciary in the same way that Madison and Hamilton thought the removal power incident to the Executive.<sup>125</sup> These powers may have included, for example, “the power to issue binding judgments . . . within the court’s jurisdiction”;<sup>126</sup> and we could read Amar as including other auxiliary powers in this class.

If all that’s correct, then there’d be no need for an unwritten constitution to explain judicial doctrines implementing the text. On this picture, when a court establishes a new doctrine, it’s using its incidental powers of determining procedures and establishing remedies. And the political branches’ inability, in some cases, to overturn what the court has done would thus be a function of the (written) Vesting Clause of Article III.

This story assumes, of course, that such powers *actually were* incidental to the courts. That’s a historical question, and probably a contested one. Federal courts haven’t always had a fully free hand to reshape procedures, remedies, and rules of evidence as they desire.<sup>127</sup> And Amar’s claim that courts can expand suffrage if the political branches have failed to do so seems in tension with other doctrines about enforcement discretion or the textual commitment of issues to coordinate branches.<sup>128</sup>

More importantly, the relative silence of the text on issues of pleading and evidence doesn’t mean that those issues were wholly delegated to the courts. As Justice Breyer has pointed out, “silence is not ambiguity; silence means that ordinary background law applies.”<sup>129</sup> The ordinary background law might have imposed binding, rather than flexible, constraints on the courts’ ability to craft new doctrines and to advance the purposes of substantive law.<sup>130</sup> But either way, it’d be ordinary law that decides, not an unwritten constitution.

---

124. See John Harrison, Essay, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 522 (2000) (making this argument in the context of stare decisis); cf. Sachs, *supra* note 15, at 1864 (making a similar argument).

125. See Sachs, *supra* note 15, at 1859–63.

126. William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1811 (2008).

127. See, e.g., Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 93 (requiring federal courts in common-law actions to follow the “forms and modes of proceeding” then used by the states in which they sat); Process Act of 1792, ch. 36, § 2, 1 Stat. 276, 277 (retaining that rule); Conformity Act of 1872, ch. 255, § 5, 17 Stat. 196, 197 (requiring dynamic conformity with the “practice, pleadings, and forms and modes of proceeding existing at the time” in state courts); Act of Jan. 2, 1975, Pub. L. No. 93–595, 88 Stat. 1926 (1975) (codified as amended at 28 U.S.C. app. (2006)) (establishing the Federal Rules of Evidence).

128. See, e.g., *Nixon v. United States*, 506 U.S. 224 (1993) (textual commitment); *Heckler v. Chaney*, 470 U.S. 821 (1985) (discretion).

129. *New Jersey v. New York*, 523 U.S. 767, 813 (1998) (Breyer, J., concurring); *accord id.* at 783 n.6 (majority opinion).

130. See *supra* note 126 and accompanying text.

*D. Rules Implicitly Insulated from Change*

Incorporating a rule by reference means mentioning it explicitly. But the Constitution can also insulate legal rules from change without even mentioning them, let alone specifying their content. So long as the text disables other actors from changing the rules in the usual way, the rules simply keep on going under their own power, enjoying constitutional protection without being named in the Constitution.<sup>131</sup>

The simplest example involves the law of state borders. When two states border a changing shoreline, the Supreme Court determines the new border under traditional doctrines drawn from international law<sup>132</sup>—including, for example, rules distinguishing accretive from avulsive changes.<sup>133</sup> These rules aren't set out in the Constitution's text. Even so, Congress can't easily alter them, at least as to existing shorelines. That's because redrawing state lines created by past accretions and avulsions would reassign "Parts of States" to other states without consent—something expressly prohibited by Article IV.<sup>134</sup> In this way, the traditional border rules function *like* constitutional rules, in that they're hard to change (and might even require a constitutional amendment), but they have no constitutional force on their own.<sup>135</sup>

Are any of the rules in Amar's "unwritten Constitution" actually rules insulated from change? The discussion below identifies two examples: Congressional contempt powers and majority voting.

*1. Congressional Contempt*

The Constitution lets each House of Congress "punish its Members for disorderly Behaviour."<sup>136</sup> It doesn't mention punishing nonmembers for contempt. Yet both Houses have exercised that power since the dawn of the Republic, arresting and jailing private citizens and even executive officials.<sup>137</sup>

The textual case for that power is extremely weak. Amar notes that each House can "determine the Rules of its Proceedings,"<sup>138</sup> which might imply some authority "to protect its core functions against outside interference or defiance."<sup>139</sup> But if that's right, then every agency housekeeping statute would confer similar arrest powers. Likewise, the claim that

---

131. See Sachs, *supra* note 15, at 1827–38.

132. See, e.g., *New Jersey*, 523 U.S. at 784.

133. See *id.*

134. See U.S. CONST. art. IV, § 3, cl. 1.

135. See Sachs, *supra* note 15, at 1828–31.

136. U.S. CONST. art. I, § 5, cl. 2.

137. See *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821); JOSH CHAFETZ, *DEMOCRACY'S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS* 222–34 (2007); Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1128–43 (2009) [hereinafter Chafetz, *Executive Branch Contempt*].

138. U.S. CONST. art. I, § 5, cl. 2; AMAR, *supra* note 3, at 336.

139. AMAR, *supra* note 3, at 336.

arrest powers “simply went without saying as an implicit element of ‘legislative Power’”<sup>140</sup> could be hard to square with the requirements of due process, or with Article I’s careful enumeration of “all legislative Powers herein granted.”<sup>141</sup>

Amar suggests that this power is best supported by “early usage,” in the same way that “early presidential practices” settled issues by liquidation.<sup>142</sup> If so, then it wouldn’t be derived from an unwritten constitution, for all the reasons discussed above. But liquidation, too, is an odd fit. Why regard this usage as liquidating the meaning of the *text*, if nothing in the text actually speaks to the issue?

Yet there’s another possible foundation for congressional contempt powers, one also present in Amar’s work.<sup>143</sup> They might be based, not on practices after the Founding, but on a shared common-law tradition *before* the Founding. Arrest powers had been exercised by Parliament and by the colonial and early state legislatures: they were a recognized part of the common law of legislative privilege.<sup>144</sup> Given that background, if the Constitution did nothing to abrogate the traditional arrest power, then the Houses of Congress might still enjoy it—not because the text says so or an unwritten constitution requires it, but simply because an unwritten common-law rule applicable to all legislatures had continued in force. In that case, the Rules of Proceedings Clause might indeed secure each House’s ability to make use of a power they already have, and might prevent the power from being taken away by legislation.<sup>145</sup>

Whether or not all this is true depends on the history and the text—in particular, whether the common law of legislative privilege was abrogated by the due process clause or the limits on Congress’s enumerated powers. But if this account is right, it might be more satisfying than an account based on liquidation. (For one thing, it helps to explain our adherence to certain rules from the pre-Founding period, like the need to release prisoners “when the house session ends.”<sup>146</sup>) It would also show why the contempt power doesn’t require an unwritten constitution. Even if the source of the power is in unwritten law, that law needn’t have any special constitutional status. It might just be a rule of common law, one that continues in force after the Founding and that was inadvertently protected by the Constitution’s text.

---

140. *Id.*

141. U.S. CONST. art. I, § 1.

142. AMAR, *supra* note 3, at 339.

143. *See id.* at 336–37.

144. *See* Chafetz, *Executive Branch Contempt*, *supra* note 137, at 1143.

145. *See* Sachs, *supra* note 15, at 1857.

146. AMAR, *supra* note 3, at 336.

## 2. *Insulation and Majority Vote*

The same could be said for majority vote in Congress. Amar argues that the modern filibuster is unconstitutional, because the Constitution “requires ultimate majority rule in the Senate.”<sup>147</sup> Of course, the text doesn’t explicitly require majority voting, and it lets the Senate set the “Rules of its Proceedings.”<sup>148</sup> But because majority rule was the universal default at the Founding, and because the original Constitution gave a specific voting rule only when something other than a majority was needed, Amar contends that “the Constitution’s text evidently incorporated this majoritarian premise.”<sup>149</sup> To Amar, majority rule “go[es] without saying in the Constitution, in the absence of strong implicit or explicit contraindication.”<sup>150</sup>

So stated, the argument seems to rely on an unwritten constitution. The (written) Constitution gives the House and Senate full power to pick their own rules. If majority rule was the old default, why can’t the Senate pick a new one? Treating the consensus favoring majority rule as an independent and binding requirement—one that displaces the Senate’s constitutional power to set its own rules—seems like treating it as part of an unwritten constitution.

But there’s another possibility. By the time of the Founding, Amar notes, majority rule had been established “in common *law* as well as common right”;<sup>151</sup> the “general rule of all parliamentary bodies [was] that . . . the act of a majority of the quorum is the act of the body.”<sup>152</sup> This common-law rule would have persisted in the Houses of Congress unless displaced by written law, such as the Constitution *or* the rules of a House. So, if the Senate makes a rule requiring sixty votes to end debate on a bill, that’s fine; the Senate rule overrides a common-law rule, and not the other way around. But, as Amar points out, there’s one deeply problematic feature of the Senate’s rules: *the rules themselves* can’t be amended without a two-thirds vote to end debate.<sup>153</sup> *That* rule, and not the filibuster, is the problem.

The Constitution gave the Senate power to “determine the Rules of its Proceedings.” Under the common law of legislative procedure, that power would ordinarily be exercised by a majority of a quorum, which could then adopt rules regulating any of the Senate’s activities. But a rule limiting the rule-making power in particular—say, by declaring the existing rules unamendable, or amendable only by some process requiring a supermajority vote—would violate the common-law rule against

---

147. *Id.* at 362.

148. U.S. CONST. art. I, § 5, cl. 2.

149. AMAR, *supra* note 3, at 358; *see also id.* at 363. *See generally* Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003 (2011).

150. AMAR, *supra* note 3, at 363 (discussing majority rule in light of the ratification process).

151. *Id.* at 358 (emphasis added) (internal quotation marks omitted).

152. *United States v. Ballin*, 144 U.S. 1, 6 (1892); *see* AMAR, *supra* note 3, at 364.

153. SEN. R. XXII(2); AMAR, *supra* note 3, at 362, 582 n.37.

entrenchment, and would abridge the Senate’s ongoing constitutional power to “determine” its rules. (As Blackstone put it, “[a]cts of parliament derogatory from the power of subsequent parliaments bind not.”<sup>154</sup>) As discussed below, this anti-entrenchment rule serves as an exception to the defeasible language of the Rules of Proceedings Clause.<sup>155</sup> So the Senate must be able to change its rules by a majority of a quorum, even though it could use those rules to require unanimous voting on every *other* question it faced. For this issue in particular, Amar concludes, “the rule that the Constitution has entrenched for each house is majority rule.”<sup>156</sup>

What’s important to point out, though, is *how* the Constitution entrenched this rule. The majority-voting norm isn’t a rule of constitutional law. It’s just part of the common law of legislative procedure, which applies until properly displaced. The Rules of Proceedings power can be used to displace majority voting, but that power is itself limited by another rule of common law, namely the anti-entrenchment rule. And because the only way of displacing the anti-entrenchment rule is to use the Rules of Proceedings power—the very power that anti-entrenchment limits—there’s nothing the Senate can do to get rid of it. So the Constitution really does require majority voting on certain questions, but not because it *says*—even in invisible ink—that majority voting is required. Instead, the text simply fails to displace certain common-law rules, and fails to grant sufficient power to the Houses to displace those rules themselves. The relevant rules are rules of unwritten law, to be sure, but not part of an unwritten constitution.

### *E. Defeasible Language and Defeaters*

The previous example might seem confusing. How can the anti-entrenchment rule, a mere rule of common law, limit the Constitution’s clear text? Doesn’t the Constitution trump statutes, and don’t statutes trump common law? In fact, our legal language is what logicians call “defeasible”: we ordinarily state legal rules subject to unnamed exceptions that defeat their operation in particular cases.<sup>157</sup> Because of this feature of our language, the Constitution protects from abrogation some unwritten rules that seem, at first glance, to contradict the document’s text.<sup>158</sup>

---

154. 1 BLACKSTONE, COMMENTARIES \*90; cf. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) (agreeing that “one legislature is competent to repeal any act which a former legislature was competent to pass”).

155. See *infra* notes 167–78 and accompanying text; see also Sachs, *supra* note 15, at 1848–54.

156. AMAR, *supra* note 3, at 367.

157. See Carlos Iván Chesñevar et al., *Logical Models of Argument*, 32 ACM COMPUTING SURVEYS 337, 338–39 (2000); H.L.A. Hart, *The Ascription of Responsibility and Rights*, in LOGIC AND LANGUAGE 145, 147–48 (1st ser.) (Antony Flew ed., 1951).

158. This discussion summarizes a more extensive treatment in Sachs, *supra* note 15, at 1838–47.

In normal usage, we routinely make statements about the law without including all the necessary and sufficient conditions for their application. We describe a contract as valid if there's offer, acceptance, and consideration, without mentioning capacity or the Statute of Frauds;<sup>159</sup> we define burglary as "breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony,"<sup>160</sup> without mentioning defenses like duress, infancy, or diplomatic immunity; and we say that in-state "service of process confer[s] jurisdiction,"<sup>161</sup> without mentioning exceptions for "force or fraud."<sup>162</sup> This doesn't mean that we're speaking loosely, or that our definitions are somehow improper. Rather, legal statements are *always* made subject to defeat from unknown sources. When Congress enacts that "anyone who does *X* shall be imprisoned for two years," the law applies to "anyone." But Congress doesn't need to remind us that diplomats, three-year-olds, or persons under duress might be excepted, any more than it needs to remind us that imprisonment has to wait for trial, conviction, and sentence.<sup>163</sup> Courts automatically treat new laws as defeasible, applying them "in light of the background rules of the common law" unless there is "some indication of [legislative] intent, express or implied," to change the rules.<sup>164</sup>

The same is true of the Constitution. Article III defines treason without mentioning any defenses; but since the Founding, common-law defenses have been accepted even in the face of the constitutional definition.<sup>165</sup> Likewise, Congress can legislate on a wide variety of subjects ("in all Cases whatsoever," for D.C. and the territories<sup>166</sup>), but it can't declare its laws unamendable, because this power is limited by the anti-entrenchment rule discussed above.<sup>167</sup>

Rules that act as defeaters for constitutional language don't themselves need to be constitutional rules, any more than an uncodified duress defense that limits criminal statutes needs to be a rule of statute law. These defeaters are just ordinary rules of unwritten law, which interact with constitutional rules without themselves becoming part of the Constitution. And the crucial question, in each case, is whether that ordinary unwritten law itself receives any textual protection against future abrogation or change.

---

159. See Chesñevar, *supra* note 157, at 338.

160. Taylor v. United States, 495 U.S. 575, 580 n.3 (1990) (internal quotation marks omitted).

161. Burnham v. Superior Court, 495 U.S. 604, 613 (1990) (plurality opinion).

162. *Id.*; see Wanzer v. Bright, 52 Ill. 35, 41 (1869); Tickle v. Barton, 95 S.E.2d 427, 431 (W. Va. 1956).

163. See Frank Easterbrook, *The Case of the Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1913, 1913 (1999).

164. Staples v. United States, 511 U.S. 600, 605–06 (1994).

165. See United States v. Vigol, 2 U.S. (2 Dall.) 346, 347, 28 F. Cas. 376, 376 (C.C.D. Pa. 1795) (No. 16,621) (discussing duress).

166. See U.S. CONST. art. I, § 8, cl. 17.

167. See, e.g., Lockhart v. United States, 546 U.S. 142, 147 (2005) (Scalia, J., concurring); United States v. Winstar Corp., 518 U.S. 839, 872 (1996) (plurality opinion); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135 (1810).



In his book, Amar suggests that “cherished principles of higher law” limit government action, “even if these specific principles do not appear explicitly in the terse text.”<sup>168</sup> Those unenumerated limits seem like prime candidates for an unwritten constitution.<sup>169</sup> Once we start thinking in terms of defeasibility, though, even these principles might be understood not as unwritten constitutional rules, but as ordinary rules of unwritten law.

### I. Nemo Judex

Consider the maxim *nemo judex in sua causa*, that no one can be a judge in his own case.<sup>170</sup> This maxim plays a central role in Amar’s case for the unwritten constitution; his opening example discusses whether the Vice President can preside over his own impeachment.<sup>171</sup> As Amar describes it, the maxim was a “foundational feature of civilized legal systems—not merely in late eighteenth-century America and England, but across the planet and over the centuries.”<sup>172</sup> Against this kind of authority, he argues, the plain language of the Constitution gives way. The Founders’ interpretive tradition, following Blackstone, would “expound the statute by equity,” disregarding the “collateral matter [that] arises out of the general words, and happens to be unreasonable”—the paradigm case of which is a statute authorizing a man to “determine his own quarrel.”<sup>173</sup>

This sounds a lot like an unwritten constitution, but it doesn’t have to. The question isn’t whether *nemo judex* is so awesome that it triumphs over the Constitution’s text. General language is often defeated by more specific unwritten rules, even if written law normally trumps unwritten law, and even if the defeater isn’t all that important in the long run (e.g., laches). Here, *nemo judex* wasn’t just a good idea, but a recognized rule of common law. And as Amar notes, many of Blackstone’s “basic English legal principles . . . applied with full force in America.”<sup>174</sup> So it’s not crazy to think that *nemo judex* might have gone “without saying”<sup>175</sup>: the point of defeasibility is to allow legislators to act “in light of the back-

---

168. AMAR, *supra* note 3, at 481.

169. See generally Grey, *supra* note 31.

170. Contra Adrian Vermeule, *Contra Nemo Iudex in Sua Causa: The Limits of Impartiality*, 122 YALE L.J. 384 (2012).

171. AMAR, *supra* note 3, at 5.

172. *Id.* at 13.

173. 1 BLACKSTONE, COMMENTARIES \*91; see also AMAR, *supra* note 3, at 8. For a general discussion of the “equity of the statute” in the early United States, compare John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001), with William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001), and John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648 (2001).

174. AMAR, *supra* note 3, at 7.

175. *Id.* at 8.

ground rules of the common law,” unless they actively decide to change the rules.<sup>176</sup>

All this said, Amar might be right or wrong on the Vice President’s impeachment role. The answer depends on the best reading of the Constitution and on the actual scope of *nemo judex* at the Founding.<sup>177</sup> But either way, the argument is at least as strong from the perspective of defeasibility as it would be from the unwritten constitution. To have its full effect, *nemo judex* doesn’t need any status more exalted than that of an ordinary rule of common law.

Understanding the actual nature of the rule also helps us answer other questions more fully. If *nemo judex* is just a rule of common law, then it can be abrogated—unless there’s something in the Constitution that prevents it. So suppose the Senate, using its rulemaking power, adopts a rule specifically inviting the Vice President to preside over his impeachment if he wants. Now the analysis is less clear. If *nemo judex* is just a common-law maxim, then the Senate rule should trump. Written law normally beats unwritten law—and unlike the anti-entrenchment rule, *nemo judex* doesn’t limit the very power that might be used to abrogate it. But if *nemo judex* were truly a constitutional rule, then it should operate regardless of the Senate’s wishes. That seems unlikely, and it would require some special justification above and beyond a well-established common-law pedigree.

## 2. *Defeasibility and Higher Law*

Defeasibility can also help us to understand Amar’s claims regarding higher law and natural principles of justice. For example, Amar argues that the Ex Post Facto Clauses were unnecessary: the common law at the Founding was allegedly so hostile to ex post facto laws that a generally worded grant of legislative authority would exclude them.<sup>178</sup> This, again, sounds in defeasibility: a recognized and specific prohibition defeats a general grant. The historical issues here may be contested; during and after the Convention, some portrayed ex post facto laws as a real threat (or even a positive benefit), though it’s hard to know whether the speakers were talking about criminal cases or just civil ones.<sup>179</sup> Either

---

176. *Staples v. United States*, 511 U.S. 600, 605 (1994).

177. See, e.g., Michael Ramsey, *Michael Stern and Seth Barrett Tillman on the Vice President’s Impeachment Trial*, THE ORIGINALISM BLOG (Nov. 4, 2012, 7:00 A.M.), <http://originalismblog.typepad.com/the-originalism-blog/2012/11/michael-stern-and-seth-barrett-tillman-on-the-vice-presidents-impeachment-trialmichael-ramsey.html>.

178. See AMAR, *supra* note 3, at 9–10; see also 1 BLACKSTONE, COMMENTARIES \*46 (describing such laws as cruel and unjust).

179. See, e.g., 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 376 (Max Farrand ed., 1911) (“Mr Carrol remarked that experience overruled all other calculations. It had proved that in whatever light they might be viewed by civilians or others, the State Legislatures had passed them, and they had taken effect.”); *id.* (statement of Mr. Williamson) (“Such a prohibitory clause is in the Constitution of N. Carolina, and tho it has been violated, it has done good there & may do good here, because the Judges can take hold of it.”); *id.* at 640 (statement of Mr. Mason) (“Both the general legisla-

way, the form of this argument is plainly consistent with an exclusive commitment to a written Constitution.

Even Amar's broadest argument, that the Constitution has to be consistent with "the first principles of justice,"<sup>180</sup> needn't invoke an unwritten constitution. Of course, if we applied those principles of justice through a direct appeal to social convention—because we believe in them, as Americans, and expect them to be reflected in our law—then they'd constitute a form of unwritten constitutional law. But things are different if we apply those principles because of the written Constitution. If the Constitution simply *said* that "the foregoing is subject to natural justice," there'd be nothing else to do. Or, if original interpretive conventions would have understood the text as having an implicit Natural Justice Clause, then we'd be either overreading or underreading the text by doing otherwise. (On this picture, natural justice—like impossibility or scrivener's error—would simply be one more on the list of appropriate canons.) And if neither the text nor the interpretive conventions said that, but natural justice had been a recognized requirement of common law applicable to grants of authority, then *maybe* this rule might have defeated the general language of Article I. None of these theories, though, involves any unwritten constitution. The first relies on the Constitution's text itself; the second on rules for reading that explain what the text is; and the third on unwritten law lacking any constitutional status.

Whether these theories are true, of course, depends on the facts. For every Justice Chase, who doubted that anyone would "entrust a Legislature with such powers" as impairing private contracts or taking from *A* to give to *B*,<sup>181</sup> there may have been a Justice Iredell, who thought "the principles of natural justice" were "regulated by no fixed standard," and who thought judges should respect the legislature's "equal right of opinion."<sup>182</sup> Adjudicating disputes like these from two centuries away is tricky, and demands precise attention to the historical record. But so long as our sources of legal authority remain the same, these disputes needn't involve any unwritten constitution.

---

ture and the State legislature are expressly prohibited making *ex post facto* laws; though there never was nor can be a legislature but must and will make such laws, when necessity and the public safety require them; which will hereafter be a breach of all the constitutions in the Union, and afford precedents for other innovations."); *see also* MARCUS [JAMES IREDELL], ANSWERS TO MR. MASON'S OBJECTIONS TO THE NEW CONSTITUTION (Newbern, N.C., Hodge & Wills 1788), *reprinted in* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES: PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787–1788, at 333, 368 (Paul Leicester Ford ed., Brooklyn, n. pub. 1888) ("*Ex post facto* laws may sometimes be convenient, but that they are ever absolutely necessary I shall take the liberty to doubt . . .").

180. AMAR, *supra* note 3, at 10.

181. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388–89 (1798) (opinion of Chase, J.) (emphasis omitted); *see* AMAR, *supra* note 3, at 101.

182. *Calder*, 3 U.S. (3 Dall.) at 399 (opinion of Iredell, J.).

## III. AMAR'S UNORTHODOX CONSTITUTION

If Amar's book did no more than highlight an underappreciated set of conventional legal arguments, in which written text works hand-in-glove with unwritten rules, that itself would be worthy achievement. Yet the book has a higher aim. The "unwritten Constitution" enhances and perfects the text, reinforcing its claim to moral authority and connecting it firmly to current judicial practice. These goals are worthy ones, and they're natural for scholars passionate about the Constitution to pursue—even to the point of venturing beyond the text.

Unfortunately, passion can mislead us as well as inspire us. It would be a good thing for the Constitution to be fully legitimate, or fully consistent with day-to-day practice. But that doesn't make it so. And the aspects of Amar's book that are truly unorthodox (including its most novel proposal, the "enactment argument") seek these ends by reaching beyond the traditional sources of law, drawing legal inferences directly from theories of legitimacy or from judicial practice.

Of course, "unorthodox" doesn't necessarily mean "wrong." No one can rule out, *a priori*, that there might be aspects of our existing practices and social conventions that have been left out of the standard hierarchy of legal sources. In that case, unorthodox views of law might actually be the best pictures of our society's legal commitments; every argument has to stand or fall on its own merits. But from the perspective of the casual observer, it's enough to point out that our legal system hasn't yet openly incorporated these rules—and that Amar's arguments for including them in an unwritten constitution may not be fully persuasive.

A. *Popular Sovereignty*

Why obey the Constitution? Why does it bind us? Many scholars have asked this question, and Amar offers a clear answer: popular sovereignty. He argues that the Constitution's "basic claim to legitimacy" rests on the theory that the people are sovereign.<sup>183</sup> The people adopted the Constitution through a special process with a special "democratic mandate," one that is "superior to any authority that could be claimed by . . . ordinary lawmakers elected in the ordinary way."<sup>184</sup>

From this political commitment, Amar infers specific legal conclusions. If we regard the Constitution as legitimate (and we do), then we have to accept popular sovereignty as a legitimating principle for our legal regime, and thus as a potential source of legal rules. Only popular sovereignty can explain why the Constitution trumps ordinary law: "a mere statute passed by Congress is not democratically equivalent to a

---

183. AMAR, *supra* note 3, at 285.

184. *Id.* at 52.

Constitution ratified more directly by the people themselves.”<sup>185</sup> And if “[t]he written text depends on the unwritten principle of popular sovereignty,” then it “must be construed in light of that principle even though [it] does not quite say so in any one explicit clause.”<sup>186</sup>

If this were right, then popular sovereignty really would be part of an unwritten constitution, a new source of legal rules outside the traditional canon. But, as shown below, there’s reason for doubt. Legitimacy and legal validity are different things, and one needn’t imply the other. And when it comes to specific applications, popular sovereignty proves far too complex a concept to have easy translation into legal rules.

### 1. *In General*

Legitimacy can sometimes inform legal reasoning without creating law on its own. We might interpret old texts with an eye to that era’s philosophical presuppositions.<sup>187</sup> And if our legal sources leave a question indeterminate, we might as well go with the answer that’s morally preferable. But Amar sees the unwritten constitution as going further than this—as using legitimacy as a direct source of legal rules.<sup>188</sup>

The problem with that move is that it may confuse legitimacy, a political concept, with validity, a legal one. Whether a given legal system is politically legitimate, whether it deserves our adherence, obedience, subversion, or rebellion, is an “ought” question of morality and political theory.<sup>189</sup> That’s very different from the “is” question of whether a particular rule happens to be valid within that legal system—something that, to a positivist, is a matter of social fact.<sup>190</sup> The law of East Germany might have been wildly illegitimate, both substantively vicious and against the will of the governed; but we can still investigate its contents and find out whether, say, East Germans were allowed to emigrate or not. Often it’s only because we *know* the hateful contents of a legal system that we can then condemn the system as illegitimate.

What’s true of bad legal systems is also true of good ones. The principles that ground the legitimacy of the American legal system—the ones that provide reasons for adhering to our law—don’t themselves have to be legal rules, or even sources of legal rules, within the system. Many of the Founders did believe in popular sovereignty, or view the

---

185. *Id.* at 279.

186. *Id.* at 285.

187. *See, e.g.,* *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 429 (1819) (rejecting state taxes on federal instrumentalities, partly because “the people of a single state cannot confer a sovereignty which will extend over [the people of the United States]”); *see also* AMAR, *supra* note 3, at 31 (making a similar argument).

188. *See infra* text accompanying notes 205–07, 211–17.

189. *See generally* Fabienne Peter, *Political Legitimacy*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., Summer 2010), <http://plato.stanford.edu/archives/sum2010/entries/legitimacy>.

190. *See generally* HART, *supra* note 28; Hart, *supra* note 16.

Constitution as legitimate because it had, in their view, been properly adopted by a sovereign people.<sup>191</sup> And one reason to adhere to the American legal system today might be that the system is more or less responsive to Americans' desires. But it's less clear that popular sovereignty is a rule *within* our legal system, under our rules of recognition, as opposed to a political and moral argument *for* our legal system.

What our social conventions identify as law is an empirical question about how our legal system works and what its participants believe. Armchair sociology, at least, suggests that we don't yet recognize popular sovereignty as a rule of law—not least because Amar's arguments have yet to gain widespread acceptance.<sup>192</sup> Maybe, as a matter of political morality, the Constitution *ought* to trump ordinary statutes because it's the more authentic voice of the people.<sup>193</sup> (Even if the actual people it now governs weren't alive in 1788, and had no chance to vote?) As a legal matter, that kind of authenticity is irrelevant. The Constitution *does* trump statutes because that's the kind of law we see it as; that's the role that our social conventions give it in our system.<sup>194</sup>

## 2. *Specific Applications*

To understand the differences between these views, consider two areas of law where Amar sees popular sovereignty as making a real difference: stare decisis and women's equality.

### a. Stare Decisis

American judges have relied on precedent for a long time—even when precedent conflicts with their best reading of the Constitution. Knowing this, lawyers routinely focus their arguments on the doctrine, not the document.<sup>195</sup> Some academics have taken this practice to show that precedent, under our social conventions, is an independent source of constitutional law that properly overrides the text.<sup>196</sup>

Amar rejects that approach, arguing that the judiciary has no more power to override the Constitution than does Congress or the President.<sup>197</sup> But he sometimes encourages judges to adhere to the doctrine over the document, even when the prior precedent “misinterpreted the

---

191. AMAR, *supra* note 3, at 52–53.

192. Cf. Michael Steven Green, *Legal Revolutions: Six Mistakes About Discontinuity in the Legal Order*, 83 N.C. L. REV. 331, 380 (2005) (making this point).

193. See AMAR, *supra* note 3, at 279.

194. Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.”).

195. AMAR, *supra* note 10 (decrying this practice).

196. See, e.g., Fallon, *supra* note 33, at 1077.

197. AMAR, *supra* note 3, at 237; see also *id.* at 238 (“Departures from the document—amendments—should come from the people, not from the high court.”).

central meaning of some part of the Constitution.”<sup>198</sup> When an erroneous precedent enjoys widespread popular acceptance, he argues, obeying the people means leaving their preferred mistakes in place,<sup>199</sup> and thus accepting the judiciary’s “gloss” on the text.<sup>200</sup>

This argument for stare decisis doesn’t depend, as some others do, on existing sources in the legal hierarchy. Amar doesn’t assert that the Constitution itself provides for stare decisis—say, because “judicial Power” requires adherence to precedent,<sup>201</sup> or because Article III makes judges the supreme expositors of the Constitution.<sup>202</sup> Nor does he suggest that stare decisis is a common-law presumption that courts can fall back on when the law is uncertain.<sup>203</sup> And he doesn’t limit his argument to cases in which the Ninth Amendment, on his reading, adopts rights that ordinary Americans have come to regard as fundamental.<sup>204</sup>

Instead, Amar justifies these departures from the text by relying on popular sovereignty. On his view, whatever “‘We the People’ deliberately laid down could not be changed, except by a later amendment reflecting wide and deep popular approval.”<sup>205</sup> But this wide approval needn’t be stated formally. So a government action that squarely contradicts the text can still become good law, so long as it is “later championed not merely by the Court, but also by the people.”<sup>206</sup> In other words, “[w]hen the citizenry has widely and enthusiastically embraced an erroneous precedent,” and “most” of the precedent’s initial critics “have deemed [it] to be fundamental and admirable,” then a court may “view this precedent as sufficiently ratified by the American people so as to insulate it from judicial overruling.”<sup>207</sup>

These legal conclusions don’t necessarily follow. One *feature* of the legal system chosen by “We the People” might be a requirement of formal agreement on whether and when new rules will supplant the constitutional text. (The people’s choice to ratify Article V, and not to amend it since, might be their most recent word on the topic.) When it comes to the basic mechanisms of governance, there’s much to be said for choosing rules over standards.<sup>208</sup> Adopting popular precedents as a source of

---

198. *Id.* at 238.

199. *See id.* at 238–40.

200. *Id.* at 231.

201. *See Anastasoff v. United States*, 223 F.3d 898, 900–03 (8th Cir.), *vacated as moot on reh’g en banc*, 235 F.3d 1054 (8th Cir. 2000).

202. *See Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

203. *See, e.g., Caleb Nelson, Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001); *see also* Sachs, *supra* note 15, at 1863–66; *infra* text accompanying notes 243–45.

204. *See AMAR, supra* note 3, at 238 (describing the case for stare decisis as “*especially* true if,” not only true if, “the erroneous precedent recognized an unenumerated right before its time” (emphasis added)).

205. *Id.* at 237.

206. *Id.* at 238.

207. *Id.*

208. *See John Harrison, The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 457–62 (2001).

law, regardless of what our other legal commitments might be, disables the people from making that choice.

This kind of direct appeal to popular sovereignty lacks support in the usual hierarchy of legal sources. But it also lacks the kind of endorsement by social convention that might justify an unwritten addition to the list. As Amar notes, the Supreme Court doesn't "assert its supremacy over the written Constitution," even when its precedents have received broad popular acceptance.<sup>209</sup> Instead, the Court always "asserts its own subordination to the Constitution," portraying its judgments as bound by the text.<sup>210</sup> Without evidence that Amar's ratified-precedent theory has itself been "sufficiently ratified by the American people" as "fundamental and admirable,"<sup>211</sup> it doesn't seem required by a commitment to popular sovereignty.

#### b. Women's Equality

The Nineteenth Amendment's ban on sex discrimination in voting was a sea change in American politics and society. Legally, though, Amar views it as even more fundamental. The Amendment recognized the unfairness of denying women the vote, and thereby "undercut the democratic legitimacy of the constitutional regime that preceded" it—a regime run solely by men.<sup>212</sup> So "when the old Constitution is read to trump a modern women's-rights statute," passed by legislators for whom women can now vote, "it is hard to see how this trumping can be said to be democratically consistent with popular sovereignty."<sup>213</sup>

For Amar, the fact that popular sovereignty is "the written Constitution's legitimating principle"<sup>214</sup> has direct consequences for women's rights. In his view, the Constitution trumps statutes only because it has a better claim to speak for the people.<sup>215</sup> If a modern Congress, elected by a diverse population with an expanded franchise, writes a civil-rights statute that arguably goes "beyond the powers" conferred by dead white males—even the powers to enforce the Fourteenth and Nineteenth Amendments—then the statute could still be valid, because of popular sovereignty.<sup>216</sup> "[T]he unwritten Constitution is a Constitution of American popular sovereignty, and popular sovereignty is perverted when more democratic, post-woman-suffrage enactments championing women's rights are trumped by less democratic, pre-woman-suffrage legal texts."<sup>217</sup> To "vindicate" this principle, he offers a "basic precept":

---

209. AMAR, *supra* note 3, at 205.

210. *Id.*

211. *Id.* at 238.

212. *Id.* at 279.

213. *Id.* at 281.

214. *Id.*

215. *Id.* at 279.

216. *Id.* at 280, 285.

217. *Id.* at 282.



“When the written Constitution can fairly be read in different ways, congressional laws that are enacted after the Nineteenth Amendment and are designed to protect women’s rights merit a special measure of respect because of their special democratic pedigree.”<sup>218</sup>

This argument may prove too much. If an “old Constitution” shouldn’t be “read to trump a modern women’s-rights statute” such as the Violence Against Women Act,<sup>219</sup> could Congress find assailants through suspicionless searches, deny them assistance of counsel, and subject them to cruel and unusual punishments?<sup>220</sup> Could the states?<sup>221</sup>

Amar avoids these issues through a proviso that the modern statute must be “clear” and the old constitutional text “ambiguous,”<sup>222</sup> capable of being read “in different ways.”<sup>223</sup> But why clarity should matter here is, to say the least, unclear. Amar is right that the Nineteenth Amendment was “designed to work as *law*”<sup>224</sup>; any reading that deprives us of clear rules will frustrate that purpose. Yet that’s only one purpose among others. Clear texts can be just as biased or politically illegitimate as vague ones. (The problem with coverture laws or the Black Codes wasn’t that they were too hard to understand.) If the Constitution’s legal force really hinges on its democratic pedigree, then we have every reason to prefer a “clear and more democratic statutory text” over equally clear language from the Bill of Rights. (And if clear text is so important, what happens when Congress overrides the *unwritten* constitution—say, by denying alleged abusers the right to testify in their own defense?)<sup>225</sup>

Nor is it clear why popular sovereignty has such bite regarding sex in particular. Few women were allowed to vote before 1919. But *no one* alive today voted on the Constitution of 1787. And almost no one alive

218. *Id.* at 281–82.

219. *Id.* at 281.

220. Amar elsewhere suggests that the unwritten constitution can expand individual rights, but not contract them. *See id.* at 239, 557 n.24. But that claim relates to Amar’s theory of the Ninth and Fourteenth Amendments in particular; and a grant of individual rights can be just as oppressive, from a gender perspective, as a limitation on government powers. *See, e.g.,* FED. R. EVID. 412(b)(1)(C) (suggesting that sexual assault defendants may have a constitutional right to present evidence of the victim’s sexual history).

221. Federalism produces real confusions here. If the old Constitution suffered from a democracy deficit, why would that give *Congress* “broad power to protect women’s rights”? AMAR, *supra* note 3, at 282. Why not the state legislatures, for which women also vote? The Constitution isn’t silent on this point: undelegated powers are reserved by default “to the States respectively, or to the people.” U.S. CONST. amend. X. By definition, any unwritten sex-equality power lies outside the enforcement clauses of the Fourteenth and Nineteenth Amendments, which *do* empower Congress. So if popular sovereignty generates an unwritten sex-equality power, and nothing suggests that the power is delegated to the federal government, then it belongs to the states. And if the state legislatures, elected by women and men together, choose not to adopt certain sex-equality measures, then extending Congress a preemptive power would actually disrupt their democratic choices.

222. AMAR, *supra* note 3, at 285.

223. *Id.* at 281; *see also id.* at 319 (“Where the text and structure of the written document are clear, the written Constitution trumps the unwritten Constitution . . .”).

224. *Id.* at 284.

225. *See id.* at 97; *cf. id.* at 138 (suggesting that a single statute, as opposed to a “dramatic[] change[]” in the “legislative pattern,” would normally be insufficient to trump unwritten rights).

today voted on anything in the 1920s, though both women and men were allowed to. Treating the Constitution as democratic enough for today's men, but not for today's women, involves a certain kind of essentialism: men and women are so different that one group can't bind the other,<sup>226</sup> but today's men are enough like men of the 1780s, and today's women like women of the 1920s, to be bound by all of *their* decisions.<sup>227</sup>

The point of all this isn't to criticize Amar's account. It's to suggest that popular sovereignty is a very woolly concept when used as a rule of law, rather than a principle of politics. People disagree on how best to apply moral notions like these, which is why we have specific legal rules to guide our conduct in the interim.<sup>228</sup> If our social conventions already gave popular sovereignty the legal force Amar describes, that'd be that; but our intuitions seem to point the other way. And if the people, who are meant to be sovereign, don't themselves recognize popular sovereignty as part of a system "designed to work as *law*,"<sup>229</sup> then we'd have no reason to disagree.

### B. *The Pull of Practice*

Constitutional scholars often wrestle with the tension between the document and the doctrine. Although everyone agrees that the Constitution's text is supreme, that supreme law sometimes seems at variance with day-to-day practice in the courts—a gap that an unwritten constitution might fill. Amar's book makes a particularly noteworthy effort to reconcile text and practice. On his account, the vast majority of today's judicial doctrine is consistent with the document, properly understood. Even the most innovative rulings of the modern Supreme Court regularly "reached the right result," albeit with the wrong reasoning.<sup>230</sup>

But to get there, Amar relies on practice in a particular way—as a "gloss" on the text, a new source of constitutional law.<sup>231</sup> On Amar's account, practice supports our reliance on precedent; it influences our understanding of the text; and it serves as an independent constraint on constitutional meaning. Each of these roles, though, may be highly problematic. At a more abstract level, practice constitutes our law, revealing the social conventions and rules of recognition that we share. But whether those conventions recognize day-to-day practice as a source of legal rules is another matter entirely.

---

226. *Id.* at 282.

227. Consider, in this context, Amar's claim that state abortion restrictions would have a stronger constitutional basis if they'd been readopted after the Nineteenth Amendment. *See id.* at 292.

228. *See* W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* 55–56 (2010).

229. AMAR, *supra* note 3, at 284.

230. *Id.* at 197; *see also id.* at 141.

231. *Id.* at 231.

### 1. *Practice and Precedent*

In addition to the popular sovereignty theory discussed above,<sup>232</sup> Amar advances another argument for stare decisis that is based on practice. When a past judicial decision gives rise to strong reliance interests, making the return to the Constitution's actual meaning very costly, Amar contends that judges can legitimately adhere to precedent instead.<sup>233</sup> More generally, he supports stare decisis when "the actual practice of American government—in particular, the practice of Article III judges themselves—has plausibly and usefully glossed the text."<sup>234</sup> Because that practice has created an "overall Article III system" that "works, and works well," it shouldn't lightly be disturbed.<sup>235</sup>

Courts and lawyers often make prudential arguments in cases of uncertainty, as a reason to read the law one way and not another. Rarely, though, do they argue that prudence is actually a constitutive part of the law, capable of displacing other sources. Of course courts should hesitate before overturning apple carts; getting it wrong could carry terrible costs. But once the court is convinced that an older ruling is wrong, there needs to be a justification *in the law* for withholding the relief that the complainant seeks.

Amar finds that justification in constitutional silence.<sup>236</sup> The judicial "gloss" acts "in a manner that is invited by the text, albeit not compelled by the text."<sup>237</sup> While the "text does not explicitly say that this useful and plausible gloss should control, neither does the text say that it shouldn't."<sup>238</sup> With the text "indeterminate over a certain range," and ostensibly permitting either result, we are then free to resolve the indeter-

---

232. See *supra* text accompanying notes 195–211.

233. See, e.g., AMAR, *supra* note 3, at 239 ("[E]ven if the Court were tomorrow to deem erroneous its long-standing precedents upholding the constitutionality of paper money, surely the justices could not ignore the vast economic system that has built up in reliance on paper."). But cf. Robert G. Natelson, *Paper Money and the Original Understanding of the Coinage Clause*, 31 HARV. J.L. & PUB. POL'Y 1017 (2008) (arguing that Congress's power to "coin Money" originally extended to paper as well as metal).

234. AMAR, *supra* note 3, at 231.

235. *Id.*

236. Amar also suggests that stare decisis is an "equitable" consideration[]," authorized by the federal courts' power "to hear cases 'in Law and Equity' arising under 'this Constitution.'" *Id.* at 238 (quoting U.S. CONST. art. III, § 2, cl. 1). But the doctrine's history isn't limited to courts of equity, as opposed to those of common law; and in any case, "where the law has determined a matter, with all its circumstances, Equity cannot . . . intermeddle against the positive rules of law." 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 61, at 68 (Boston, Charles C. Little & James Brown 4th ed. 1846). Amar further argues that "judicial underenforcement" of the text through stare decisis "is built into the very structure" of Article III, because judicial review of government action is necessarily *ex post*. AMAR, *supra* note 3, at 240. But some mistaken precedents overenforce the Constitution instead.

237. AMAR, *supra* note 3, at 231.

238. *Id.*

minacy in a manner “faithful to the letter and spirit of the text and that enables the text to work in court and on the ground.”<sup>239</sup>

But that kind of free play doesn’t follow. As noted above, “silence is not ambiguity; silence means that ordinary background law applies.”<sup>240</sup> The Constitution is silent on many things (how high should tax rates be?), but judges can’t always impose the answer they find “useful and plausible.” If we don’t know how to apply a given provision, then we may need a decision procedure to decide who wins.<sup>241</sup> But if we know that the text doesn’t say anything on a topic, either way, then we just fall back on the rest of the law, written and unwritten.<sup>242</sup>

Amar’s labeling suggests that stare decisis must be of part of some constitution, written or no, because it can override the Constitution’s written text.<sup>243</sup> But there’s another alternative, namely that stare decisis might just be a rule of unwritten law. Courts routinely dispose of claims—even constitutional claims—based on unwritten rules, such as waiver or laches. Stare decisis may traditionally have been just such a doctrine, a heuristic that helped courts do their jobs when faced with repeated litigation over similar questions.<sup>244</sup> And the common-law practice may have been very much like what Amar recommends: courts would give the benefit of the doubt to past decisions, “admit error” when they conclude that “error has occurred,” and only then “consider whether special reliance interests apply and how those interests might limit the use of retrospective judicial power.”<sup>245</sup> In other words, courts might be authorized by law to rely on past precedent, at least where that precedent is not “demonstrably erroneous.”<sup>246</sup>

If this account is right, and if stare decisis were reconceptualized as a doctrine of common law, we’d have to figure out whether Congress may abrogate it.<sup>247</sup> Congress can make lots of rules about how courts

239. *Id.* at 231–32. Finding wiggle room in the text is a persistent theme. *See, e.g., id.* at 91 (noting that the original Constitution was not understood to authorize a draft, but did not “explicitly bar a national army draft” either); *id.* at 313 (“[N]othing in the official constitutional text explicitly delegated authority to George Washington to fill in the blanks of Article II and thereby sharpen the role of all future presidents. But neither did the terse text explicitly prohibit the inference . . .”).

240. *New Jersey v. New York*, 523 U.S. 767, 813 (1998) (Breyer, J., concurring); *accord id.* at 783 n.6 (majority opinion).

241. *See* Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 HARV. J.L. & PUB. POL’Y 411 (1996); Gary Lawson, *No History, No Certainty, No Legitimacy . . . No Problem: Originalism and the Limits of Legal Theory*, 64 FLA. L. REV. 1551, 1563–64 (2012).

242. *See* Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 540 (1983); Sachs, *supra* note 15, at 1816.

243. *Cf.* Fallon, *supra* note 33, at 1077–78.

244. *See* Nelson, *supra* note 203; *see also* Sachs, *supra* note 15, at 1863–66.

245. AMAR, *supra* note 3, at 240; *compare id. with* Nelson, *supra* note 203, at 1, 3, 7.

246. Nelson, *supra* note 203, at 1.

247. *See generally* Harrison, *supra* note 124; John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803 (2009); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1577 (2000).

Abrogation is also a worry on Amar’s account. He suggests that Congress can override past precedents by prospective legislation—say, through “a gradual ten-year phase-in of a new, more con-

process their cases. But the vesting of the “judicial Power” in courts may carry a degree of decisional independence, preventing Congress from interfering.<sup>248</sup> And if Congress can’t abrogate the common-law doctrine of *stare decisis*, then the Founders’ doctrine might stay in force indefinitely—but as a rule of unwritten law, rather than as part of any unwritten constitution.

## 2. *Practice and Reading the Text*

Amar’s primary means of reconciling text and recent history is his “lived Constitution”—in which the Ninth and Fourteenth Amendments incorporate rights that Americans currently view as fundamental.<sup>249</sup> As noted above, this argument doesn’t truly rely on an unwritten constitution; it’s based on a particular reading of our (written) Constitution, and it lives or dies by whether that reading is correct. But his argument *why* that reading is correct does depend on new sources of authority.

Amar writes that there are at least two possible readings of the word “retained” in the Ninth Amendment. One refers to historically recognized rights, which might have been “retained” at the Founding and withheld from a general grant of powers to a new government.<sup>250</sup> Another sounds “more in logic and political theory,” identifying rights that are “philosophically prior to government” and thus were “conceptually,” not historically, withheld from it.<sup>251</sup> Only the latter reading, Amar suggests, can support rights that didn’t win “recognition in practice” until long after the Ninth Amendment was adopted.<sup>252</sup>

When choosing between these readings, he writes, “faithful interpreters should embrace the second,” precisely because it “helps the written Constitution cohere with settled contemporary [that is, modern] practice.”<sup>253</sup> Given that “the actual world of American constitutional law . . . recognizes and reverences many utterly uncontroversial rights” that would have been alien to the Founders, Amar counsels “[t]hose who respect the terse text and want it to succeed in its general project” not to “reject a perfectly plausible reading that ultimately strengthens the text

---

stitutionally appropriate regime.” AMAR, *supra* note 3, at 240. Yet this is in tension with the popular-sovereignty theory discussed earlier. How can Congress override a precedent that, in the courts’ view, has enough popular support to override the Constitution itself? Perhaps Congress’s attempt shows a crack in the people’s unanimity; but in that case, passing a critical sense-of-Congress resolution should do the job. Overriding legislation makes more sense if the issue is purely one of reliance, as Congress is presumably better able than the courts to weigh the social costs and benefits of correcting past errors.

248. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872).

249. See *supra* text accompanying notes 97–98.

250. AMAR, *supra* note 3, at 108.

251. *Id.* at 108–09.

252. *Id.* at 109. Amar also suggests that Congress could use its Fourteenth Amendment enforcement power to identify new privileges and immunities. *Id.* But without help from another source, these new rights wouldn’t bind the federal government should a future Congress repeal them.

253. *Id.*

by connecting it with the basic rights claimed and practiced by each generation of Americans.<sup>254</sup>

In other words, outcomes matter. And for some people, they do. A public official, entrusted with others' welfare, has to consider the consequences of legal judgments. If one reading of a legal text would have terrible consequences, it's not a worse *reading*, but there's a greater burden of persuasion: we shouldn't disrupt people's lives based on a legal consideration that could go either way. Even if the consequences are minor, we might still try to preserve past understandings, deferring to smart people before us who resolved the issue in a different way.

But these burdens don't lie as heavily on the shoulders of academics: their job is to figure out the truth. And real-world consequences might point in different directions than Amar expects. Why seek to reproduce familiar outcomes from well-known cases, while gutting the reasoning? That could easily undermine, rather than support, settled legal understandings. (Most lawyers don't read the Ninth Amendment this way, and adopting Amar's reinterpretation of the Warren Court would cut most of the pages out of our Con Law casebooks.) And if we're putting a thumb on the scale for consequences' sake, why assume that consequences favor connecting current practice to the Constitution's text? Why not choose an interpretation that better realizes social justice, or protects the environment, or advances other values we take seriously?

More fundamentally, how can we "strengthen *the text*" by reading that text to mean what it doesn't mean already? If Amar's presumption in favor of modern practice has any bite, it can only be because a reader might otherwise come down the other way. But we can't preserve, protect, and defend *the Constitution* by attributing to it various popular policies that aren't actually there. If the goal is to increase adherence to the Constitution (like early Christians adopting pagan holidays), it might be a pyrrhic victory, won only at the cost of changing the thing we sought to preserve.

### 3. *Practice as an Independent Source of Law*

As discussed earlier, some Founders looked to early practice to eliminate legal uncertainties, liquidating the meaning of the new Constitution's unclear language.<sup>255</sup> Amar cites these theories in discussing the removal power debates of 1789.<sup>256</sup> But his reliance on practice isn't limited to liquidation, at least not in the sense that the Founders envisioned

---

254. *Id.* Amar has recently reiterated this point: "[I]n order to make clear that the text does indeed continue to operate as a functioning focal point, we should prefer readings of the text that cohere with actual practices on the ground." Akhil Reed Amar, *American Constitutionalism—Written, Unwritten, and Living*, 126 HARV. L. REV. F. 195, 198 (2013).

255. *See supra* text accompanying notes 57–61.

256. *See supra* text accompanying notes 53–54, 62–66.

it. Rather, he sees modern practice as having an independent role as a source of law.

In 1789, the House famously recognized a removal power in creating the Department of Foreign Affairs.<sup>257</sup> Similar decisions were made for the Departments of War and Treasury.<sup>258</sup> On Amar's account, however, Congress made no decision as to "other appointees."<sup>259</sup> Since then, Congress has created a number of independent "hydra-headed" agencies—such as the Federal Trade Commission or the Federal Reserve Board—run by multiple officers whom the President can remove only for cause.<sup>260</sup> Some Presidents have protested these agencies as incursions on their authority,<sup>261</sup> but most have played along.<sup>262</sup>

Are these agencies constitutional? Amar says they are, and his basic argument is framed in terms of liquidation. He contends that the early debates "did not reach and therefore did not resolve" issues posed by these hydra-headed agencies.<sup>263</sup> Hydra heads weren't around before the twentieth century, and once they emerged, a new practice settled the question. Thus, modern practice resolves the agencies' status: "post-1789 presidents and Congresses have in effect decided that the president needs only the power to remove hydra heads *for cause*, rather than *at will*."<sup>264</sup>

One could quibble with the details here: Congress hasn't restricted tenure protections to hydra heads, but has also protected individual of-

---

257. See AMAR, *supra* note 3, at 320.

258. *Id.*

259. *Id.* at 322.

260. *Id.* at 323.

261. See generally *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935) (holding that President Roosevelt had unlawfully removed a Federal Trade Commissioner from office).

262. AMAR, *supra* note 3, at 384.

263. *Id.* at 323.

264. *Id.* Amar suggests that acquiescence by "modern presidents themselves . . . furnishes a strong reason for the rest of us" to accept limitations on the removal power. *Id.* at 386. These presidents "may not have even wanted truly plenary power," finding it more convenient to offload responsibility. *Id.* But convenience is irrelevant under a Constitution that requires presidents to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3; *cf.* *Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138, 3155 (2010) ("The President can always choose to restrain himself in his dealings with subordinates. He cannot, however, choose to bind his successors by diminishing their powers, nor can he escape responsibility for his choices by pretending that they are not his own.").

Amar also briefly suggests that the Twenty-Fifth Amendment "blesses" the hydra-head distinction by distinguishing the "principal officers of the executive departments," single individuals who determine presidential incapacity, from independent hydra-heads. U.S. CONST. amend. XXV, § 4; AMAR, *supra* note 3, at 586–87 n.61; *accord id.* at 384 n.\*. Yet the Amendment's reference to "executive departments" is traditionally understood as limited to cabinet agencies so labeled by statute. See, e.g., H.R. REP. NO. 89–203, at 3 (1965); *cf.* 5 U.S.C. § 101 (defining "Executive departments"). Many other entities, such as NASA or the Office of the Director of National Intelligence, have individual heads and are departments for appointment purposes, but have no role in determining presidential incapacity. See *Free Enterprise Fund*, 130 S. Ct. at 3163 (defining an Appointments Clause department as "a freestanding component of the Executive Branch, not subordinate to or contained within any other such component"); see also *id.* at 3163 n.11 ("express[ing] no view" on the scope of the Twenty-Fifth Amendment). If the Twenty-Fifth Amendment draws the line for purposes of removal, it draws it in the wrong place.

ficers who are heads of departments for appointment purposes.<sup>265</sup> But the more important worry is theoretical. If liquidation-by-practice is legitimate because it was part of the Founding generation's interpretive toolbox, then we have to apply it the way they understood it to work. And according to Madison's description of the removal debates, the view that "prevailed, as most consonant to the text of the Constitution," turned out to be Madison's own: removal of officers was an "Executive function" that accompanied the general grant of executive power to the President, not having been "expressly taken away" or limited (as the appointment power had been) by the text of Article II.<sup>266</sup> That theory extends to the Federal Trade Commission no less than to the Department of Foreign Affairs. If we're bound by how the Founders settled the issue, why aren't we bound by their reasoning in doing so?<sup>267</sup> Alternatively, if we're allowed to ignore the participants' own understanding of what doctrine they had agreed on, then why not limit all liquidations to their facts—leaving as open questions, say, any Cabinet offices other than Foreign Affairs, War, or Treasury?

Amar gives practice a role much broader than just the initial liquidation of language. Amar argues, for example, that a broad reading of the recess appointments power, letting the President fill preexisting vacancies during a Senate recess, has been settled by practice since 1823—a "definitive gloss" accepted by "all three branches."<sup>268</sup> But he also suggests that a narrower view, restricting the power to new vacancies only, may have been recognized for the first decade of the Republic.<sup>269</sup> If liquidation is part of our law because the text was designed to be read that way, then subsequent practice shouldn't be able to change the meaning of a clause that's already been fully liquidated (unless that's how liquidation was supposed to work). But Amar sees "confirmatory practice, acquiescence, and supportive legislation" as all shaping constitutional

---

265. See, e.g., 5 U.S.C. § 1211(b) (Office of Special Counsel in the Civil Service); 12 U.S.C. § 5491(b)(5)(A), (c)(3) (Director of the Consumer Finance Protection Board); 42 U.S.C. § 902(a)(3) (Commissioner of Social Security).

266. See Letter from James Madison to Thomas Jefferson (June 30, 1789), in 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789–1791, at 893, 893 (Charlene Bangs Bickford et al. eds., 2004); see also 1 ANNALS OF CONG., supra note 63, at 463 (statement of Rep. Madison).

267. The same question can be asked in reverse. As of *Myers v. United States*, 272 U.S. 52 (1926), the Court understood the removal power in broad terms. It then upheld the FTC's removal restrictions in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), not because of the FTC's multi-member structure, but on the now-discredited grounds that the FTC was a "quasi-legislative and quasi-judicial" entity outside the executive branch. See *id.* at 628; see also *Morrison v. Olson*, 487 U.S. 654, 689 (1988) (throwing "quasi-legislative" under the bus). If the *Humphrey's Executor* Court established a new tradition for the wrong reasons, do their reasons control, or ours?

268. AMAR, supra note 3, at 576 n.16.

269. See *id.* (comparing the Washington-Randolph position of 1792, President Madison's position in 1813, and Attorney General Wirt's position in 1823, and citing Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487 (2005)); see also Noel Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013) (invalidating certain recess appointments and adopting Randolph's position over Wirt's), cert. granted, 133 S. Ct. 2861 (U.S. June 24, 2013) (No. 12–1281).



meaning,<sup>270</sup> in ways that don't seem to follow merely from Founding-era interpretive conventions.

This approach suggests that modern practice has legal force of its own. For instance, after recognizing the position of the “hardcore textualist” (and James Madison) that removal was incident to the executive power, Amar notes that the removal of officers has often been limited by statute, and that “[t]he simple text [of Article II] . . . cannot easily explain this interesting difference in actual institutional practice.”<sup>271</sup> If actual institutional practice were the topic demanding explanation, with our reading of the text obliged to follow suit, that really would suggest an unwritten constitution.

But we shouldn't expect the text to explain practice. The text is a “parchment barrier,”<sup>272</sup> most of which was ratified over two centuries ago. It can't predict the future or explain subsequent events. Those events might or might not be consistent with the rules in the text, but that's not the text's fault. Practice is determined by presidents and legislators elected for other reasons, who select judges and lower-level officials with whom they agree on other issues, and whose mistakes or convenient errors get compounded over time. There's no guarantee, and perhaps not even any reason to believe, that over a span of centuries an authoritative text will still be understood correctly—or, like the laws against jaywalking, that it won't be primarily honored in the breach.<sup>273</sup>

Of course, a text that's been *wholly* abandoned by practice is no longer part of the law. Only practice and convention, after all, explain why our laws are made in Washington and not Westminster. But so long as our practices and conventions still treat a given text as authoritative, one can still criticize particular elements of current practice as inconsistent with that text. And given that Amar agrees there are many areas in which text and practice have diverged for long stretches of time—segregation, *Lochner*, presidential succession, the exclusionary rule—it seems that our commitment really is to the document, not to the doctrine, and not to the practice that the doctrine has produced.

### C. The Enactment Argument

The arguments in the previous two Sections have implications for the past as well as the future. If the unwritten constitution serves to perfect constitutional law, connecting it to political legitimacy and to current practice, then we can make inferences in the other direction: what must

---

270. AMAR, *supra* note 3, at 577 n.16.

271. *Id.* at 321.

272. THE FEDERALIST NO. 48, *supra* note 57, at 333 (James Madison).

273. See generally Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Security State*, 75 FORDHAM L. REV. 489 (2006) (describing their theory of “partisan entrenchment”); see also ROBERT PENN WARREN, ALL THE KING'S MEN 67 (1946) (“I bet things were just like they are now. A lot of folks wrassling round.”).

our constitutional law be like in order for these connections to hold? And, in particular, how must our constitutional law have been adopted in order for it to have these important virtues today? These questions lie at the center of Amar's "argument from enactment," one of the most novel proposals found in the book.<sup>274</sup> If successful, the enactment argument would be a significant advance over the existing literature—a new modality of constitutional interpretation.<sup>275</sup> But for many of the same reasons discussed above, there are significant grounds for doubt.

The central claim of the enactment argument is as follows: "the process by which" the Constitution was enacted "is itself part of the Constitution, and thus a source of constitutional law and constitutional principle."<sup>276</sup> Amar notes, for example, that "the very act of constitutional ordainment" in 1787–1788 "itself occurred in and through a regime of boisterous, virtually uncensored free speech,"<sup>277</sup> and he concludes that a right of free speech therefore became "an intrinsic and indispensable, albeit unwritten, element of the Constitution as actually enacted."<sup>278</sup>

The precise nature of this claim isn't obvious, but it may become clear in context. On my reading, Amar is asking the following "Kantian-type question": how are enactments possible?<sup>279</sup> Philosophers call this a "transcendental" argument, one that "begins with an uncontroversial premise . . . , and then reasons to a substantive and unobvious necessary condition of this premise."<sup>280</sup> Amar's enactment argument starts with the uncontroversial assumption that a particular text has been validly enacted, that we accept it as law for us. One necessary condition of that acceptance, the argument goes, is for us to regard the process that produced that text as capable of producing valid law. Whatever was necessary to produce that enactment must itself, *a fortiori*, be in some sense part of the law.

Amar emphasizes how the Preamble "directs readers to the ratification process as the very foundation of the entire document's legal authority"<sup>281</sup>: if you're going to accept the document as part of the law, you have to consider "who did this and how,"<sup>282</sup> and accept what was necessary for its adoption as part of the law as well. In the case of free speech, for example, Amar contends that the Constitution was enacted by the sovereign people of the United States acting as a sovereign legislature, debat-

---

274. AMAR, *supra* note 3, at 54.

275. See generally PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982) (describing various modalities of interpretation).

276. AMAR, *supra* note 3, at 56.

277. *Id.* at 55.

278. *Id.* at 54.

279. ROBERT NOZICK, ANARCHY, STATE & UTOPIA 261 (1974).

280. Derk Pereboom, *Kant's Transcendental Arguments*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter 2009), <http://plato.stanford.edu/archives/win2009/entries/kant-transcendental/>; see also P.F. STRAWSON, *Skepticism, Naturalism and Transcendental Arguments*, in SKEPTICISM AND NATURALISM: SOME VARIETIES 1, 8–9 (1985).

281. AMAR, *supra* note 3, at 63.

282. *Id.* at 55.

ing the document's merits and criticizing their officials. If the validity of the Constitution's enactment depends on each ordinary citizen's acting as a legislator, with a legislator's freedom of speech and debate,<sup>283</sup> then accepting the Constitution as valid commits one to a certain set of free speech rights.<sup>284</sup> Or so the argument goes.

In a way, the enactment argument could be viewed as an implicit response to Bruce Ackerman's critiques of the Founding and the Reconstruction Amendments.<sup>285</sup> The Constitution of 1787 was ratified by majority vote in nine popularly elected state conventions, even when state constitutions required supermajorities,<sup>286</sup> and even though the Articles of Confederation required consent from all thirteen legislatures instead.<sup>287</sup> On Amar's account, to accept the Constitution as law despite these restrictions, we have to accept majority rule as a fundamentally legitimate and efficacious means of forming new constitutions, whatever legal barriers might lie in the way.<sup>288</sup>

Or consider the Fourteenth Amendment. That Amendment's ratification was valid, it's said, only if the Thirty-Ninth Congress had power to exclude delegations from southern states, as well as to insist on compliance with the First Reconstruction Act (which required the South, among other things, to ratify the Amendment before their delegations would be seated).<sup>289</sup> Given the centrality of the Fourteenth Amendment to modern legal practice, Amar argues, the entire constitutional project "implodes" if the Fourteenth Amendment was unlawful.<sup>290</sup> So we must assume that it *was* lawful, and therefore that Congress's actions during Reconstruction were proper.<sup>291</sup> And that, in turn, could only have been the case if the Republican Government Clause<sup>292</sup> confers on Congress "sweeping authority to hold state governments to the highest contemporary standards of democratic inclusiveness."<sup>293</sup> So, starting from the assumption that the Constitution is law—that its text has been validly enacted—we work backwards to broader conclusions about the propriety of the enactment process, and from there to new understandings of our current law.

---

283. See *id.* at 52–53 (quoting James Wilson on this point).

284. *Id.* at 51–56.

285. See, e.g., 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 34–38 (2000) (discussing the Founding); *id.* at 99–119 (discussing Reconstruction).

286. See AMAR, *supra* note 3, at 58–60.

287. Compare U.S. CONST. art. VII with ARTICLES OF CONFEDERATION of 1781, art. XIII ("And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.").

288. See AMAR, *supra* note 3, at 60–61.

289. See *id.* at 82–84, 86–88; see also An Act to Provide for the More Efficient Government of the Rebel States, ch. 153, § 5, 14 Stat. 428, 429 (1867).

290. AMAR, *supra* note 3, at 83.

291. *Id.* at 80–81.

292. U.S. CONST. art. IV, § 4.

293. AMAR, *supra* note 3, at 81.

This is my best understanding of Amar's claim. On this understanding, the enactment argument is clear and coherent, and it really does call for an unwritten constitution. It identifies rules that aren't grounded in the text (and can't be, if they're responsible for the text being law), but that nonetheless have constitutional status.<sup>294</sup>

But this version of the argument is also highly problematic, because the basic premise—that only a valid legal process can give rise to valid legal rules—is false. Ratification violated the Articles of Confederation and state constitutions, the Revolution violated British law, and the colonization of the Americas was a nasty business all round. Legally speaking, we don't care. Our social conventions and rules of recognition point us to certain legal axioms (say, “the Constitution is law”) that form part of our legal system and don't need any further foundations. As Michael Steven Green has pointed out, “[u]nlike the other laws within a legal system,” legal axioms don't themselves “have a legal justification”<sup>295</sup>; otherwise it's turtles all the way down.<sup>296</sup> The enactment argument can only work for legal rules that are validated by other, intermediate legal rules, not for those directly supported by social convention.

The enactment argument may also go astray to the extent that it relies, like the arguments in the previous two Sections, on legitimacy or consistency with current practice as a substitute for validity. The fact that Anti-Federalists, for example, “accepted the legitimacy of simple majority rule” in the ratifying conventions<sup>297</sup> shows that they thought the majority could legitimately speak for the people. They may have gone along with a violation of the old regime because doing otherwise would be “rebellion” against a new regime that morally deserved their respect.<sup>298</sup> But that kind of legitimacy doesn't necessarily mean that majority vote had any special legal status, even in the teeth of constitutions that explicitly required something more. Nor does it mean that the current Senate can “change its current filibuster rules by simple majority vote,” the “enormous implication” that Amar draws “precisely” from “the particular manner in which the Constitution was enacted in each state ratifying convention in 1787–1788.”<sup>299</sup>

Likewise, the centrality of the Fourteenth Amendment to current practice doesn't tell us which horn of the supposed dilemma we should grasp. Maybe, in accepting the amendment as valid, our constitutional

---

294. Amar suggests that the enactment argument “can perhaps be seen” as “an interpretation of the tiny but powerful workhouse word ‘do’ in the Preamble.” *Id.* at 55. Would things be different if the Preamble's authors had skipped “do,” and gone straight on to “ordain and establish”? U.S. CONST. pmbl.

295. Green, *supra* note 192, at 339.

296. See *Rapanos v. United States*, 547 U.S. 715, 754 & n.14 (2006) (opinion of Scalia, J.); CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 28–29 (1973).

297. AMAR, *supra* note 3, at 58.

298. *Id.* at 59 (internal quotation marks omitted).

299. *Id.* at 63. (This happens to be true, but it has nothing to do with state ratifying conventions. See *supra* text accompanying notes 151–56.)

practice has gone horribly astray. Or maybe our current rules of recognition treat certain amendments as lawful, regardless of what Article V says. Either way, we don't have to change our reading of the Republican Government Clause.

Before using the enactment argument, though, we do have to be sure that the necessary conditions of our law are really necessary. Amar rightly leaves for “eccentrics”<sup>300</sup> and “cranks”<sup>301</sup> the claim that the Fourteenth Amendment “was never properly adopted” because it “was ratified by dint of a congressional statute that went beyond the Constitution as understood by the framers.”<sup>302</sup> But he rejects that inference only because he sees Reconstruction as “giv[ing] birth to a new constitutional principle” of republican government—one that retroactively renders the First Reconstruction Act constitutional, even if the original Founders might have had their doubts.<sup>303</sup>

Assuming, though, that the First Reconstruction Act and the exclusion of southerners from Congress *were* unconstitutional—something that's hardly obvious—would that actually undermine the Fourteenth Amendment? John Harrison has argued persuasively that it would not, and that the Fourteenth Amendment was perfectly consistent with Article V.<sup>304</sup> The Thirty-Ninth Congress had a quorum in both Houses,<sup>305</sup> each House, as the sole “Judge of the Elections, Returns and Qualifications of its own Members,”<sup>306</sup> had found the southern delegations unqualified; each House approved the Amendment by a two-thirds vote,<sup>307</sup> and the *de facto* state governments that helped the Amendment across the three-fourths finish line had legal authority to do so.<sup>308</sup> That the Amendment would have been impossible without the Act, that it *causally* depended on the statute as a matter of history, doesn't mean that it *legally* depended on the statute: the validity question is settled by Article V.<sup>309</sup> Perhaps that's why we rarely hear challenges to the other products of the Thirty-Ninth Congress—like the Tax Anti-Injunction Act,<sup>310</sup> the metric system,<sup>311</sup> or the Department of Education.<sup>312</sup> Just as certain legal

---

300. AMAR, *supra* note 3, at 82.

301. *Id.* at 84.

302. *Id.* at 83.

303. *Id.* at 81–82.

304. *See generally* Harrison, *supra* note 208.

305. *See id.* at 378 n.11.

306. U.S. CONST. art. I, § 5, cl. 1.

307. *See* Harrison, *supra* note 208, at 452–54.

308. *See id.* at 436–51.

309. Causal necessity and legal necessity are very different things. Suppose a bill escapes from a subcommittee only because its chairman has been bribed: the resulting law is valid because it went through bicameralism and presentment, not because it's okay to bribe subcommittee chairmen.

310. An Act to Amend Existing Laws Relating to Internal Revenue, and for Other Purposes, ch. 169, § 10, 14 Stat. 471, 475 (1867) (codified as amended at 26 U.S.C. § 7421(a)).

311. An Act to Authorize the Use of the Metric System of Weights and Measures, ch. 301, 14 Stat. 339 (1866) (codified as amended at 15 U.S.C. § 205).

312. An Act to Establish a Department of Education, ch. 158, 14 Stat. 434 (1867) (codified as amended at 20 U.S.C. § 3411).

doctrines help us tolerate past errors (like adverse possession and prescription in property, or the enrolled bill rule in legislative procedure),<sup>313</sup> the formal criteria of Article V or Article I, Section 7, permit some sausage-making in the course of getting to a valid legal rule.

Recognizing a legal rule as valid doesn't require us to bless everything that occurred along the way. Our law can tolerate a little invalidity here or there, just as it can tolerate some illegitimacy or deviation from practice. If we can't perfect the text without an unwritten constitution, then maybe we should learn to live with an imperfect Constitution instead.

#### IV. WHY AN UNWRITTEN CONSTITUTION?

As I've argued above, many of Amar's unconventional arguments are really based on legal sources that we already recognize. They operate within the conventional framework, not outside it. And, if his arguments turn out to be correct, we can almost always accept them without accepting an "unwritten Constitution"—at least under my stipulated definition.

Why, then, does the label matter so much? Why not let Amar have his terminology, accept his examples as part of the "unwritten Constitution," and call it a day?

The answer is that labels affect our thinking. A shared label can persuade us that two things share some essential nature, even if they have nothing else in common—and even if the resemblance, on closer examination, turns out to be false. And that, I fear, may be the case with *America's Unwritten Constitution*. Setting aside those claims that really do invoke new sources of law (claims, I've suggested, that may be less than fully persuasive), the bulk of the "unwritten Constitution" is composed of phenomena that are very different from one another, with very different reasons for being part of our law. Treating these legal rules as part of an unwritten constitution, a legal no-man's-land between statutes and the written Constitution, can cause us to misunderstand the actual roles they play.

Sometimes the label leads us to elevate the status of subconstitutional rules. Plenty of ordinary rules serve "constitutional" functions—establishing organs of government, regulating officials, conferring rights, and so on. These rules aren't formally entrenched, but can turn out in practice to be entrenched "informally and politically, via incentive structures and power allocations that make the current system functionally self-perpetuating."<sup>314</sup> Social Security was enacted by Congress and could

---

313. See, e.g., *Field v. Clark*, 143 U.S. 649, 672 (1892) (enrolled bill rule); *Rhode Island v. Massachusetts*, 45 U.S. (4 How.) 591, 638–39 (1846) (prescription).

314. AMAR, *supra* note 3, at 481; accord Young, *supra* note 12.

be repealed by Congress,<sup>315</sup> but most congressmen can think of easier ways to commit political suicide.

Likewise, many features of our election law—like single-member House districts<sup>316</sup>—encourage a two-party system that sitting legislators have every reason to maintain.<sup>317</sup> That’s why Amar suggests we “regard the current two-party system as a basic element of America’s Constitution.”<sup>318</sup>

But that kind of elevation is a mistake. For example, the two-party system isn’t a rule of *law*, much less a rule of constitutional law. Third parties aren’t illegal here; if a visiting Martian asked whether the Constitution limits the number of political parties, the correct answer would be no.

Yet Amar still accords the two-party rule some degree of legal effect. In discussing gerrymandering, he offers a variety of reasons why the Constitution permits partisan or incumbent-protective gerrymanders; but as to bipartisan gerrymanders, in which both parties work together “to freeze out all third parties,” he says only that “the practice is constitutionally proper” because the Constitution, “[r]ightly read, . . . in fact sanctions a self-perpetuating and self-stabilizing two-party system.”<sup>319</sup> Maybe the Constitution allows the two-party system to exist. That’s not an affirmative endorsement, and it can’t shield the two-party system from other legal inquiries. When we call the two-party system part of an “unwritten Constitution,” it’s easy to blur the lines between rules of law and mere regularities of practice.

The label also gives some real constitutional rules less respect than they deserve. The most noticeable example is jury unanimity. On Amar’s account, the Founders’ juries had twelve members,<sup>320</sup> rendered unanimous decisions,<sup>321</sup> and could “nullify” criminal laws by acquitting against evidence.<sup>322</sup> Amar claims that nullification is still with us, because the Constitution’s references to the “jury”<sup>323</sup> incorporated the familiar common-law features of that institution.<sup>324</sup> And he accepts the number twelve as still binding today because he sees “no logical and principled stopping point” to reducing the number of jurors.<sup>325</sup> But he sees many potential stopping points short of unanimous voting, such as a majority

---

315. See 42 U.S.C. §§ 301–1397mm.

316. See 2 U.S.C. § 2c.

317. AMAR, *supra* note 3, at 411, 413–14.

318. *Id.* at 409.

319. *Id.* at 227.

320. *Id.* at 443.

321. *Id.* at 442–43.

322. *Id.* at 437.

323. U.S. CONST. art. III, § 2, cl. 3; *id.* amend. VI.

324. AMAR, *supra* note 3 at 424–25.

325. *Id.* at 443–44. (How about two?)

or two-thirds.<sup>326</sup> And in his view, subsequent amendments have expanded the “demographic diversity” of the jury pool, making the Founders’ vision of unanimity “unrealistic.”<sup>327</sup> To prevent this diversity from producing too many hung juries (that is, too many retrials or too few convictions), a “sensible response” is to send defendants to jail even when multiple jurors are convinced of their innocence.<sup>328</sup>

This argument makes the status of unanimity very unclear. If the Constitution didn’t really require unanimous verdicts—if its jury references “connoted” unanimity, but nothing more<sup>329</sup>—there’d be no problem with changing the rules, and we wouldn’t need an unwritten constitution to justify it. Or if unanimity really were part of the meaning of “Trial...by Jury,”<sup>330</sup> then our subsequent amendments wouldn’t impliedly repeal that rule—any more than they impliedly repealed the rest of the Sixth Amendment. (Southern juries long frustrated the enforcement of the Reconstruction Amendments, but that didn’t make it “appropriate” to suspend jury trials.)<sup>331</sup> And if the Constitution incorporates common-law jury rules by reference, then the Founders’ decision to preserve the existing rules, whatever they were, is just as binding as their decision to require juries at all—and just as protected from implied repeal. Yet Amar describes the unanimity rule as something different from all of these: a rule that’s sometimes required by the Constitution, but that’s also abrogable when other constitutional purposes are to be achieved.<sup>332</sup> Making jury unanimity part of an unwritten constitution, designed to serve the document’s spirit when the letter is silent, places it on a par with a wide variety of different legal rules—indeed, on a par with rules, like the two-party system, that aren’t law at all.

Despite Amar’s hesitation to place “new limits on ancient rights,”<sup>333</sup> a forced uniformity can’t help but weaken strong rules and strengthen weak ones. The picture of the unwritten constitution that emerges from the book is essentially malleable, founded on changeable understandings of how best we can serve the document’s ends. But sometimes the Constitution specifies means as well as ends, requiring compliance with certain rules of unwritten law (like jury rules) without specifying their con-

---

326. *Id.* at 444. Amar also calls unanimity a “counting trick,” because it ignores the dissenting votes in previous juries when a case is retried after a mistrial. *Id.* But one might as well call bare-majority votes in the House a counting trick, if the same bill was roundly rejected by the last Congress.

327. *Id.*

328. *Id.* at 442.

329. *Id.* at 443.

330. U.S. CONST. art. III, § 2, cl. 3.

331. *Id.* amend. XIV, § 5; *id.* amend. XV, § 2.

332. Note that the force of the constitutional purposes here is not obvious. Getting convictions (and avoiding retrials) is important, but that may just be preventing an adverse collateral consequence of “the post-Founding right-to-vote amendments,” rather than actually providing for their “full enforcement.” AMAR, *supra* note 3, at 444. The newly enfranchised get to serve on juries either way; the only question is whether their dissenting votes will matter. (Query whether the new entrants will appreciate being admitted to the jury room, knowing that their new and distinct views will be ignored if they are too distinct from everyone else’s.)

333. *Id.* at 116.



tent—and without regard to whether some novel arrangement might better serve the purpose. In certain ways, a commitment to our unwritten law could prove even more binding than the “unwritten Constitution.”

## V. CONCLUSION

Americans today—lawyers and judges, as well as ordinary people—don’t think we have an unwritten constitution. We do have several varieties of unwritten *law*. But these varieties don’t have constitutional status, at least not based on our conventionally accepted sources of law.

Amar’s book, in part, is an attempt to persuade us otherwise. He points to a number of features of currently accepted law that he sees as unwritten companions to the (written) Constitution’s “terse text.”<sup>334</sup> And he identifies ways in which an unwritten constitution can make the written one better, by enhancing its political legitimacy and by connecting it to current practice. In my view, many of Amar’s proposals can be understood through the lens of unwritten law, rather than necessitating an unwritten constitution; those that can’t be understood through this lens probably aren’t law at all.

But regardless of which view is correct, the book’s invaluable contribution is to focus attention on the role of unwritten law. Modern constitutional discourse is neglectful of the text in some ways, but in other ways it’s blind to everything outside the Constitution’s four corners. If every issue of constitutional magnitude has to be settled by the text itself, then we’ll end up “interpreting” (some might say “twisting”) the text into expressing a great deal that it doesn’t say. On the other hand, if some issues that *seem* constitutional are actually handled by other kinds of law, then we can take the Constitution’s meaning as we find it, without requiring it to solve all our problems and answer all our questions. Once we realize this, we can shift some of our attention away from the Constitution, and toward our existing hierarchy of sources of law.

America’s unwritten legal tradition is remarkably rich. It deserves more attention and respect than it has received. Viewed in that light, *America’s Unwritten Constitution* is a deeply welcome corrective: it forces us to think outside the text and to recognize the central role of unwritten law in our constitutional order. Whether or not its arguments come to be accepted, the book will help us better understand our commitment to the Constitution and to the rest of our law, written and unwritten.

---

334. *Id.* at 481.

