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THE GOVERNMENT OF THE LIVING—THE LEGACY OF THE DEAD

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Akhil Amar has written a stunning book about what he calls "the high temple of our constitutional order"[1]—the Bill of Rights. The temple metaphor is revealing, for it is evident throughout his book that Professor Amar views the Constitution as a sanctified structure, the use of which is to be determined by a holistic study of the original blueprints and the surviving comments of the long-dead architects. This characterization is complicated but not fundamentally changed by the fact that Amar's story is, as the subtitle of the book proclaims, one of "creation and reconstruction." The creation is that of the original Bill of Rights, proposed in 1789 and ratified in 1791. The reconstruction is that wrought by the Fourteenth Amendment, proposed in 1866 and ratified in 1868. The story pretty much stops there. Although Amar criticizes what he terms "curiously selective ancestor worship,"[2] it turns out that he is merely arguing for a somewhat more inclusive ancestor worship—John Bingham as well as James Madison, and Frederick Douglass as well as Patrick Henry.[3] Worthy ancestors all, but what about their descendants?

Amar's temple is a sort of constitutional Chartres Cathedral, built over the course of about seventy years and subjected to unauthorized alterations and indignities ever since. Visitors to Chartres cannot expect to find it in its original condition. Some of the old stained glass has been removed and clear windows inserted to let in more light. The high altar has been moved up

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1. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION at xi (1998).

2. *Id.* at 293.

3. *See id.*

to accommodate modern forms of worship, and the maze in the center is covered with chairs so that the parishioners no longer have to stand.[4] To a preservationist, at least, the solution seems obvious enough. Replace those clear glass windows with stained glass! Move back the altar! Take out the chairs so that pilgrims might walk the maze once more! Of course the parishioners will have to stand in a darkened church looking at a distant altar, but the plan of the architects will be restored, and that has value in itself.[5]

As a student of history and a lover of art, I am not altogether opposed to this vision. Along with numerous other pilgrims, I would much prefer to see a cathedral in its original glory. If I were given the responsibility of approving an actual renovation proposal, however, I would want not only to study the original architectural plans, but also to consider the customs and needs of contemporary users of the cathedral and cast an eye toward the future as well. This is a perspective that Amar's magisterial book lacks.

This criticism is not intended to diminish the important contribution that Amar has made to historical scholarship. Treated as a work of intellectual history, *The Bill of Rights: Creation and Reconstruction* (*"The Bill of Rights"*) is a landmark study that will be an invaluable resource for students of early American history for generations to come. Amar's sure grasp of the source material and his ability to weave disparate strands of constitutional history into a coherent whole stands as a solid refutation of Judge Posner's recent assertion that members of the legal profession, including law professors, judges, and legal advocates, lack the necessary skills to conduct responsible historical research.[6] Amar also makes an important political argu-

4. *See* MALCOLM MILLER, CHARTRES CATHEDRAL 18, 19 (2d ed. 1996).

5. The force of my metaphor is not lessened by Amar's conclusion that his "tale . . . at the end of the day, ends up supporting most of today's precedent about the Bill of Rights." AMAR, *supra* note 1, at 307. Amar consistently employs a historicist and textual approach, and when modern courts get it right, it is their "result and . . . instincts" that are right and not their analysis. *Id.* Moreover, as Amar acknowledges, he has elsewhere, using substantially the same analytical techniques, "sharply criticized modern judicial doctrine" in the important field of constitutional criminal procedure. *Id. See generally* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES (1997).

6. *See* Velasquez v. Frapwell, 160 F.3d 389, 393 (7th Cir. 1998).

ment—a point to which I shall return—that the source of the Constitution's legitimacy lies in "We the People" and that a Bill of Rights that does "not live in the hearts and minds of ordinary Americans [will] probably, in the long run, fail."[7] In addition, Amar's book is studded with keen insights on a dazzling array of legal problems involving the first ten amendments.[8] It will provide an invaluable resource for students, judges, and practitioners who will not only read it for background, but also plunder it for usable material in addressing a host of disparate constitutional issues. Such an achievement plainly merits high praise.

It is quite clear, however, that Amar's work is intended to be something considerably more ambitious than a historical reference book. It is intended to serve as a current guide to a correct interpretation of the Bill of Rights. Much of the book, for example, is devoted to the development of a refined incorporation model, and an important chapter illustrates what acceptance of that model would "mean in practice."[9] Beyond this, Amar is plainly—and commendably—concerned throughout his work with "getting it right,"[10] and the "it" to which he refers is not history, but law.[11] The "right" law is to be determined by a

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7. AMAR, *supra* note 1, at 296-97.

8. From numerous possible examples illustrating the soundness of Amar's legal and historical instincts, let me cite one. Amar convincingly argues that it is the abolitionists rather than the early American icons of free speech such as John Peter Zenger "who are the truer forebears of modern political and religious speakers perceived as 'nuts' and 'cranks' by the dominant culture." *Id.* at 243. He points out that the historical analysis of the Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), would have been immeasurably enriched by reference to the Reconstruction Era. *See* AMAR, *supra* note 1, at 243. Although Amar does not further explore this particular issue, it turns out that illuminating evidence supporting his argument appears in the history of *Sullivan* itself. Shortly after the 1960 publication of the allegedly defamatory *New York Times* advertisement at issue in the case, the Montgomery, Alabama *Advertiser* printed an angry editorial expressly referring to the Reconstruction Era. "'The Republic paid a dear price once for the hysteria and mendacity of abolitionist agitators,' [the editorialist] wrote. 'The author of this ad is a lineal descendant of those abolitionists, and the breed runs true.'" ANTHONY LEWIS, MAKE NO LAW 11 (1991) (quoting Editorial, ADVERTISER (Montgomery, Ala.), Apr. 7, 1960). As Amar would be the first to agree, "the lineal descendant[s] of those abolitionists" merit a special place in our pantheon of First Amendment heroes.

9. AMAR, *supra* note 1, at 231. The chapter in question is Chapter 11, "Reconstructing Rights."

10. *Id.* at 307. "From start to finish this book has aimed to explain how today's judges and lawyers have often gotten it right without quite realizing why." *Id.*

11. Thus Amar states: "[C]ourts today have ended up in pretty much the right

textual, structural, and historical analysis along the lines that the author describes. To the extent that the decisional process departs from this model, it seems fair to call it "wrong,"[12] and if the result of an aberrant process departs from that which is demanded by Amar's analysis, then that result is, by definition, "wrong" as well.

Assuming that Amar's factors of text, structure, and history are indeed the correct referents, his argument is plainly a powerful one. The force of the author's analysis, the voluminous source materials that he summons in support of his argument, and his prominence in the legal community obviously mark *The Bill of Rights* as an influential work. Moreover, Amar's reliance on text, structure, and history will find many responsive ears in both the academic and judicial worlds. Almost every member of the legal profession at one time or another relies on text, structure, and history in shaping arguments and decisions, and no one will contend that such factors should be ignored. It is, however, one thing to consider these factors and quite another to find them determinative as a matter of course. This latter approach, which I think fairly describes the path that Amar is blazing, leaves no room for the growth of the law and is ultimately subversive of the very Constitution that it seeks to preserve.

The limits of Amar's analysis are apparent in the structure of his book. *The Bill of Rights*, for all practical purposes, stops with the proposal of the Fourteenth Amendment in 1866. Although he examines numerous post-1866 judicial decisions, he limits the discussion largely to an explanation of where these decisions do or do not "get it right." Indeed, as Amar candidly points out, "judges are not exactly the heroes and heroines of [his] tale."[13] Justice Holmes was a law student in 1866, Justice Brandeis was ten years old, and Justice Brennan would not

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place, even if they have not always offered the best textual and historical reasons." *Id.*

12. Amar does not necessarily put it quite so bluntly, but the "wrongness" of alternative decisional models is, I think, an inescapable corollary of his approach. At the very least, to use a somewhat more gracious phraseology, it is implicit in his analysis that a decisional process that relies upon factors foreign to his model cannot be "right."

13. AMAR, *supra* note 1, at 305.

even be born for another forty years. The ideas that were to flow so abundantly from their pens and shape the course of debate for future generations were not yet dreamed. But those ideas, however wise, can have little place in shaping a model entirely formed by factors set in place in 1866. Profound changes in our society, our technology, and our government that have occurred since 1866 similarly go unmentioned.[14] It is the text, the structure, and the historical records of the Bill of Rights and the Fourteenth Amendment that shape our model, and once we "get it right," well, there it is. It becomes something like Thucydides' *History*, not a thing written for the immediate moment, but a possession for all time.[15] This quest, however noble, is one that cannot succeed.

Changelessness is an admirable quality of classical literature, but it is not quite so appropriately a property of the law. The common law tradition, a tradition in which judges and lawyers have long been steeped, prides itself on its flexibility. It is not, as Justice Holmes famously said, "a brooding omnipresence in the sky."[16] This perception lies at the heart of the Supreme Court's celebrated ruling in *Erie Railroad Co. v. Tompkins*[17] that, "[t]here is no federal general common law."[18] Although it was once thought that judicial decisions "are, at most, only evidence of what the laws are,"[19] *Erie* accepts Holmes's argument that the notion of "a transcendental body of law . . . to be found" is a "fallacy and illusion."[20] In actuality, the common

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14. *See* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 401 (1974).

15. *See* THUCYDIDES, THE HISTORY OF THE PELOPONNESIAN WAR I ¶ 22 (Henry Dale trans., Harper & Bros. 1858).

16. Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting). This observation has more recently been echoed on the other side of the Atlantic by Lord Reid:

> Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame. Bad decisions are given when the judge has muddled the pass word and the wrong door opens. But we do not believe in fairy tales any more.

Lord Reid, *The Judge as Law-Maker*, 12 J. SOC'Y PUB. TCHRS. OF L. 22 (1972).

17. 304 U.S. 64 (1938).

18. *Id.* at 78.

19. Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842), *overruled by* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

20. *Erie*, 304 U.S. at 79 (quoting Black & White Taxicab & Transfer Co. v.

law is made by judges and is subject to change.[21] This capacity for growth and adaptation is one of the common law's abiding strengths.[22]

To many—including, I suspect, Amar—constitutional law seems different. While the whole of the common law is judge-made,[23] the whole of constitutional law is not. We have a written constitution established by "We the People," and amendments to that constituent act are infrequent events. The stability inherent in a written constitution is one of the principal strengths of our system of governance, and this stability has been demonstrated repeatedly throughout the long history of our republic.[24] The written form of our Constitution makes a search for the Framers' intent relevant, for that intent helps illuminate the meaning of the words that guide our actions.[25] Yet, this does not, and should not, mean that the Framers' intent will necessarily be determinative, even when that intent can, by scrupulous historical scholarship, be made reasonably clear.[26] However permanent the written form of our Constitu-

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Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

21. An excellent recent discussion of this phenomenon can be found in *Kleinwort Benson Ltd. v. Lincoln City Council*, [1998] 3 W.L.R. 1095 (H.L.).

22. *See* Funk v. United States, 290 U.S. 371, 382-83 (1933); Hurtado v. California, 110 U.S. 516, 530 (1884). The highest courts of other English-speaking nations recognize a judicial responsibility to "adapt the common law to reflect the changing social, moral and economic fabric of the country." *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.* ¶ 150 (visited June 5, 1999) <http://www.droit.umontreal.ca/doc/csc-scc/en/pub/1999/vol1/html/1999scr1_0010.html>; *see State Rail Authority of New South Wales v Earthline Constructions Pty Limited (in Liq [1999] HCA 3 (9 February 1999)* ¶ 87 (last modified Apr. 21, 1999) <http://www.austlii.edu.au/au/cases/cth/high_ct/1999/3.html> (Judge Kirby's concurring opinion). Lord Scarman explained that,

> [t]he mark of the great judge from Coke through Mansfield to our day has been the capacity and the will to search out principle, to discard the detail appropriate (perhaps) to earlier times, and to apply principle in such a way as to satisfy the needs of their own time.

Gillick v. West Norfolk & Wisbech Area Health Auth., 1986 App. Cas. 112, 183 (appeal taken from Eng.) (Scarman, L., concurring).

23. *See generally Kleinwort Benson*, 3 W.L.R. at 1095.

24. In a striking nonjudicial illustration of this stability, the impeachment trial of President William J. Clinton was conducted as this essay was written, and no tanks circled the Capitol.

25. *See* Charles Fried, *Sonnet LXV and the "Black Ink" of the Framers' Intention*, 100 HARV. L. REV. 751, 759 (1987).

26. To take perhaps the most famous example, almost everyone, scholar and citi-

tion may be, the articulation of its principles requires some flexibility. This flexibility is, both as an empirical and a normative matter, surprisingly similar to the adaptability of the common law tradition. The existence of this flexibility—which, properly viewed, is something to be celebrated rather than deplored—ultimately makes an attempt to write a guide to constitutional law grounded exclusively in the original sources, however scholarly, a futile enterprise.

To first address the empirical point, there can be no doubt that constitutional law is, as a practical matter, characterized by a good deal of flexibility. Some decisions are plainly grounded in considerations other than history and text.[27] Even once a decision is made, its durability cannot be assumed. The Supreme Court regularly reconsiders constitutional rulings thought to be unsatisfactory. The Court in *Payne v. Tennessee*[28] itemized thirty-three instances in the twenty terms preceding that decision where it overruled previous constitutional decisions in whole or in part.[29] *Payne*, of course, was hardly the last instance of such an overruling.[30] Reconsideration rarely occurs because a scholar or jurist has discovered something previously overlooked in the relevant constitutional history and text. It occurs because of the development of doctrine and the lessons of experience.

A textualist might argue that the empirical observation just made, while true as far as it goes, affirmatively supports an analysis of the Constitution focusing on the Framers' intentions. A Supreme Court that incessantly alters constitutional doctrine to accommodate shifting majorities and changeable judicial minds is not necessarily a welcome sight.[31] If the Court were

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zen alike, would now agree that *Brown v. Board of Education*, 347 U.S. 483 (1954), was correctly decided regardless of what the original understanding of the Framers of the Fourteenth Amendment may have been on the subject of segregated schools. *See* Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955). *Brown* was properly based "on the moral and material state of the nation in 1954, not 1866." *Id.* at 65.

27. To take another famous example, see *Roe v. Wade*, 410 U.S. 113 (1973).

28. 501 U.S. 808 (1991).

29. *See id.* at 828-30 n.1.

30. *See, e.g.*, Agostini v. Felton, 521 U.S. 203 (1997). The line of overruled Supreme Court decisions is entirely certain, like the line of kings in *Macbeth*, to stretch out to the crack of doom.

31. Professor Amsterdam, a leading authority on the Fourth Amendment, once

to focus instead on the relatively permanent factors of text, structure, and history, there should, at least in theory, be no need to change judicial doctrine once the relevant text, structure, and history have been correctly ascertained and analyzed. Such a development would enhance the stability of the law and, at the same time, insulate the judiciary from the criticism that its decisions are based on personal belief rather than legal analysis.[32] This is a powerful argument. It will inevitably appeal to some scholars, jurists, and many ordinary citizens as well, and cannot be conclusively rebutted because it turns on a matter of judgment. There are, however, significant problems in this textualist position that ultimately deprive it of much of its persuasive power.

To begin with, an important tension exists between the unforgiving doctrinal demands of the textualist position and the realities of judicial review. In hindsight, at least, the seeds of the textualists' destruction are contained in *Marbury v. Madison*,[33] where the Supreme Court held that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[34] Once we have assigned the articulation of the law to judges, certain consequences ineluctably follow. One of these consequences is that judges will articulate the law by deciding cases. A case-based system of decision making virtually ensures that the law will be articulated on an ad hoc basis, often on the basis of messy facts, unsatisfactory records, countervailing doctrines, and sympathetic parties, whose sorry plights will tug at even the most doctrinal of judicial hearts.

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said that listening to tax lawyers complain about how the Supreme Court has mangled the law of taxation made him feel "like Captain Ahab's ghost hearing trout fishermen prattle of the big one that got away." Amsterdam, *supra* note 14, at 349-50.

32. *See* Federal Power Comm'n v. Natural Gas Pipeline Co., 315 U.S. 575, 601 n.4 (1942) (Black, J., concurring).

33. 5 U.S. (1 Cranch) 137 (1803).

34. *Id.* at 177. *Marbury* does not itself advocate this position. The view that it takes of constitutional law is, in fact, not far removed from the view that *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), takes of the common law. *Marbury*'s description of the Constitution as "a superior, paramount law, unchangeable by ordinary means," 5 U.S. (1 Cranch) at 177, is similar to *Swift*'s vision of a transcendent common law furnishing "positive rules, or conclusive authority, by which our own judgments are to be bound up and governed," 41 U.S. (16 Pet.) at 19. This is hardly an argument for flexibility in future application of the law in question. The system of judicial review that *Marbury* establishes, however, ensures that such flexibility will inevitably result.

For this reason alone, legal doctrine, or at least the doctrine articulated by the courts, while profoundly influenced by considerations of text, structure, and history, will never be entirely shaped by those forces.

The consequences of *Marbury v. Madison* go deeper than this. Not only do judges decide cases, but cases are decided by judges. Judges in the Anglo-American world are inculcated in the common law tradition. This means, among other things,[35] that judges—especially judges who sit on reviewing courts—are likely to be interested in, and sometimes deeply committed to, the growth of doctrine and its adaptation to the circumstances of a changing world. This common law trait has repeatedly manifested itself in the development of constitutional law. Consider, for example, the reasoning of Justice Brandeis's classic dissent in *Burnet v. Coronado Oil & Gas Co.*[36] Justice Brandeis observed that, as an empirical matter, the Supreme Court frequently changes its mind on constitutional issues.[37] He then explained that this flexibility is not a weakness, but is a strength of our judicial system. "The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function."[38]

The "judicial function" to which Justice Brandeis referred is the function of a judge in the common law tradition. The words

35. The common law tradition breeds a host of traits that influence the judicial decision-making process. Judges typically receive the factual information at issue in a case from the parties rather than from independent research. Although judges can and do perform independent legal research, the legal briefs submitted by the parties ordinarily provide the starting point of such endeavors. The obligation to hear both sides is a central responsibility of the judicial office. This requirement, combined with the ethical command of disinterestedness, probably results in a tendency (not always realized) to take medial positions. An ancient judicial oath used in the Isle of Man required a judge to "swear to do justice between cause and cause as equally as the backbone of the herring doth lie midmost of the fish." CURTIS BOK, BACKBONE OF THE HERRING at title page (1941). Beyond this, the ability to forge workable solutions that leave both sides feeling that they have been fairly treated is a trait highly prized at all judicial levels. An excellent recent example of this quality appears in the Supreme Court's ingenious and much-praised Title VII decisions at the close of the 1997 term. *See* Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998); Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257 (1998).

36. 285 U.S. 393, 405-13 (1932) (Brandeis, J., dissenting).

37. *See id.* at 407 & n.2.

38. *Id.* at 407-08 (footnote omitted).

just quoted could be that of any great common law judge. They are uttered in the same spirit as Judge Cardozo's pronouncement in *MacPherson v. Buick Motor Co.*[39] that

> [p]recedents drawn from the days of stagecoach do not fit the conditions of travel today. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be.[40]

This aspect of the adjudicatory process has long been recognized by judicial reformers[41] and conservatives[42] alike and is so thoroughly woven into our juridical tradition[43] that, while it will always have its detractors, its disappearance is unlikely in the extreme.

An originalist might accept these observations as accurate but irrelevant. An empirical explanation of why the law has gone astray, if you want to look at it that way, is quite different from a vision of what the law would be had it not gone astray. It is this latter vision that Amar embraces. By returning to our origins, he describes a sort of constitutional Garden of Eden, while I merely chronicle our fall from grace. Aside from the inconvenient fact that (in this life, anyway) our return to a pure text-based state of constitutional law is about as likely as our return to Eden, it is very far from certain that a legal system driven exclusively by historical factors would be a

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39. 111 N.E. 1050 (N.Y. 1916).

40. *Id.* at 1053.

41. Brandeis is, of course, a preeminent example of such a reformer.

42. *See, e.g.*, Payne v. Tennessee, 501 U.S. 808 (1991).

43. The Supreme Court signaled the close connection between the constitutional and common law traditions in 1938 when, on a single day, it issued two decisions with profound consequences for generations to come. On April 25, 1938, the Court decided both *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), which famously announced that the federal courts were going out of the common law business, and *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), which, in its celebrated footnote 4, just as famously announced that the same federal courts would now be aggressively open for business on a wide array of constitutional disputes. *See id.* at 152-53 n.4. Combined, these cases strongly suggested that the Court's imaginative common law energies were being redirected rather than abandoned. This is, of course, exactly what has come to pass. I thank the Secretary of the Navy (formerly Professor) Richard Danzig for pointing out this fact in a memorable class long ago.

legal system in which we would want to live. Such an approach would stultify the very Constitution it seeks to preserve.

The Preamble to the Constitution reminds us not only that our founding instrument has been established by "We the People" but also that this has been done to "secure the Blessings of Liberty to ourselves and our Posterity."[44] Amar tells us that, "[t]he Preamble's dramatic opening words . . . trumpeted the Constitution's underlying theory of popular sovereignty."[45] But what generation is to be sovereign? The populace that the Constitution is intended to serve and protect is not simply the citizenry of the Framers' generation. The Preamble's reference to posterity reminds us that the Constitution was meant to govern future generations. If there is to be what Amar terms "popular sovereignty," that term must encompass the sovereignty of succeeding generations as well. This interpretation gives the Constitution a dynamic aspect that is essential to its continued viability.

When Amar speaks of "popular sovereignty," he refers to jury verdicts and other actions of the general citizenry rather than to judicial review.[46] But if we are to have judicial review,[47] it also follows that each generation of jurists has some responsibility to interpret the Constitution in order to meet the needs of the time. That, at least, has been a recurrent judicial theme since Chief Justice Marshall's frequently-quoted statement in *M'Culloch v. Maryland*[48] that the Constitution was "intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs."[49] The judge's task, as Justice Holmes stated a century later, is to consider cases "in the light of our whole experience and not merely in that of what was said a hundred years ago."[50] As long as judicial review endures, each generation must ask itself whether it wishes for judges to be textualists and historians alone or

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44. U.S. CONST. preamble.

45. AMAR, *supra* note 1, at 27.

46. *See id.* at 129-31.

47. Amar recognizes that, in a speech before the First Congress, James Madison anticipated some form of judicial review. *See id.* at 129-30.

48. 17 U.S. (4 Wheat.) 316 (1819).

49. *Id.* at 415.

50. Missouri v. Holland, 252 U.S. 416, 433 (1920).

whether it wishes them to be both learned and responsive to contemporary circumstances and experience. If the Constitution is to live, it will be in part because this broader basis for adjudication prevails.

Amar, as previously mentioned, acknowledges that the Bill of Rights must "live in the hearts and minds of ordinary Americans" in order to survive.[51] This raises an important point of political legitimacy. A written constitution, whatever its language, will not alone secure a nation's freedom. One need only compare the current state of civil liberties in the People's Republic of China, which has a written constitution, with that of the United Kingdom, which does not, to confirm this melancholy truth. Any constitution, to survive, must be accepted by each succeeding generation that it purports to govern. It is those succeeding generations which maintain the constitution and which are confronted with the actual constitutional problems that need to be resolved.[52] Judges responsible for construing the constitution ignore this fact at their peril.

Although Amar's "hearts and minds" rhetoric and his repeated references to popular sovereignty might seem to edge him towards a dynamic view of the Constitution, his relentless historicist approach inevitably inclines toward a static interpretation. The process of creation and reconstruction that he describes is itself a dynamic one, but that process ended in 1866. A constitution with a meaning already fixed by events that have occurred well over a century ago is not a living document. A construction based on this theory will not foster continued legitimacy. This will become increasingly the case in future generations as the Founding and Reconstruction Eras further recede in memory and society continues to evolve.

Legitimacy ultimately lies in acceptance by the people. In this spirit, Amar has addressed his book "to fellow citizens."[53] In the long run, however, legitimacy will not result from an assumption that our constitutional fate is exclusively controlled by the dead hands of the Framers and the almost-as-dead hands of the reconstructors reaching from their graves. Legiti-

51. AMAR, *supra* note 1, at 297; *see supra* text accompanying note 7.
52. *See* A. INGLIS CLARK, STUDIES IN AUSTRALIAN CONSTITUTIONAL LAW 21 (1901).
53. AMAR, *supra* note 1, at 306.

macy is more likely to come from a frank acceptance of the fact that each succeeding generation must faithfully construe the Constitution as a living instrument to address its own problems.[54]

For the reasons that I have briefly discussed, constitutional law has and must continue to have a flexibility and adaptability that will, in practice, be similar to that of the common law tradition. Insofar as this perhaps slightly heretical observation is correct, it has profound implications for Amar's own ambitions to get the Bill of Rights "right" based on text, structure, and history alone. Like squaring the circle with a ruler and compass alone, this is a project that cannot be done—not by the most talented scholar, not by the wisest judge, not by anyone, ever. To use Lord Reid's striking metaphor of the common law,[55] there is no law of the Constitution hidden away in some Aladdin's cave in all its splendor, and there is no magic word, to be found by scholarship or anything else, that will suddenly reveal that law. It is a fairy tale, comforting but misleading, to think otherwise. Amar's scholarship is extremely valuable in ascertaining our historical roots, but it cannot fully substitute for judgment in addressing the problems of modern society.

Amar's book comes at an important time in our legal and constitutional history. At the very time that Amar issues his powerful plea for us to look backward into our early national history, the rest of the English-speaking legal world is looking outward. By coincidence, we are in the midst of two international developments of enormous potential significance for the way that we find and analyze the law of human rights. One development is both legal and political. The world is presently witnessing an explosion in the enactment of bills of rights by numerous English-speaking countries. In crafting their respective documents, these countries have been inspired by the American model but have avoided slavishly copying it. The other development is technological and extremely recent. The Internet now allows ready access to foreign judicial decisions

54. *Theophanous v. Herald & Weekly Times Ltd.* (1994) 182 C.L.R. 104, 171 (Austl.) (Deane, J., concurring), contains an important discussion of the legitimacy issue that has significantly influenced my own views on the subject.

55. *See generally* Reid, *supra* note 16.

that construe these newly enacted provisions. None of these decisions, are in any way binding on us, but at least some of them will provide useful wisdom in addressing the problems we encounter. The remainder of this essay will briefly explore these developments and their implications for how we approach constitutional law.

There is a powerful movement in the English-speaking world to enact national bills of rights. This is not an entirely new development, even outside our own country. The English Bill of Rights, which inspired portions of the American model, was enacted in 1688,[56] and several African and Caribbean nations have enacted bills of rights since attaining independence.[57] The English Bill of Rights, however, is limited in its application,[58] and the bills of rights of smaller nations have not produced a readily available jurisprudence apart from a few Privy Council decisions. That situation is now rapidly changing. Canada acquired a written constitution as a result of the 1982 Canada Act.[59] The Canada Act contains a Canadian Charter of Rights and Freedoms[60] that has generated a copious body of decisional law from the Supreme Court of Canada. New Zealand enacted a bill of rights in 1990[61] that has been construed by the New Zealand Court of Appeal on numerous occasions. The Republic of South Africa adopted a written constitution in 1996[62] that contains a lengthy bill of rights.[63] The Constitutional Court of South Africa has already delivered a series of exceptionally powerful decisions construing their bill of rights. Most recently, the United Kingdom enacted the 1998 Human Rights Act,[64] which incorporates the provisions of the 1950 European Convention on Human Rights[65] into domestic English law.

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56. An Act Declaring the Rights and Liberties of the Subject and Setleing [sic] the Succession of the Crowne (The Bill of Rights), 1688, 1 W. & M., ch. 2 (Eng.).

57. *See* Minister of Home Affairs v. Fisher, 1980 App. Cas. 319, 328 (P.C. 1979) (appeal taken from Berm.).

58. *See* AMAR, *supra* note 1, at 25 n.*.

59. CAN. CONST. (Constitution Act, 1982).

60. *See id.* pt. I (Canadian Charter of Rights and Freedoms), § 2.

61. New Zealand Bill of Rights Act, 1990.

62. S. AFR. CONST. (Act No. 108, 1996).

63. *See id.* ch. 2.

64. Human Rights Act, 1998 (Eng.).

65. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, art. 3, 213 U.N.T.S. 221, *reprinted*

That Act is certain to produce a great deal of English human rights jurisprudence in future years. Australia, which has a written constitution not containing a bill of rights, is currently in the midst of a national debate concerning its constitutional future.[66] A future enactment of a bill of rights governing that country is certainly within the realm of possibility.

At the same time that an international human rights jurisprudence is burgeoning, technology is working to make that jurisprudence readily available not only to judges and scholars, but also to almost every literate person. The decisions of almost every major national high court in the English-speaking world are now placed on the Internet within hours or days of filing.[67] This technology has revolutionary implications for the way that the law is researched, argued, decided, and reported. A small town lawyer or a country magistrate armed with a computer has a means to access current international legal developments that would have amazed the most advantageously placed law professor of a decade ago. The extent to which this access will be utilized remains to be seen, but some hint of the potential can be gathered from the relatively eclectic approach of judges elsewhere in the English-speaking world.

The Supreme Court currently looks at international law with considerable indifference. *Stanford v. Kentucky*[68] nicely encap-

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in BASIC DOCUMENTS ON HUMAN RIGHTS 326, 327 (Ian Brownlie ed., 3d ed. 1992).

66. An Australian constitutional convention convened in 1998, and a national referendum on whether the country is to become a republic will be held in November 1999.

67. Readers intrigued by this portion of the essay may wish to bookmark the following internet addresses for the decisions of national high courts:

Supreme Court of the United States—
<http://supct.law.cornell.edu/supct/opinionlist.1998.html>;
High Court of Australia—
<http://www.austlii.edu.au/au/cases/cth/high_ct/recent-cases.html>;
Supreme Court of Canada—
<http://www.droit.umontreal.ca/doc/csc-scc/en/rec/index.html>;
Court of Appeals of New Zealand—
<http://www.brookers.co.nz/legal/judgments/default.htm>;
Constitutional Court of South Africa—
<http://pc72.law.wits.ac.za/lawreps.html>;
House of Lords (U.K.)—
<http://www.parliament.the-stationery-office.co.uk/pa/ld199697/ldjudgmt/ldjudgmt.htm>.

68. 492 U.S. 361 (1989).

sulates the Court's prevailing view by declaring that "it is *American* conceptions" of acceptability that are dispositive in construing the Constitution.[69] Recent attempts to persuade the Supreme Court to consider current international standards involving the administration of the death penalty have been unsuccessful, although Justices Stevens and Breyer have issued noteworthy dissents.[70] Judges elsewhere in the English-speaking world have a strikingly different outlook. Almost any newly published volume of national high court decisions from England, Canada, Australia, New Zealand, or South Africa contains numerous references to the judicial decisions of foreign tribunals, including the decisions of American courts. Foreign citations are routine in cases involving the common law. The House of Lords, for example, in a recent case involving the law of nuisance,[71] referred to judicial decisions from Canada, New Zealand, Germany, the United States, and the European Court of Human Rights in addition to a line of English precedents.[72]

Such cross-citation makes intuitive sense in cases involving the common law because common law principles frequently transcend national borders. More surprisingly, however, a similar citational pattern has emerged in national high court cases involving questions of domestic constitutional law. In *R. v. Goodwin*,[73] for example, the Court of Appeals of New Zealand construed the New Zealand Bill of Rights Act provisions pertaining to confession evidence in a wide-ranging decision that discussed, in addition to New Zealand authorities, cases from the United States, England, Canada, Micronesia, Sri Lanka, and the European Court of Human Rights.[74] *Goodwin* is exceptional in its breadth of analysis, but somewhat less ambitious decisions construing domestic constitutional provisions by refer-

69. *Id.* at 369 n.1.

70. *See* Elledge v. Florida, 119 S. Ct. 366 (1998); Lackey v. Texas, 514 U.S. 1045 (1995) (denying certiorari in cases addressing the constitutionality of lengthy stays on death row). Justices Stevens and Breyer in their separate opinions in these cases have expressed an interest in considering the analysis of the Privy Council limiting the time in which the state may constitutionally carry out sentences of execution. *See also* Pratt v. Attorney-General, [1994] 2 App. Cas. 1 (P.C. 1993) (appeal taken from Jam.).

71. Hunter v. Canary Wharf, Ltd., 1997 App. Cas. 655 (appeal taken from Eng.).

72. *See id.* at 656-57.

73. [1993] 2 N.Z.L.R. 153.

74. *See id.* at 174-80.

ence to the decisions of other national high courts have become fairly commonplace.[75] As a result of this pattern of international reference, there has developed something like a dialogue between national high courts on constitutional issues. Our own Supreme Court is often cited in this dialogue but does not otherwise actively participate in the exchange.[76]

We are not, of course, bound in any manner by the way in which the rest of the world views issues of fundamental human rights.[77] A failure to listen to the rest of the world, however, particularly at a time when the development of the Internet has made such listening relatively unproblematic, places ourselves in a cocoon of our own design. The rest of the world cannot, except by way of contrast, help us find our own unique national character. For that, we must look to our history and ourselves. But as Justice Brandeis recognized in *Burnet v. Coronado Oil & Gas Co.*,[78] "the lessons of experience and the force of better reasoning"[79] are also important in construing

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75. The constitutional decisions of foreign tribunals on the Internet frequently contain cross-citations to the judicial decisions of other countries.

76. A recent series of national high court decisions involving the principle of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), provides a good illustration of this dialogue. *Sullivan*, as is well known, holds that the First Amendment limits "a State's power to award damages for libel in actions brought by public officials against critics of their official conduct." *Id.* at 283. Plaintiffs in such actions are required to show "actual malice" in order to succeed. *See id.* This ruling, designed to foster a "robust and wide-open" debate on domestic issues, *id.* at 270, has generated a robust international debate of its own elsewhere in the English-speaking world. In the past four years alone, the highest national courts of Canada, South Africa, Australia, and New Zealand have considered the applicability of *Sullivan* to their domestic constitutions. *See* Lange v. Australian Broad. Corp. (1997) 189 C.L.R. 520 (Austl.); Hill v. Church of Scientology [1995] 2 S.C.R. 1130 (Can.); Lange v. Atkinson [1998] 3 N.Z.L.R. 424; DuPlessis v. DeKlerk, 1996 (3) SALR 850 (CC) (S. Afr.). The New Zealand Court of Appeal substantially adopted the *Sullivan* principle, while its counterparts in Canada, South Africa, and Australia have not. The High Court of Australia, not surprisingly, was strongly influenced by the fact that Australia does not have a bill of rights with an express guarantee of freedom of expression. *See Lange* (1997), 189 C.L.R. at 567. Despite the diversity of result, all four decisions contain extensive references both to *Sullivan* itself and the international jurisprudence inspired by *Sullivan*. There is a real sense that these courts are listening to each other as they struggle with constitutional issues that may be novel to their domestic jurisprudence but not novel to the world at large.

77. As the discussion of the varying international reception of *Sullivan* illustrates, doctrinal uniformity is hardly an international norm. *See supra* note 76.

78. 285 U.S. 393 (1932).

79. *Id.* at 407-08 (Brandeis, J., dissenting).

the great provisions of our Constitution. For that, we can profit by looking outward as well as backward and inward.

The title of this essay is inspired by an aphorism of Justice Holmes that, "[t]he law, so far as it depends on learning, is . . . the government of the living by the dead."[80] The lasting influence of the dead is inescapable in any society governed by law, for law substantially depends on text and precedent for its substance and legitimacy. Akhil Amar has done us a lasting service by bringing a vital part of our constitutional past to light. His error lies in suggesting that we can get the law of our Constitution "right" by reference to this past alone. As Justice Holmes went on to say, "the present has a right to govern itself so far as it can."[81] The Constitution, however sanctified, is not quite the changeless structure, the temple to be preserved, that Amar suggests. The Constitution was intended to live.

80. 3 COLLECTED WORKS OF JUSTICE HOLMES 492 (Sheldon M. Novick ed., 1995).
81. *Id.*