COMMENTARY

HERCULES, HERBERT, AND AMAR: THE TROUBLE WITH *INTRATEXTUALISM*

Adrian Vermeule[*] *and Ernest A. Young*[**]

Do the provisions of the Constitution fit together in a coherent scheme? Should judges interpret the Constitution as if they do? Akhil Amar's recent article, *Intratextualism*,[1] answers "yes" to both of these questions. Amar takes a familiar canon of statutory construction — that similar terms appearing in different parts of a statute should generally be interpreted to have similar meanings — and expands it into an ambitious new approach to constitutional interpretation. Amar describes intratextualism as a form of "holistic textualism" through which the words of the Constitution are seen as part of broad linguistic and structural patterns. By paying heed to these patterns, the ingenious reader may achieve interpretive insights that would be lost to "clause-bound" interpreters, who never lift their eyes above the narrow horizons of individual constitutional provisions.

Amar's article is a fresh and interesting contribution to a field plagued by the chronic worry that little new remains to be said. Yet we are skeptical about *Intratextualism*'s general project and specific claims. A quarter-century ago another constitutional theorist, Ronald Dworkin, articulated a general theory of legal interpretation that shared Amar's central idea that the relevant legal materials fit together, or at least should be read to fit together, into a coherent pattern.[2] The protagonist of Dworkin's theory was Hercules, an ideal judge endowed with infinite patience and resourcefulness. The unavoidable impression left by Dworkin's account was that it would take a judge like Hercules to wrest coherence from the chaotic mass of

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[*] Assistant Professor of Law, University of Chicago Law School.

[**] Assistant Professor of Law, University of Texas School of Law. This article was substantially completed while Mr. Young was Visiting Assistant Professor of Law at Villanova University School of Law.

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[1] Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

[2] *See* Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1094–95 (1975).

modern law. And the obvious criticism of Dworkin was that Hercules, of course, does not exist.

Our basic critique of *Intratextualism* derives from similar concerns. All interpretive techniques, including the strong form of holistic textualism that Amar proposes, are the product of two factors: a theory of constitutional obligation that explains why the interpretive technique in principle yields legitimate decisions and an account of the institutional capacities of constitutional interpreters that explains why those interpreters will perform more successfully in practice with the proposed technique than with some other approach. At critical points in the argument, *Intratextualism* fails to address these issues of obligation and institutional capacity; when it does address them, it proves unpersuasive.

First, although *Intratextualism* is ambiguous about its account of constitutional obligation, neither of the accounts most plausibly attributed to Amar — originalism or text-oriented conventionalism — provides any necessary normative justification for Amar's Herculean approach to constitutional meaning. Whether an originalist or a conventionalist would understand the Constitution as a deeply coherent document are difficult questions that Amar has largely failed to investigate. Amar's assumption of constitutional coherence is also descriptively implausible in light of the heterogeneity of the Constitution, a document whose component provisions were enacted at different times, in different circumstances, and for different reasons, and whose interpreters generally read different types of provisions in different ways.

Second, Amar does not examine judges' interpretive capacities or their likely performance under the alternative regimes of intratextualism and clause-bound interpretation. That examination would require difficult empirical and predictive judgments. But we doubt that judges laboring under severe constraints of time, information, and expertise would perform better, even by Amar's own lights, under a regime of intratextualism than under its clause-bound competitor. Whichever regime would better serve such judges, Amar's failure even to consider these institutional issues creates a yawning gap in his defense of intratextualism.

Part I lays the groundwork by detailing Amar's intratextualist methodology and by specifying the alternative interpretive approach that Amar opposes.[3] We distinguish "weak intratextualism," a canon of interpretation suggesting that, all else equal, similar provisions should be read similarly, from "strong intratextualism," an approach that uses inferences drawn from parallel provisions to trump localized

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[3] *See infra* pp. 733–39.

arguments based on text, history, and precedent. Although Amar muffles his claims in cautious language, we conclude that strong intratextualism is at the heart of his proposal and that he frequently attempts to justify the overriding of locally based interpretations. Amar advances his approach as an alternative to "clause-bound" interpretation, in which interpreters proceed by examining the local text, history, and precedent of particular constitutional provisions, without attempting to read the Constitution in a holistic, coherent manner. Despite Amar's contempt for clause-bound interpretation, we believe that it remains a necessary component of intratexualist interpretation. And this fact has important implications for our critique.

In Part II, we examine Amar's theory of constitutional obligation.[4] *Intratextualism* contains a pervasive, if only partially articulated, assumption that the Constitution is a fully coherent document. We criticize this assumption on both normative and descriptive grounds. Normatively, Amar has not advanced an account of constitutional obligation that would justify the coherence assumptions of intratextualism. Descriptively, Amar's strong assumption of coherence stands at odds both with the patchwork character of the Constitution and with the settled practice of constitutional interpreters. We argue, using some of Amar's own examples, that traditional clause-bound practice may afford important advantages not captured by a global interpretive approach like intratextualism.

Part III introduces Herbert, a rather pedestrian judge first employed by Dworkin as a foil for Hercules.[5] For Herbert, hampered by the cognitive and institutional limitations that hamper actual judges, it is not at all obvious that the best interpretive approach is simply to follow the Herculean ideal as best he can. We thus focus in Part III on intratextualism's merits and demerits as a second-best theory of interpretation for real judges acting with limited time, information, and interpretive expertise.[6] Comparing intratextualism with clause-bound interpretation from this second-best perspective, we conclude that intratextualism may well increase the decision costs and error costs associated with constitutional interpretation, loosen interpretive constraints on judges, and destabilize interpretive practice. In a world in which most judges are more like Herbert than Hercules, a clause-bound approach may well be preferable along all these dimensions.

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[4] *See infra* pp. 739–59.

[5] *See* Dworkin, *Hard Cases*, *supra* note 2, at 1103–04.

[6] *See infra* pp. 759–77.

I. WHAT *IS* "INTRATEXTUALISM"?

The intratextualist interpreter "tries to read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase."[7] As a "classic example" of this technique, Amar begins with *McCulloch v. Maryland*,[8] in which Chief Justice Marshall drew upon the phrase "absolutely necessary" in Article I, Section 10 (concerning duties and imposts) to clarify the meaning of "necessary" in the Necessary and Proper Clause.[9] Because the Framers used "absolutely necessary" to convey a strong sense of necessity, Marshall reasoned, the unadorned "necessary" in Article I, Section 8 should not be understood to imply a similar sense of strict limitation.[10] Different words mean different things.[11]

The same words, conversely, ought generally to mean the same thing to an intratextualist.[12] One of Amar's arguments about the First Amendment's Free Speech Clause, for example, relies upon the term "speech" in Article I, Section 6's Speech or Debate Clause. That clause, which provides that senators and representatives "shall not be questioned in any other Place" for "any Speech or Debate in either House," plainly applies only to political speech. Hence, Amar says, the same word in the Free Speech Clause ought likewise to be read to protect only, or at least chiefly, *political* speech.[13] One consequence of this view is that Supreme Court opinions that "shrink the doctrinal difference" between political and commercial speech are misguided.[14] Another consequence is that courts need not worry too much about content-based distinctions in regulating free speech, so long as there is no

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7 Amar, *Intratextualism*, *supra* note 1, at 748.

8 17 U.S. (4 Wheat.) 316 (1819).

9 Amar, *Intratextualism*, *supra* note 1, at 756–57 (citing *McCulloch*, 17 U.S. at 414–15).

10 *McCulloch*, 17 U.S. at 414–15.

11 Except when they mean the same thing. *See infra* Part III.B.2 (discussing the extreme malleability of intratextualism in practice).

12 Except when they mean different things. *See infra* Part III.B.2 (discussing the extreme malleability of intratextualism in practice).

13 *See* Amar, *Intratextualism*, *supra* note 1, at 815.

14 *Id.* at 812–13 (discussing 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996)). Although Amar reserves his primary fire for Justice Thomas's concurrence in *44 Liquormart*, which argued that there is no "philosophical or historical basis" for according commercial speech less protection than political, *see* Amar, *Intratextualism*, *supra* note 1, at 813 (quoting *44 Liquormart*, 517 U.S. at 522 (Thomas, J., concurring)), it is clear that his attack is directed more broadly at the majority of the Court's recent commercial speech jurisprudence, *see id.* at 812–13 (discussing the *44 Liquormart* plurality), as well as other cases extending First Amendment protection beyond classic verbal and written political debate, *see id.* at 813 (criticizing Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997), which recognized a First Amendment right of cable television system operators to control the content placed on their networks, and *Buckley v. Valeo*, 424 U.S. 1 (1976), which extended First Amendment protection to expenditures of money in political campaigns).

discrimination on the basis of viewpoint. Legislatures, after all, frequently restrict the *subjects* of political debate.[15]

These two examples illustrate the flip sides of Amar's intratextualist project: the familiar recourse to a nearby clause's use of the same word in *McCulloch*, on the one hand, and on the other the startling juxtaposition of "the freedom of speech" with "speech or debate." We begin by examining the tension between these two faces of intratextualism.

A. Strong or Weak?

Intratextualism has its roots in the familiar principle of statutory construction that, ordinarily speaking, "identical words used in different parts of the same act are intended to have the same meaning."[16] This principle is usually stated as a "natural presumption," and it frequently comes with a qualification that "the presumption is not rigid and readily yields" whenever variations in context or other sources of meaning suggest that the identical terms were in fact used with different intent.[17] We may call this relatively uncontroversial, tie-breaking version of the principle "weak intratextualism."[18]

Sometimes Amar seems to advocate little more than weak intratextualism; his article has more hedges than an English garden. Amar is careful, for example, not to "claim that intratextualism is the only or even the best form of constitutional argument, or that it will work in every important case."[19] Two of Amar's three types of intratextualism — using the Constitution itself as a dictionary to show that a contested term *can* mean a certain thing[20] or to suggest patterns in the document that favor certain readings over others[21] — seem easily compatible with weak intratextualism. Even the third, more demanding type, which reads the Constitution "*as if* a metacommand clause existed telling us to construe parallel commands in parallel fashion," is limited

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[15] *See* Amar, *Intratextualism*, *supra* note 1, at 816; *see also id.* (urging a "parliamentary model of freedom of speech").

[16] Sullivan v. Stroop, 496 U.S. 478, 484 (1990) (quoting Sorenson v. Secretary of the Treasury, 475 U.S. 851, 860 (1986)); *see also* Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 87 (1934); Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932).

[17] *Atlantic Cleaners & Dyers*, 286 U.S. at 433; *see also* Lamar v. United States, 240 U.S. 60, 65 (1916) (Holmes, J.) (refusing to apply the presumption).

[18] Even this weak version has its enemies. *See* Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333, 337 (1933) ("The tendency to assume that a word which appears in two or more legal rules . . . has and should have precisely the same scope in all of them . . . has all the tenacity of original sin and must constantly be guarded against."); Gustafson v. Alloyd Co., 513 U.S. 561, 598 (1995) (Ginsburg, J., dissenting) (quoting Cook, *supra*). But we are not among them.

[19] Amar, *Intratextualism*, *supra* note 1, at 788.

[20] *See id.* at 791–92 (discussing "Intratextualism as Philology").

[21] *See id.* at 792–94 (discussing "Intratextualism as Pattern Recognition").

by "the possibility that, upon reflection, there are sound constitutional reasons not to treat the individual commands as *in pari materia*."[22] At times, intratextualism resembles a brainstorming technique rather than a technique for *resolving* interpretive issues; Amar says, for instance, that it "will not so much dictate results as suggest possible readings."[23] Finally, the evidence amassed by Amar to show that intratextualism is "an important form of constitutional argument bearing a distinguished legal pedigree"[24] is generally consistent with the weak approach. In *McCulloch v. Maryland*[25] and *Martin v. Hunter's Lessee*[26] — two decisions that (Amar says) used intratextualism successfully[27] — intratextualism figures as one in a broad arsenal of legal weapons, existing alongside historical, structural, and pragmatic arguments.[28]

Whether Amar is advocating only weak intratextualism or something more consequential turns on the strength of the presumption in favor of reading like words alike in the face of contradictory evidence generated by other tools of interpretation. Strong intratextualism would enable a reading of a provision somewhere else in the document to trump clause-specific textual or historical evidence, or legal precedent, concerning the provision in dispute.[29] When Amar turns from decided cases to his own analyses, *Intratextualism* takes on this more radical cast. His reading of the Free Speech Clause, for instance, would allow two intratextual factors — the use of "speech" in Article I, Section 6's Speech or Debate Clause and the parallel structures of the First Amendment and the Necessary and Proper Clause — to trump a great deal of precedent extending significant First Amendment protection to commercial speech and erecting a formidable barrier to content-based regulation of expression.[30] His reading of Section 5 of the

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[22] *Id.* at 795.

[23] *Id.* at 799.

[24] *Id.* at 749.

[25] 17 U.S. (4 Wheat.) 316 (1819).

[26] 14 U.S. (1 Wheat.) 304 (1816).

[27] Amar's other examples are of cases in which the Court *should* have used intratextualism but didn't, *see* Amar, *Intratextualism*, *supra* note 1, at 763–73 (discussing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) and Bolling v. Sharpe, 347 U.S. 497 (1954)), or in which the Court *did* use intratextualism but poorly, *see id.* at 773–78 (discussing Roe v. Wade, 410 U.S. 113 (1973)).

[28] *See* Amar, *Intratextualism*, *supra* note 1, at 750–58 (discussing *McCulloch*, 17 U.S. (4 Wheat.) 316); *id.* at 758–63 (discussing *Martin*, 14 U.S. (1 Wheat.) 304).

[29] We speak of precedent here as a persuasive indicator of constitutional meaning. *See, e.g.*, Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 691–92 (1994). We consider the stare decisis value of precedent and its relation to intratextualism *infra* pp. 773–74.

[30] *See* Amar, *Intratextualism*, *supra* note 1, at 812–18. For the Court's holdings on commercial speech, see, for example, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980); and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). On

Fourteenth Amendment *in pari materia* with Section 2 of the Thirteenth Amendment, likewise, permits his interpretation of the latter provision to trump originalist evidence concerning the drafting history of the Fourteenth Amendment itself.[31] Amar's doctrinal proposals thus display a strong version of intratextualism with radical potential to redirect First Amendment law, reconceptualize equal protection as declaratory of due process, or use the theory of enumerated powers as a restraint on the Bill of Rights.[32]

It thus seems fair to focus our critique on the strong version of intratextualism that generates these arresting outcomes. It would be odd, after all, to read Amar as having devoted eighty law review pages to advocacy of a familiar, weak presumption in favor of reading similar words to say similar things. The criticisms we raise here, however, will generally apply to *any* version of intratextualism, with the important qualification that the *degree* of interpretive risks and costs will vary according to the weight given to intratextualist readings. While weak intratextualism is usually inoffensive,[33] its use should always be accompanied by a candid assessment of its liabilities.

Amar's version of intratextualism might also be either strong or weak along a second dimension: the extent to which he asks judges to prefer intratextualist readings in the face of contrary precedent. In constitutional interpretation, the question of meaning is always distinct from that of institutional design.[34] Just as one might argue that judges should be able to prefer their own view of constitutional meaning to

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content discrimination, see, for example, *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105 (1991); and *United States v. Eichman*, 496 U.S. 310 (1990).

[31] *See* Amar, *Intratextualism*, *supra* note 1, at 822–24. Amar views the interpretations generated by intratextualism as consistent with the originalist evidence concerning the Fourteenth Amendment mustered by Justice Kennedy in *City of Boerne v. Flores*, 521 U.S. 507, 520–24 (1997), which indicated that the Reconstruction Congress rejected a draft that would have given Congress plenary legislative power over civil rights. But Amar's interpretations — which would either give Congress the power "to define rights that in good faith it considers truly fundamental and basic" or at least treat Congress's definition "as powerful evidence of fundamentality in courts" — are hardly "middle-ground." Amar, *Intratextualism*, *supra* note 1, at 824. If Congress may define any right of property, family relations, education, etc. as "fundamental," thereby triggering broad enforcement powers, then it is hard to see how Amar's proposal would not reinstate the "plenary" legislative power rejected by the drafters. Amar's view is thus best read as overcoming the Fourteenth Amendment's drafting history based on the broader enforcement power that has been read into the *Thirteenth* Amendment.

[32] *See* Amar, *Intratextualism*, *supra* note 1, at 812–18 (free speech); *id.* at 772–73 (equal protection); *id.* at 814–15 (enumerated powers and the Bill of Rights).

[33] Some use of weak intratextualism may even be obligatory, at least in some cases. *See, e.g.*, Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1272 (1995) (noting that "peripheral vision seems essential for coherent structural argument in constitutional law").

[34] *See, e.g.*, Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249, 1251 (1997).

that of the political branches only in exceptionally clear cases,[35] one might also argue that judges' application of particular interpretive theories should be limited by stare decisis.[36]

Here, too, Amar seems to advocate a strong version of his theory. Intratextualism is obviously a theory to be applied by judges; Amar's examples of intratextualism in practice, after all, are overwhelmingly drawn from judicial opinions.[37] Amar says relatively little about stare decisis, and it is possible that he would ask judges to apply intratextualist analysis only in open-textured cases, in which clause-bound precedent does not dictate a different result. This, of course, would render Amar's prescriptive examples of academic interest only, as each example — the Court's content discrimination and commercial speech cases, *Morrison v. Olson*,[38] and *City of Boerne v. Flores*[39] — involves precedents otherwise entitled to stare decisis effect.[40] Given Amar's powerful attack on *Morrison*,[41] it is hard to believe that he would counsel the Justices to adhere to it in a future case. And his contention that "content-based discriminations are not themselves (even presumptive) violations of the freedom of speech"[42] seems to call rather clearly for a retreat from current doctrine. More generally, Amar's invocation of the democratic virtues of textualism over the "inherently exclusionary" — read 'elitist' — "arts of doctrinal analysis"[43] would be largely beside the point if doctrine wins whenever it is well-established. In the end, Amar seems to be attempting not only to forestall errors in future cases, but also to cure past mistakes.[44]

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35 *See, e.g.*, James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

36 *See, e.g.*, Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 382 (1981).

37 *See* Amar, *Intratextualism*, *supra* note 1, at 749–78. Amar's recent work on criminal procedure, which employs significant intratextual analysis, is likewise directed to "a lawyer or judge who needs to understand a particular clause or amendment to deal with the case at hand." AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES x (1997) [hereinafter AMAR, FIRST PRINCIPLES].

38 487 U.S. 654 (1988).

39 521 U.S. 507 (1997).

40 *See* Amar, *Intratextualism*, *supra* note 1, at 802–26. Amar suggests that the Court's opinion in *Edmond v. United States*, 520 U.S. 651 (1997), undermined *Morrison*'s precedential status, but the question would still remain whether the Court acted properly in *Edmond* by preferring an intratextual reading to a prior decision on point.

41 *See* Amar, *Intratextualism*, *supra* note 1, at 809–12.

42 *Id.* at 817. Indeed, because "the entire edifice of First Amendment doctrine . . . is *itself* content-based," Amar asserts that judges' adherence to the ban on content discrimination by the political branches is "obtuse and self-dealing." *Id.* This is not the language of someone who would counsel the Court to adbere to the existing edifice for stare decisis reasons.

43 *Id.* at 796.

44 Again, Amar's work on criminal procedure provides helpful evidence. *See, e.g.*, AMAR, FIRST PRINCIPLES, *supra* note 37, at 160 (calling for a radical "reconceptualization of the field" and urging "judges," as well as "scholars, lawmakers, and citizens," to "rally to the banner I have tried to raise"); Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law after Rodney*

No one should be surprised that, in the hands of someone as ingenious as Amar, a dusty canon of construction is transformed into a sweeping tool of constitutional redefinition. And Amar's article, in both its length and its tone, has the unmistakable cast of someone seeking to say something new and important, with significant implications for real cases. But the liabilities of intratextualism that we identify below extend in principle to *any* version of intratextualism, strong or weak. The only difference is that the magnitude of these problems will vary in proportion to the aggressiveness with which intratextualism is employed. Where intratextualism is done modestly, its advantages may outweigh its liabilities, but even then interpreters would do well to remain cognizant of the method's problematic assumptions.

B. The Role of Clause-Bound Interpretation

Amar's principal target is "clause-bound" interpretation. The clause-bound interpreter incurs Amar's ire whether or not the interpreter focuses principally on text or on a mixture of text, history, and precedent. In either event, clause-bound interpretation is "blinkered"[45] and treats "the document . . . as a jumbled grab bag of assorted clauses."[46] By contrast, intratextualism "always focuses on at least two clauses and highlights the link between them," and "read[s] a two-dimensional parchment in a three-dimensional way, carefully folding the parchment to bring scattered clauses alongside each other."[47]

It is critical to understand, however, that clause-bound interpretation is itself a component of intratextualism. Standing alone, even a strong version of intratextualism is necessarily incomplete. Intratextualism always requires at least two constitutional provisions: text *A* and text *B*. And in order for text *B* to help us interpret text *A*, we must already understand the meaning of text *B*. If we are to avoid an infinite regress, intratextualism itself cannot supply the initial meaning for text *B*. That means "we still need other tools of interpretation" not simply to "finally assess the plausibility of any reading suggested by intratextualism," as Amar admits,[48] but to generate those readings in the first place.

King, 95 COLUM. L. REV. 1, 27 (1995) (calling for the Court to overrule a case inconsistent with Amar's view of the Fifth Amendment). We discuss the implications of intratextualism for stare decisis further *infra* pp. 767–69.

[45] *See* Amar, *Intratextualism*, *supra* note 1, at 788.

[46] *Id.* at 795.

[47] *Id.* at 788.

[48] *Id.* at 799; *see also id.* at 796 n.193 ("Even though intratextual analysis will often lead readers to consider certain clauses and their possible interrelation, fully satisfying constitutional analysis will often require the use of other tools of interpretation once the relevant clauses and questions have been identified.").

In the abstract, at least, it should not matter which interpretive techniques we use to fix the meaning of text *B*. Whether its interpretation is derived from plain meaning, originalist history, judicial precedent, or numerology, an established meaning for text *B* will be necessary, even under a weak version of intratextualism, to arrive at a meaning for text *A*. But judging by Amar's examples, his interpretive approach is an eclectic version of clause-bound interpretation that relies upon a mixture of arguments from text, history, and precedent. For example, Amar asks whether "the Twenty-Sixth Amendment, ratified in 1971, protect[s] the right of eighteen-year-olds to 'vote' in juries as well as in ordinary elections."[49] Amar answers this question by referring to the text and history of the assertedly parallel Fifteenth Amendment. Because that Amendment "was drafted to encompass the political right of citizens to serve and 'vote' on juries, this fact about word usage and constitutional meaning in 1870 would be relevant to an intratextualist confronting a different (but parallel) amendment adopted 100 years later."[50]

Because clause-bound readings are a necessary component of intratextualism, Amar is implicitly comparing two interpretive regimes: one clause-bound regime that emphasizes the local meaning of constitutional provisions in the light of text, history, and precedent, and another regime, intratextualism, which considers all of those sources, but *additionally* considers parallel provisions in the light of *their* text, history, and precedent, and seeks illumination by comparing the two provisions.[51] The latter regime makes strong assumptions about constitutional coherence and the interpretive competence of judges. We examine the coherence assumption in Part II, and Amar's optimistic view of judicial capacities in Part III.

II. HERCULES' CONSTITUTION: COHERENCE AND CONSTITUTIONAL OBLIGATION

In his influential article *Hard Cases*, Ronald Dworkin imagined an ideal judge, Hercules, who served as the protagonist of Dworkin's interpretive theory.[52] When the judge confronts an issue to which the governing legal materials do not immediately provide a clear answer — a "hard case" — the Herculean task is to develop a general theory that takes into account all the relevant constitutional and statutory provisions, judicial precedents, and philosophical principles, and then

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[49] *Id.* at 789.

[50] *Id.*

[51] *See infra* pp. 741, 743, 750–57.

[52] *See* Dworkin, *Hard Cases*, *supra* note 2, at 1083.

to apply that theory to decide the particular case at bar.[53] Hercules formulates and applies "top-down" theories[54] that are conceived at a high level of theoretical abstraction and are intended to unify a large area of legal material. And Hercules performs these tasks with infinite patience and superhuman wisdom.[55]

Amar, of course, uses real judges as his examples, not characters out of mythology.[56] Yet *Intratextualism* shares two critical assumptions with *Hard Cases*: the belief that top-down coherence is possible across a broad range of issues arising in constitutional interpretation, and the exhortation that even non-Herculean judges should strive for this ideal.[57] Amar never undertakes to defend these assumptions, and their truth is far from obvious.

This Part examines the coherence assumption. Section A explains and illustrates Amar's tacit belief that the Constitution's drafters, interpreters, and amenders together create a fully theorized and integrated document. Section B critiques Amar's coherence assumption on the normative ground that it lacks foundations in any theory of constitutional obligation that could plausibly be attributed to Amar. Section C critiques the coherence assumption on descriptive grounds, arguing that the coherence assumption misdescribes the Constitution as a historical text and misdescribes the prevailing practices of constitutional interpreters.

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[53] *Id.* at 1094 ("[Hercules] must construct a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents and, so far as these are to be justified on principle, constitutional and statutory provisions as well.").

[54] *See* Richard A. Posner, *Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights*, 59 U. CHI. L. REV. 433, 433 (1992) (defining top-down reasoning).

[55] *See* Dworkin, *Hard Cases*, *supra* note 2, at 1083 ("[Hercules is] a lawyer of superhuman skill, learning, patience and acumen . . . .").

[56] However, we will suggest in Part III that the real judges Amar praises, such as Marshall, are so heavily mythologized as to serve the same role in Amar's theory that Hercules serves in Dworkin's. *See infra* pp. 761–62.

[57] Both admirers and detractors have noted this attraction to constitutional coherence in Amar's work. *See, e.g.*, Michael J. Gerhardt, *The Utility and Significance of Professor Amar's Holistic Reasoning*, 87 GEO. L.J. 2327, 2328 (1999) (reviewing AMAR, BILL OF RIGHTS) (describing Amar's book, *The Bill of Rights*, as "the most self-conscious, refined, and comprehensive use of [holistic interpretation] in constitutional scholarship"); Ronald J. Allen & Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge*, 72 ST. JOHN'S L. REV. 1149, 1172 (1998) (accusing Amar of pursuing "logical consistency for its own sake"); Susan R. Klein, *Enduring Principles and Current Crises in Constitutional Criminal Procedure*, 24 L. & SOC. INQUIRY 533, 562–63 (1999) (reviewing AMAR, FIRST PRINCIPLES) (criticizing Amar's assumption that "a single value underlies criminal procedural guarantees"); Carol S. Steiker, *"First Principles" of Constitutional Criminal Procedure: A Mistake?*, 112 HARV. L. REV. 680, 687 (1999) (charging that Amar's work on criminal procedure "may well overestimate the value of coherence").

A. Hercules as Drafter, Amender, and Interpreter

Amar makes no bones about the degree of coherence that his theory assumes in, or imputes to, the Constitution: "Perhaps the greatest virtue of intratextualism," he says, is that "it takes seriously the document as a whole rather than as a jumbled grab bag of assorted clauses .... [I]t is *a* (single, coherent) Constitution we are expounding."[58] This assumption is critical. Amar's favorite aspect of the *McCulloch* opinion is Chief Justice Marshall's juxtaposition of "necessary" in Article I, Section 8, with "needful" in Article IV, Section 3, which confers power upon Congress to make "rules and regulations" for the territories.[59] Because Article IV clearly contemplates the power to create corporate bodies (like territorial governments), Marshall infers that Article I's similar language must include a similar power (to create a bank). Yet this juxtaposition works only if the Constitution is read to entail a strong norm of internal consistency.[60]

We are still, of course, a step short of assuming that the Constitution embodies a coherent *theory* of the sort that Dworkin's Hercules might construct; similar words might have similar meanings throughout the document, without implying any broader sense of theoretical consistency. Yet Amar cheerfully takes this step by identifying his theory as a textual brand of constitutional holism. This "holistic textualism," Amar says, "calls for special skill, seeing and showing how different clauses cohere into larger patterns of constitutional meaning."[61] Amar's insight that the First Amendment's "Congress shall make no law" language parallels the Necessary and Proper Clause's "Congress shall have Power ... [t]o make all laws" terminology, for example, quickly expands into an argument that the First Amendment forbids only what the original Constitution did not authorize.[62] Amar uses intratextualism, in other words, to read the structural theory of enumerated powers into the Bill of Rights. Such a reading is perfectly appropriate, he claims, because "the textual interlock between the First Amendment and the Necessary and Proper Clause was no coincidence but part of a deep design."[63]

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58 Amar, *Intratextualism*, *supra* note 1, at 795.

59 *See id.* at 757–58 (extolling this argument as Marshall's "intratextual ace" or "trump card").

60 *Cf. infra* note 122 (suggesting that the differing contexts of Articles I and IV may well matter here). A separate problem is that it is not clear, on Amar's theory, that Marshall was correct to read "necessary" as equivalent to "needful"; perhaps the difference in wording should make a difference. This is an example of the malleability of intratextualism, which we discuss *infra* pp. 767–69.

61 Amar, *Intratextualism*, *supra* note 1, at 796.

62 *Id.* at 814–15; *see also id.* at 819 ("[T]he words of the [First] Amendment were designed to interlock with those of the Necessary and Proper Clause, and thus affirm that Congress simply lacked enumerated power to restrict speech or free exercise in the states.").

63 *Id.* at 814.

Now we can make out the shadow of Hercules. Amar's constitution is completely theorized.[64] Particular provisions do not have local meanings that fail to fit easily into an overarching plan; rather, everything fits together seamlessly as "part of a single coherent Constitution."[65] This is the sort of constitution that Hercules might *write*: a document embodying a single textual, institutional, and political scheme, with all its parts integrated into a coherent whole. Everything has been thought through in terms of its relation to everything else, and jarring elements have been eliminated. Any given provision may offer clues to the meaning of others, no matter how distant in location or purpose, because all are parts of the same "deep design."[66]

Amar is surely aware of many of the tradeoffs, political battles won and lost, and compromised ideals that went into the drafting of the Constitution.[67] And Amar is quick to acknowledge that many of the underlying unities that he finds in the document were likely *not* specifically intended by its drafters. Like a great play, he says, the Constitution "may contain a richness of meaning beyond what was clearly in the playwright's mind when the muse came,"[68] although Amar also insists that "the pattern here is not constitutionally coincidental."[69] Intratextualism thus emerges not only as an empirical assumption about drafting, but also as an imperative for *reading*; the "genius of the Constitution," he concludes, is *both* "a genius of its writers" *and* "a genius of its readers."[70]

This move clinches Amar's kinship to Dworkin. Intratextualism directs interpreters to "look for . . . consistency rather than inconsis-

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[64] *See generally* Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995) (contrasting "completely theorized" and "incompletely theorized" positions).

[65] Amar, *Intratextualism*, *supra* note 1, at 822.

[66] *Id.* at 814. One might object, on Amar's behalf, that only similarly worded provisions are assumed to share this sort of kinship. Yet here, too, Amar is unafraid to take the next step. "Even if adjoining clauses have no linguistic overlap," he says, "they often deal with related subjects, and each is often illuminated by careful comparison with its neighbors." *Id.* at 796. Nor is the "adjoining" constraint any more critical than that of shared wording. The Citizenship Clause of the Fourteenth Amendment and the Attainder and Nobility Clauses of Article I are all brought to bear on *Bolling v. Sharpe*, 347 U.S. 497 (1954), not because they are placed close together — although the last three *are*, in fact — but because they each share the trait of applying to both the state and the federal governments. *See* Amar, *Intratextualism*, *supra* note 1, at 769–72; *see also id.* at 788 ("[I]ntratextualism often reads the words of the Constitution in a dramatically different order, placing textually nonadjoining clauses side by side for careful analysis."). These clauses thus form, in Amar's view, a "larger pattern[] of constitutional meaning" that is not dependent on linguistic similarity or textual proximity.

[67] *See, e.g.*, LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 24 (1991) (noting the extent to which the Fugitive Slave Clause, for example, compromised "many of the ideals found elsewhere in the document").

[68] Amar, *Intratextualism*, *supra* note 1, at 793–94.

[69] *Id.* at 794.

[70] *Id.*

tency"[71] — to make the text, in Dworkin's terms, "the best it can be."[72] Like Amar, Dworkin directs judges "to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author — the community personified — expressing a coherent conception of justice and fairness."[73] But also like Amar, Dworkin knows that Hercules was *not* the original drafter and that all prior enactments cannot be rationalized under "any single, coherent scheme of principle."[74] "Law as integrity" requires, however, that "we must report this fact as a defect, . . . and that we must strive to remedy whatever inconsistencies in principle we are forced to confront."[75] So too for Amar with text and structure: the Constitution must be read, as far as possible, as if it sprang fully formed from the forehead of James Madison, and any inconsistencies are to be regretted and minimized.[76]

Amar would apply this theory of interpretation not only to disparate provisions of the original Constitution, but also to provisions drafted at different times in our history.[77] Intratextualism thus implies a particular theory of constitutional amendment: when a new amendment to the Constitution is ratified, it modifies not only the provisions that the framers and ratifiers explicitly set out to modify, but also any provision that shares linguistic or structural similarities with the new text. When Amar reads the Fourteenth Amendment's Equal Protection Clause as declaring the meaning of Due Process in the same amendment, for example, his next move is to interpolate that meaning back into the Fifth Amendment's identically worded Due Process Clause.[78] Each new amendment is thus a new datum in a global pattern of constitutional meanings, virtually any part of which is at least potentially subject to alteration, or even wholesale reconceptualization, as a result of the change. This approach effectively imposes Dworkin's principle of "legislative integrity" on constitutional amendments.[79] Hercules, in other words, must pull duty as amender as well as initial drafter and ultimate interpreter.

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[71] *Id.*

[72] RONALD DWORKIN, LAW'S EMPIRE 229 (1986).

[73] *Id.* at 225.

[74] *Id.* at 217.

[75] *Id.*

[76] *See, e.g.*, Amar, *Intratextualism*, *supra* note 1, at 766–73 (devising a series of ingenious arguments to eliminate the textual inconsistency arising from the fact that the Equal Protection Clause appears to govern only the states).

[77] *See, e.g.*, *id.* at 772–73 (reading the Fourteenth and Fifth Amendments together); *id.* at 822–23 (reading the Thirteenth and Fourteenth Amendments *in pari materia*, although they were ratified several years apart).

[78] *See id.* at 772–73.

[79] DWORKIN, LAW'S EMPIRE, *supra* note 72, at 176. Dworkin's principle of legislative integrity "asks lawmakers to try to make the total set of laws morally coherent." *Id.*

These three labors of Hercules are integrated into Amar's general assumption of constitutional coherence. But Amar never evaluates that assumption as a normative imperative or a descriptive claim. Rather, he simply cites intratextualism's holistic aspects as a "strength" of the theory.[80] We question whether the coherence assumption is a strength in the next two sections, which respectively explore the assumption's normative and descriptive weaknesses.

B. The Problem of Obligation

Any theory of constitutional interpretation must address, if only implicitly, what David Strauss calls "the central problem of written constitutionalism," that is, why we should accept as binding "the judgments of people who lived centuries ago in a society that was very different from ours."[81] A response to this central problem might be called an account of constitutional obligation. Such an account is a necessary component of theories of interpretation because it specifies which interpretations are to count as erroneous and which as correct. A theorist who cannot say what makes the Constitution authoritative can never explain why an interpreter ought to read the Constitution one way rather than another.

Amar never explicitly offers (or incorporates by reference) any account of constitutional obligation. Sometimes Amar seems to assume an originalist account, sometimes a conventionalist account. But both possibilities are problematic for Amar. Neither originalism nor conventionalism supports the strong coherence assumptions of the intratextualist method. Accordingly, Amar's interpretive approach lacks normative justification in any account of constitutional obligation, or at least in the accounts most plausibly discerned in his article.

Although Amar does not discuss the question of constitutional obligation directly, much of his intratextual analysis is interwoven with historical exploration. These passages, and the general corpus of his

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[80] *See* Amar, *Intratextualism*, *supra* note 1, at 795.

[81] David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 880 (1996); *see also* Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1119 (1998) ("For the textualist a theory of political legitimacy comes first, followed by a theory of interpretation that is appropriate to the theory of obligation."); Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1128 (1998) ("We cannot address the question of *how* to interpret the Constitution . . . without first understanding *why* we should consult the decisions of persons long dead . . . ."). As Strauss demonstrates, the nature of our theory of obligation has consequences for interpretive method. *See* Strauss, *supra*, at 885–87, 906–11. Thus, a proponent of a particular interpretive doctrine must either argue for some theory of obligation compatible with the doctrine or else show that, based on some empirical findings, all (plausible) theories of obligation converge in justifying the doctrine. *See* Adrian Vermeule, *Interpretation, Empiricism, and the Closure Problem*, 66 U. CHI. L. REV. 698, 698–99 (1999) (discussing the relationship between theories of interpretive legitimacy and the choice of interpretive doctrine).

work, suggest that Amar is best described as an originalist.[82] And originalism does have a theory of obligation. Originalists commonly argue that the framers' intent matters because "the force of law derives from the authority of the lawmaker";[83] the theory of obligation is, in other words, fundamentally positivist.[84] Yet it is by no means clear that an originalist would embrace an intratextualist approach to constitutional interpretation or its strong assumption of coherence. One problem, discussed in the next section, is descriptive. Perhaps there simply is no single coherent originalist understanding of the whole Constitution; there may be only originalist understandings of different parts of the document generated by framers and ratifiers of different provisions. But there are normative problems as well.

If constitutional obligation derives from the authority of the framers of each provision, then *their* views on interpretation would seem to matter a great deal.[85] Intratextualism would, in that case, be both

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[82] *See, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 181–214 (1998) [hereinafter AMAR, BILL OF RIGHTS] (supporting his theory of incorporation by exhaustively examining the legislative history of the Fourteenth Amendment); Akhil Reed Amar, *Popular Sovereignty and Constitutional Amendment* [hereinafter Amar, *Popular Sovereignty*], *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 89, 92–108 (Sanford Levinson ed., 1995) (justifying his account of constitutional amendment by use of originalist evidence).

[83] Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 233 (1988); *see also* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 145 (1990) ("If the Constitution is law, then presumably its meaning, like that of all other law, is the meaning the lawmakers were understood to have intended."); Lino A. Graglia, *"Interpreting" the Constitution: Posner on Bork*, 44 STAN. L. REV. 1019, 1024 (1992) ("An entirely sufficient reason for originalism, is that interpreting a document *means* to attempt to discern the intent of the author . . . ."). This is not the only argument for or variety of originalism, *see* Young, *supra* note 29, at 631–32 (discussing various bases for originalism), but many of the alternatives share this ultimate dependence on the authority of the original lawmaker, *see* Strauss, *supra* note 81, at 886–87 & nn.28 & 30 (discussing Lawrence Lessig's "translation" theory and Bruce Ackerman's idea of "higher lawmaking" as "more sophisticated variants of originalism"). Justice Scalia justifies originalism as the interpretive theory best suited to the limited institutional competence of courts. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989). We supply a similar institutional critique of intratextualism in Part III, *infra*.

[84] *See* Strauss, *supra* note 81, at 885–86 (tracing originalism to the "command theory" of Austin, Bentham, and Hobbes); McConnell, *Textualism and the Dead Hand of the Past*, *supra* note 81, at 1132 (describing originalism as resting on "constitutional positivism").

[85] *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 366 (1977) (justifying originalism on the ground that it was an "interpretive presupposition[]" of the Constitution's drafters). *But see* Kay, *supra* note 83, at 259 ("It is not illogical to argue that judges should restrict themselves to the original intentions of the constitution-makers even if the constitution-makers themselves thought otherwise."). Originalists who dismiss the importance of the framers' *interpretive* intent tend to rest originalism on conventionalist grounds. *See id.* at 286–87. We discuss the incompatibility of intratextualism with conventionalism *infra* pp. 746–48. For general discussion of the significance of lawmakers' interpretive expectations, see Joseph Raz, *Intention in Interpretation*, *in* THE AUTONOMY OF

theoretically and historically contingent; its legitimacy would depend on whether Amar's particular version of originalism requires or allows him to defer to the interpretive expectations of the Framers and also on whether the Framers actually intended the Constitution to be interpreted in the way Amar suggests. Yet Amar concedes that many of the intratextual linkages he employs were most likely *not* specifically intended by the framers of the relevant provisions. As previously noted, he analogizes the Constitution to a "great play," which "may contain a richness of meaning" that transcends the author's intent.[86] But works of literature do not impose legal obligations, and it is a little odd to hear someone generally committed to democratic deliberation[87] emphasizing meanings that were never before identified, much less deliberated upon.

To be sure, it is logically possible that the Framers did not specifically intend particular intratextualist readings, yet nonetheless wished the document to be read as a coherent whole. But Amar has simply made no originalist case for that interpretive proposition. That case would be difficult to make in any event. Amar would have to demonstrate not only that Madison and his friends were intratextualists, but also that the framers and ratifiers of *each* amendment shared Amar's holistic theory of amendment. That seems unlikely. Interpretive conventions change over time,[88] and theories of amendment come and go.[89]

Amar might also be described not as an originalist but rather as a conventionalist, grounding his account of constitutional obligation in the American people's common acceptance of the constitutional text. Amar extols the text's "democratic virtues": "The Constitution is a compact document that most Americans can read."[90] Here, Amar sug-

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LAW: ESSAYS ON LEGAL POSITIVISM 249, 256–68 (Robert P. George ed., 1996); and Adrian Vermeule, *Judicial History*, 108 YALE L.J. 1311 (1999).

86 Amar, *Intratextualism*, *supra* note 1, at 793; *see also id.* at 790 ("[I]ntratextualism draws inferences from the patterns of words that appear in the Constitution even in the absence of other evidence that these patterns were consciously intended.").

87 *See* Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The* Nixon *and* Clinton *Cases*, 108 HARV. L. REV. 701, 710–15 (1995) (arguing that temporary presidential immunity is needed to protect the President's role in democratic deliberation); Amar, *Popular Sovereignty*, *supra* note 82, at 110 (emphasizing the importance of real deliberation in the amendment process).

88 *See, e.g.*, H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 887–88 (1985) (concluding from the historical evidence that reliance on "original intent" emerged as a dominant interpretive strategy after 1800 and that this strategy in turn differed significantly from modern versions of originalism).

89 Amar himself has demonstrated that the framers of the Fourteenth Amendment shared a willingness to evade the strictures of Article V that would be unacceptable today (at least outside the confines of the Yale Law School). *See* Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994).

90 Amar, *Intratextualism*, *supra* note 1, at 796.

gests that the Constitution binds us because it is a democratic "focal point" to which all Americans can look for solutions to current dilemmas. The important thing about the Constitution is thus not the authority of "dead men" in "cold graves,"[91] but rather the fact that most Americans know (or *can* know) what the text says and generally agree on it as an authoritative plan of government.[92]

But this conventionalist account of obligation creates certain oddities for Amar's theory. Conventionalism and focal points are frequently means of sustaining an "overlapping consensus" characterized by allegiance to a common Constitution without broad agreement on particular moral or philosophical theories.[93] But the same reasons that support bracketing controversial moral and philosophical issues in favor of agreement on a political principle like constitutionalism likewise point toward avoiding broad, "top-down" theories of the Constitution in favor of "incompletely theorized agreements" on particular constitutional questions.[94] Conventionalism thus creates some tension with Amar's completely theorized approach to the constitutional text.

An even more serious defect of intratextualism, when viewed from a conventionalist standpoint, is that it is too complicated and abstruse. "Conventionalism suggests that, other things equal, the text should be interpreted in the way best calculated to provide a focal point of agreement and to avoid the costs of reopening every question."[95] But the text can hardly serve as such a focal point if the meanings derived from it are unexpected or obscure. As Amar acknowledges, intratextualism "may lead to readings that are too clever by half";[96] consider, for example, Amar's use of the Bill of Attainder Clause and the Nobility Clause to defend the result in *Bolling v. Sharpe*.[97] The argument is ingenious, perhaps brilliant, but it requires a certain suspension of disbelief.[98] And the person-in-the-street for whom the Constitution is supposed to serve as a focal point is likely to be altogether mystified by it.

Intratextualism likewise undermines the other aim of conventionalism — to avoid the costs of reopening every question. As discussed

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91 Amar, *Popular Sovereignty*, *supra* note 82, at 115.

92 *See* Strauss, *supra* note 81, at 911 (observing that on a conventionalist account, the Constitution's "salience and general acceptability, rather than its authority or optimality, are the most important reasons for accepting it").

93 *Id.* at 907; *see also* JOHN RAWLS, POLITICAL LIBERALISM 133–72 (1993) (discussing the idea of an overlapping consensus).

94 CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 46–48 (1996).

95 Strauss, *supra* note 81, at 912.

96 Amar, *Intratextualism*, *supra* note 1, at 799.

97 347 U.S. 497 (1954); *see* Amar, *Intratextualism*, *supra* note 1, at 769–71.

98 *See* Daniel Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917 (1986) (suggesting that "brilliant" theories are untrustworthy precisely because of their novelty).

at greater length in Part III, intratextualism frequently proves inconsistent with respect for stare decisis; the Attainder Clause argument just noted, for example, would require a radical reconsideration of that clause's meaning.[99] The importance of avoiding such reopenings arises because, on Amar's view, "American-style written constitutionalism is a temporally extended intergenerational project calling for a sensitive collaboration between generations of writers and later generations of readers."[100] Burkeans believe that such intergenerational projects are impossible without the attention to past interpretations that stare decisis embodies.[101]

It may be that Amar would adopt neither an originalist nor a conventionalist account of constitutional obligation. But some such account he must have, and neither of the accounts most plausibly attributed to him justifies the strong coherence assumptions of intratextualism. In these respects *Intratextualism* proves normatively ungrounded. The next section will argue that it is also descriptively flawed.

C. Two Types of (In)coherence

The coherence theory reflected in *Intratextualism* has both a substantive and an interpretive dimension. The substantive dimension assumes that the Constitution's particular provisions fit together to articulate a consistent set of structural and political imperatives.[102] The interpretive dimension assumes that the same rules of interpretation should apply to each part of the Constitution. We question both assumptions. Substantively, the Constitution displays as much heterogeneity and particularity as it does coherence and integration. As a matter of interpretive practice, constitutional interpreters do not follow a single approach to constitutional interpretation that applies across the various parts of the Constitution.

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99 Under conventional doctrine, a bill works a forbidden attainder only if it (1) targets a narrow class of disadvantaged persons, *see* United States v. Brown, 381 U.S. 437, 447 (1965), and (2) inflicts "punishment," *see* Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 851 (1984).

100 Amar, *Intratextualism*, *supra* note 1, at 794.

101 *See generally* Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990); EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 108 (T.H.D. Mahoney ed., Bobbs-Merrill Educ. Publ'g 1986) (1790); *see also* McConnell, *Textualism and the Dead Hand of the Past*, *supra* note 81, at 1130 (noting that a conventionalist theory of obligation demands "a strong doctrine of stare decisis").

102 Dworkin would go even further, requiring Hercules likewise to fit the overwhelming majority of constitutional precedents into his coherent theory. *See* Dworkin, *Hard Cases*, *supra* note 2, at 1094 ("Hercules must now develop his concept of principles that underlie the common law by assigning to each of the relevant precedents some scheme of principle that justifies the decision of that precedent.").

1. Substantive (in)coherence. — Amar supposes that the Constitution displays strong substantive coherence across different provisions, even those enacted at different times. In the Fourteenth Amendment, "equal protection" provides a clarifying gloss on "due process," and after 1868 that gloss is imported into the Fifth Amendment's Due Process Clause as well.[103] "Speech" reflects a consistent commitment to political discourse in the Speech or Debate Clause and the First Amendment.[104] The words "inferior courts" and "inferior officers" impose a uniform set of direct hierarchical relationships in Article III and Article II.[105] And anyone who does not believe in this sort of substantive coherence is "reading with blinkers on."[106]

Substantive coherence, however, is hardly uncontroversial. Amar's view embodies what Laurence Tribe and Michael Dorf have called "the hyper-integrationist fallacy" of "treating the Constitution as a kind of seamless web."[107] Tribe and Dorf reject "the notion that the Constitution embodies an immanent, unitary, changeless set of underlying values or principles" as "an extraordinary intellectual conceit"; this conceit, they argue, is "inconsistent with the character of the Constitution's various provisions as concrete political enactments that represent historically contingent, and not always wholly coherent, compromises in a document that was made in stages, incrementally, over a period of two centuries."[108] Moreover, an effort to achieve coherence across constitutional provisions may undermine the document's ability to protect divergent values. Amar's equation of due process and equal protection, for example, would foreclose the argument that the former protects traditional values, while the latter embodies a forward-looking critique of traditional practices.[109]

The Constitution is only one of many such patchwork laws. Sometimes, for instance, statutes are so large and complex, and encompass so many different purposes that courts have refused to apply the normal presumption that the same words in the same act mean the same

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103 *See* Amar, *Intratextualism*, *supra* note 1, at 772–73.

104 *See id.* at 815.

105 *See id.* at 805–07.

106 *Id.* at 822.

107 TRIBE & DORF, *supra* note 67, at 24. Although the primary targets of Tribe and Dorf's critique are theories that superimpose on the Constitution "a unitary vision of an ideal political society," that critique also encompasses any theory which would read the Constitution as "a coherent, consistent document." *Id.*

108 *Id.*

109 *See* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1163 (1988); *see also* Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 38 (1991) (Scalia, J., concurring in the judgment) ("The Equal Protection Clause and other provisions of the Constitution, unlike the Due Process Clause, are not an explicit invocation of the 'law of the land,' and might be thought to have some counter-historical content.").

thing.[110] And it is difficult to imagine how Amar's approach might be applied to some of the more prolix state constitutions, which may encompass literally hundreds of vastly different provisions.[111] Substantive coherence, in other words, is a contingent characteristic of legal texts.

We can best illustrate the difficulties associated with a broad assumption of substantive coherence by turning to some of Amar's examples of intratextualism in action. Amar himself advises that "[t]hese questions are best answered by example rather than by a priori reasoning."[112] In our view, Amar's examples highlight the existence of substantive *in*coherence in the Constitution at the levels of structure and of particular terminology and therefore demonstrate the importance of close attention to context rather than a broad willingness to transfer meanings from one part of the document to another. As Justice Scalia has said — in a somewhat different context — "[i]n textual interpretation, context is everything."[113]

(a) Enumeration and the Bill of Rights. — Although one could imagine a version of intratextualism limited to importing definitions of individual terms from one constitutional provision to another, Amar's vision is not so confined. He reads, for example, the textual similarities between the First Amendment and the Necessary and Proper Clause — "Congress," "shall," "make," and "law" appear "in the same order in two places"[114] — as support for reading the Federalists' doc-

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110 *See, e.g.*, Sirbo Holdings, Inc. v. Commissioner, 509 F.2d 1220, 1223 (2d Cir. 1975) (Friendly, J.) (finding that the presumption could not be applied to the Internal Revenue Code).

111 For an empirical study of the lengths of state constitutions and the frequency with which the states amend them, see Donald S. Lute, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355, 358–60 (1994). Lute's data reveal that the three state constitutions with the greatest original length — those of Alabama, Louisiana, and Oklahoma — were well over ten times longer than the original federal constitution when adopted. *See id.* at 367 tbl. A-1. The original length of the average state constitution currently in force was over four times that of the original federal constitution. *See id.* The average state constitution is amended more than once a year, *see id.*, while the federal constitution has been amended on average less than once every seven years.

112 Amar, *Intratextualism*, *supra* note 1, at 827 n.305.

113 ANTONIN SCALIA, A MATTER OF INTERPRETATION 37 (1997) (discussing the differences between the statutory and constitutional "contexts" rather than the differing historical contexts of individual constitutional provisions).

114 Amar, *Intratextualism*, *supra* note 1, at 814. Interestingly enough, Amar would *not* appear to read "Congress" as having the same meaning in the First Amendment and Speech or Debate Clause, because he vigorously approves of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which applied the First Amendment to judicial as well as legislative restraints on speech, *id.* at 264 ("[T]he rule of law applied *by the Alabama courts* is constitutionally deficient for failure to provide safeguards for freedom of speech and of the press." (emphasis added)). *See* Amar, *Intratextualism*, *supra* note 1, at 812 (praising the grand themes of this grand opinion); *cf.* Strauss, *supra* note 81, at 907 ("'Congress' in the First Amendment is taken, without controversy, to mean the entire federal government, even though elsewhere 'Congress' certainly does not include the courts or the President.").

trine of enumerated powers as a *limit* on the scope of the Bill of Rights:

> If everyone thought that Congress simply lacked all enumerated power to restrict "speech" in the states, the "speech" they all had in mind must obviously have been political discourse as opposed to mere commercial advertising. For no one denied that Congress did indeed have broad power to regulate commercial things for purely commercial purposes (so long as the commerce involved goods or services crossing state lines).[115]

But who are "everyone," "they," and "no one"? Amar recognizes that there actually were two quite different schools of thought: Federalists, who thought the idea of enumerated powers alone sufficient to protect liberty, and "[n]ervous Antifederalists" who demanded something more.[116] In fact, the Antifederalist position represented a fundamentally different structural model of government. Believing (without liking the fact) that the Constitution granted very broad powers to the central government, the Antifederalists insisted on *affirmative limits* on those powers where individual rights were concerned.[117]

The Bill of Rights having arisen out of the Antifederalists' distrust of the doctrine of enumerated powers, it is passing strange to see Amar read that doctrine back into the First Amendment. Based on a thin textual similarity — one would expect almost any possible version of each clause to use words like "Congress," "shall," "make," and "law" — Amar limits the scope of the First Amendment to forbid only legislation that would have been beyond Congress's enumerated powers in the first place. This view seems inconsistent with Marshall's own formulation in *McCulloch*, which required that Congress's actions be not only "within the scope" of the enumerated powers, but also "not prohibited" by some other restriction.[118] And it is easy to come up with bizarre results under Amar's approach. For instance, Congress's power over "commerce" extends well beyond commercial speech. What if Congress were to ban the importation of newspapers or newspaper stories from one state into another? Such a measure would rather dramatically undermine the Fourth Estate's ability to check government power, yet it could hardly be struck down as exceeding Congress's commerce power.[119]

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115 Amar, *Intratextualism*, *supra* note 1, at 815.

116 *Id.* at 814.

117 *See* Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTINGS L.J. 305, 316–23 & 316 nn.58–59 (1987). After the New Deal's virtual elimination of the model of limited, enumerated powers, the Antifederalist model of broad power with affirmative limits is much closer to our actual system.

118 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

119 *Cf., e.g.*, Champion v. Ames, 188 U.S. 321, 363–64 (1903) (upholding restriction on interstate shipment of lottery tickets). Another problem arises when we ask how Amar's approach could possibly govern abridgments of speech by *state* governments? Such governments, after all, have

Courts and commentators have generally read the Bill of Rights as superimposing an affirmative limits model on the original enumerated powers model.[120] This practice defeats grand attempts to harmonize the Constitution's structure into a single "deep design," for the two models embody very different institutional strategies. Indeed, Professor Tribe breaks down the two strategies we've described into no less than seven different models for constitutional argument and decision.[121] The enumerated powers model establishes a substantive allocation of lawmaking authority between federal and state governments. The affirmative limits model, on the other hand, creates immunities valid against *any* government in order to ameliorate the difficulty of predicting when an enumerated power, like commercial regulation, might collide with an important sphere of rights. Because these approaches operate in fundamentally different ways, it is dangerous to rely too heavily on intratextual linkages between provisions that reflect different structural models.[122]

(b) Is "Speech" Just "Debate"? — Similar difficulties arise when one borrows the meaning of a particular term rather than a whole structural approach. Amar says that, because "speech" appears in the Speech or Debate Clause of Article I, Section 6, as well as in the First Amendment, and because "speech" in Article I is rather clearly limited to *political* speech, the same word in the First Amendment should be similarly limited.[123] He also contends that, because content-based dis-

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always been assumed to possess *general* legislative powers (except as limited by their own constitutions). *See* Sanford Levinson, *How Many Times Has the United States Constitution Been Amended? (A) <26; (B) 26; (C) 27; (D) >27: Accounting for Constitutional Change*, *in* RESPONDING TO IMPERFECTION, *supra* note 82, at 13, 28 n.47. Amar acknowledges that the Fourteenth Amendment raises different issues, *see* Amar, *Intratextualism*, *supra* note 1, at 817–18, but given his general assumption that "speech" means the same thing everywhere, his failure to discuss those issues is puzzling.

120 *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 1-3, at 6–9 (3d ed. 2000).

121 *See id.* § 1-2, at 6.

122 Another example involves Amar's favorite argument from *McCulloch*, which equates Article I, Section 8's conferral of "necessary" powers on Congress with Article IV's broad grant of all "needful" powers to govern the territories. *See McCulloch*, 17 U.S. (4 Wheat.) at 422, *discussed in* Amar, *Intratextualism*, *supra* note 1, at 757–58. The territories, which existed prior to the establishment of state governments, are a field of unitary federal sovereignty, while *McCulloch*'s application of the Necessary and Proper Clause to events within an existing state necessarily implicated the allocation of powers under a regime of *dual* sovereignty. *Cf.* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 76 (1982) (plurality opinion) (noting Congress's extraordinarily broad power over the territories). A provision designed for unitary sovereignty may well be an untrustworthy guide to the limits of federal authority vis-à-vis the States. That may be why Marshall employed the argument with "a bit less flourish," Amar, *Intratextualism*, *supra* note 1, at 757, in *McCulloch*.

123 *See* Amar, *Intratextualism*, *supra* note 1, at 815; *see also id.* at 816 (asserting that "political discourse akin to legislative 'speech and debate'" should be "the central paradigm" of the First Amendment). Amar is careful to deny any suggestion that "commercial speech should be cast out

tinctions are frequently accepted in the context of legislative debates, such distinctions "are not themselves (even presumptive) violations of the freedom of speech."[124] But here, too, context ought to be critical.

It is hardly surprising to find that "speech," as it appears in a provision dealing solely with members of Congress, contemplates only political expression. But so what? What does that tell us about whether non-legislators ought to have special freedom to produce art, consume pornography, or advertise their wares?[125] Words frequently take on more limited meanings in some contexts than others, yet we do not ordinarily understand them to retain those limitations (even presumptively) when used in a situation where a broader meaning is more natural. Amar admits, as he must, that "[t]here are obvious practical differences of context between formal legislative assemblies on the one hand, and conversations among the people out of doors on the other."[126] But in fact these contextual differences are so overwhelming that the Speech or Debate Clause can tell us nothing at all about the substance and limits of "speech" in the First Amendment.

One clue to the importance of these differences is Amar's need to cabin his intratextual conclusions with limiting principles derived from other sources. Amar says, for instance, that "viewpoint discrimination in the regulation of political discourse" is absolutely prohibited,[127] yet subject matter restrictions are routinely used in legislative arenas with the purpose to suppress particular viewpoints. Consider, for instance, a decision by congressional leaders not to allow floor debate or amendments on the subject of tobacco legislation or welfare reform. If Amar thinks that similar measures outside the legislative arena ought to be invalid, that conclusion must be driven by a theory other than intratextualism. Yet if some non-intratextualist theory is all that tells us why content discrimination is acceptable but viewpoint discrimination is not, what work is intratextualism doing in the first place? There are plenty of good arguments for limiting free speech protection

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of the First Amendment." *Id.* at 817. But that is the import of the intratextual argument that "speech" should have the same meaning in both clauses. Any limits on that argument must come from other sources — like the prudential recognition that clean distinctions between commercial and political speech may be hard to draw. *See id.*

124 *Id.* at 817.

125 We might usefully ask what the framers of the First Amendment should have said if they in fact intended a broader meaning than that in Article I. Should they have used some other word like "expression" instead of "speech"? Neither word is usually understood as having a broader meaning in terms of subject matter; rather, Amar would have to rely on the simple choice to use a word different from the one employed in the earlier provision. Even then, "expression" would be no further in meaning from "speech" than "needful" is from "necessary." Amar, *Intratextualism*, *supra* note 1, at 757–58.

126 *Id.* at 817.

127 *Id.* at 816.

to political speech or at least focusing judicial attention there.[128] But those arguments ultimately have little to do with intratextual linkages between the Free Speech Clause and the Speech or Debate Clause or the Necessary and Proper Clause. In the free speech context, Ockham's Razor leaves intratextualism on the cutting-room floor.

(c) Inferior Officers and Courts. — A third example concerns the Court's holding, in *Morrison v. Olson*,[129] that the Appointments Clause permits the appointment of independent counsels by a judicial panel.[130] The Clause says that only "inferior" officers may be appointed by the courts of law, so a critical question in *Morrison* was whether the independent counsel could be considered an inferior officer.[131] Amar's primary intratextual argument compares "inferior officers" in Article II's Appointments Clause with "inferior courts" in Article III and with Article I, Section 8's grant to Congress of the power to create tribunals "inferior to" the Supreme Court. From these sources, Amar concludes that when the Constitution says "inferior," it means "subordinate." Because the independent counsel is not subordinate to the President (the President cannot direct the counsel's activities, for example), the Appointments Clause forbids the independent counsel to be appointed by judges, so *Morrison* was wrong.[132] For rejecting this intratextual argument and overlooking others, Amar calls the majority opinion so "weak" that it "feels like the work not of the Chief Justice who signs it, but of a young law clerk with limited constitutional vision."[133]

Amar's intratextualist approach, however, has limitations of its own. Whether or not they dictate a contrary result in the end, numerous contextual differences between courts and executive officers demand attention. First, while we tend to see the primary function of

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[128] Amar cites Professor Meiklejohn's similar position, derived from a theory of democratic self-government. *See* Amar, *Intratextualism*, *supra* note 1, at 816–17 (discussing ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 34–36 (1960), and Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 253).

[129] 487 U.S. 654 (1988).

[130] *See* U.S. CONST. art. II, § 2, cl. 2.

[131] *See Morrison*, 487 U.S. at 670–71.

[132] Amar, *Intratextualism*, *supra* note 1, at 805–08. Amar relies heavily upon a similar argument in the dissenting opinion in *Morrison*. *See Morrison*, 487 U.S. at 719–20 (Scalia, J., dissenting). The Scalia dissent, however, does not exemplify Amar's approach, but rather applies the uncontroversial interpretive canon we have called weak intratextualism. The dissent invokes a variety of standard clause-bound sources to determine that "inferior" in the Appointments Clause means "subordinate" — sources such as the records of the Constitutional Convention debate on the Clause, precedents interpreting the Clause, and dictionaries of the era, *see id.* at 719–22 — and the intratextualist argument is not given pride of place.

[133] Amar, *Intratextualism*, *supra* note 1, at 803–04. This characterization is an *ad hominem* attack, not an argument, and it overemphasizes the role of law clerks.

the Supreme Court as unifying the system of federal law,[134] it is not obvious that *executive* enforcement policy requires the same degree of uniformity. After all, the existence of independent agencies is well-established, if not unquestioned, and some have characterized the idea that the Chief Executive is supposed to unify federal rulemaking as a relatively new and controversial development.[135]

Second, the Constitution provides for a number of internal and external checks on judicial power, such as the Seventh Amendment's Reexamination Clause,[136] the appointments process, and Congress's power (recently exercised) to limit federal jurisdiction.[137] But some have argued that the equivalent original constitutional checks on the Executive have been severely eroded in the modern administrative state, particularly with the recognition of lawmaking authority in the executive branch.[138] Federal judicial authority is limited by *state* judicial authority under the *Erie* and adequate state grounds doctrines,[139] while the executive branch's authority under the Supremacy Clause has sometimes been treated as subject to no similar limitation.[140] The President is, of course, subject to the fundamental political check of popular election, but whether this check limits executive authority to

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134 *See, e.g.*, Chief Justice Fred M. Vinson, Address Before the American Bar Association (Sept. 7, 1949), *quoted in* ROBERT L. STERN, EUGENE GRESSMAN, STEPHEN M. SHAPIRO & KENNETH S. GELLER, SUPREME COURT PRACTICE § 4.1, at 164 (7th ed. 1993) ("The function of the Supreme Court is . . . to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts."); SUP. CT. R. 10.1 (identifying conflicts as the most persuasive reasons for granting certiorari).

135 *See, e.g.*, Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965 (1997) (criticizing recent efforts to centralize rulemaking responsibility within the Executive Branch); Cynthia R. Farina, *Undoing the New Deal Through the New Presidentialism*, 22 HARV. J.L. & PUB. POL'Y 227, 227 (1998) (arguing that "the new presidentialism has undesirable societal implications").

136 U.S. CONST. amend. VII (stating that "no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law").

137 *See* RICHARD H. FALLON, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 31–34 (4th ed. 1999 Supp.) (discussing the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1217–21 (amending 22 U.S.C. §§ 2253–55 (Supp. 1997)), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-607 to 3009-612 (amending 8 U.S.C. § 1252 (Supp. 1997)) which both restrict federal court jurisdiction). Numerous statutory and procedural rules — such as deferential standards of review for district court judgments, limitations on appellate jurisdiction, and the existence of multi-member panels — likewise create internal checks on judicial power.

138 *See, e.g.*, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1240–41 (1994) (describing the death of the nondelegation doctrine).

139 *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); Murdock v. Mayor of Memphis, 87 U.S. (20 Wall.) 590 (1875).

140 *See, e.g.*, City of New York v. FCC, 486 U.S. 57, 63–64 (1988) (citing Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368–69 (1986)) (recognizing the independent authority of executive agencies to preempt state law).

the same extent, at the same times, and in the same way as other checks limit the judiciary is a complicated empirical question. At a minimum, it seems unwise to dismiss readings of "inferior" in Article II that would permit internal checks — such as investigative officers with a significant degree of independence — without a careful examination of the divergent institutional contexts of Articles II and III.

Problems also arise from assuming that "inferior" means the same thing when it describes an institution (a court) as when it describes an individual (an officer). As Amar recognizes, his interpretation raises the issue of whether lower-court judges are "inferior officers" who need not be appointed by the President and confirmed by the Senate.[141] Amar purports to "take no position" on this issue,[142] but how can he not? If "subordination" is the test of inferiority, as he claims,[143] then district and circuit judges are "inferior." To avoid this problem without adopting an ad hoc test, we would have to make removability the criterion, a course which Amar explicitly rejects[144] and which casts doubt upon the status of cabinet officers, who are supposed to be "principal" officers.[145] In any event, lower courts are not always "inferior" in the sense of subordinate to the Supreme Court; Congress, after all, can limit the Supreme Court's jurisdiction over them at least in some respects.[146]

Our aim is simply to raise these questions, not to resolve them. Reasonable people — not to mention the two of us — disagree as to the proper ultimate result in cases like *Morrison*. The point is simply that intratextual comparisons may raise more questions than they answer, and that frequently intratextualism will have little to say about the truly difficult issues in a case. Amar, of course, does not purport to have solved the independent counsel puzzle either; he claims only that "an intratextual analysis generates some remarkably promising leads and clues" to that puzzle.[147] But that is no more than we would expect of a weak version of intratextualism. If intratextual comparisons are to trump other forms of evidence and authority, such as judicial precedents or historical evidence, then we would expect intratextual-

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141 *See* Amar, *Intratextualism*, *supra* note 1, at 807 n.232.

142 *Id.*

143 *See id.* at 805.

144 *See id.* at 807.

145 *Cf.* Humphrey's Ex'r v. United States, 295 U.S. 602, 631–32 (1935) (stating that cabinet officers are removable at the will of the President).

146 *See* U.S. CONST. art. III, § 2, cl. 2 (conferring appellate jurisdiction on the Supreme Court, "with such Exceptions, and under such Regulations as the Congress shall make"); *see also* Mark Tushnet, *"The King of France with Forty Thousand Men":* Felker v. Turpin *and the Supreme Court's Deliberative Processes*, 1996 SUP. CT. REV. 163, 183–89 (examining Congress's constitutional authority to preclude Supreme Court review).

147 Amar, *Intratextualism*, *supra* note 1, at 811.

ism to have more power to resolve the truly difficult issues than it seems to in Amar's examples.

2. Interpretive (in)coherence. — Amar's assumption of constitutional coherence has a second, *interpretive* dimension: he assumes that the same rules of interpretation should apply to each of the Constitution's different provisions. As we observed earlier, intratextualism uses the meaning of text *B* to provide insight into the meaning of text *A*, but intratextualism cannot itself provide the initial meaning of text *B*. That requires an underlying interpretive theory, such as originalism. Intratextualism may produce jarring results, however, if the interpretive theory employed for text *B* is one *not* customarily applied to text *A* or provisions like it.

An example ought to help illustrate the point. A common description of our constitutional practice is that "some [constitutional provisions] are interpreted more expansively than others."[148] Justice Frankfurter observed:

> Broadly speaking, two types of constitutional claims come before this Court. Most constitutional issues derive from the broad standards of fairness written into the Constitution . . . . Such questions, by their very nature, allow a relatively wide play for individual legal judgment. The other class gives no such scope. For this second class of constitutional issues derives from very specific provisions of the Constitution. . . . Their meaning was so settled by history that definition was superfluous.[149]

For instance, no one uses the various expansive interpretations of "equal" developed in the context of the Equal Protection Clause to construe Article V's guarantee to each state of "equal" representation in the Senate. The fact that flexible interpretation has never been applied to Article V's Equal Suffrage Clause and, conversely, purely formal definitions of equality are not generally applied to the Fourteenth Amendment, highlights the puzzle of interpretive incoherence.

The puzzle is that Justices of widely varying ideology often agree on interpretive method while hotly disputing the proper result; moreover, the Justices often converge on *different* methods in different contexts. The federalism and Establishment Clause cases, for example, display widespread acceptance of originalism as an interpretive method but vigorous disagreement over what the history shows;[150] likewise, in the context of free speech, even Justices who are on record

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[148] Strauss, *supra* note 81, at 882; *see also* Monaghan, *supra* note 36, at 361–62 (describing the "two-clause theory" of interpretation); Tribe, *Taking Text and Structure Seriously*, *supra* note 33, at 1247–48 & 1247 n.90 (distinguishing between "architectural" and "aspirational" provisions).

[149] United States v. Lovett, 328 U.S. 303, 321 (1946) (Frankfurter, J., concurring).

[150] *See, e.g.*, U.S. Term Limits v. Thornton, 514 U.S. 779, 789–93, 846–50 (1995) (vigorous debate between Justices Stevens and Thomas over proper interpretation of originalist historical materials); Lee v. Weisman, 505 U.S. 577, 612–16, 632–36 (1992) (similar debate between Justices Scalia and Souter).

in favor of originalism tend to eschew historical analysis.[151] We are not sure how these patterns develop, but one plausible explanation is that the Justices have found, over time, that different approaches simply work better in different areas.[152]

If interpretive practice takes a contextual approach to interpretive method, then it is a mistake for Amar to draw intratextual inferences that govern, for example, both the First Amendment's Free Speech Clause and its Establishment Clause.[153] Those provisions have traditionally been subjected to two quite different interpretive approaches, and each of those approaches has diverged from that generally applied to the Necessary and Proper Clause. *Intratextualism* thus overstates not only the Constitution's substantive coherence but also the uniformity of conventional methods of constitutional interpretation.[154]

On both normative and descriptive grounds, then, Amar's account of constitutional meaning displays many of the features of Dworkin's constitutional vision and shares its shortcomings. Amar is Dworkin, albeit with a textualist and originalist emphasis that Dworkin lacks.[155] The resemblance, moreover, goes beyond the theory of constitutional meaning. *Intratextualism*, like Dworkin's work, also contains an implicit account of constitutional judicial review and of the judges' interpretive capacities. Amar, like Dworkin, makes wildly optimistic as-

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[151] *See, e.g.*, 44 Liquormart v. Rhode Island, 517 U.S. 484, 518–28 (1996) (Thomas, J., concurring) (no historical references by Justice Thomas); R.A.V. v. City of St. Paul, 505 U.S. 377, 377–96 (1992) (no historical references in the majority opinion by Justice Scalia). Of course we do not deny that the Justices sometimes explicitly debate the appropriate interpretive methodology. *Compare, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (Scalia, J., plurality opinion) (advocating a narrow approach to tradition for purposes of substantive due process), *with id.* at 137–41 (Brennan, J., dissenting) (arguing for a broader interpretive methodology).

[152] *See* Young, *supra* note 29, at 689 n.351 (suggesting that Tribe and Dorf's critique of substantive "hyper-integration" applies "equally well to the idea that all constitutional provisions call for the same interpretive approach, despite differences in language, history, and development").

[153] Amar does not specifically discuss the Establishment Clause, but his argument regarding the textual similarity of the First Amendment's opening language and the Necessary and Proper Clause, *see* Amar, *Intratextualism*, *supra* note 1, at 751–52, would apply equally to each of the First Amendment's clauses. Hence, Amar would have to say that the Establishment Clause would not bar any action respecting religion that would be within Congress's enumerated powers. Given the broad construction of the taxing power dating back to Alexander Hamilton, *see* United States v. Butler, 297 U.S. 1, 65 (1936), that interpretation would permit the very levy for the support of an established church that sparked Madison's Memorial and Remonstrance and the Virginia Bill on Religious Liberty. *But see* Everson v. Board of Educ., 330 U.S. 1, 14–18 (1947) (stating that the Establishment Clause was designed to prohibit precisely such an undertaking).

[154] Laurence Tribe has demonstrated that another canon of construction — *expressio unius est exclusio alterius* — should sensibly apply to some parts of the Constitution but not to others. *See* Tribe, *Taking Text and Structure Seriously*, *supra* note 33, at 1242–43.

[155] In fairness to each scholar, we should note two important differences. Dworkin, unlike Amar, has an explicit account of constitutional obligation: the idea of "law as integrity." *See* DWORKIN, LAW'S EMPIRE, *supra* note 72, at 225. And Amar, unlike Dworkin, does not urge judges to make overtly moral judgments. *See* Dworkin, *The Arduous Virtue of Fidelity*, *supra* note 34, at 1262.

sumptions about those capacities. We take up this topic in the next Part.

III. JUDGING WITH HERBERT: INTRATEXTUALISM AND SECOND-BEST CONSTITUTIONAL INTERPRETATION

Amar recommends intratextualism as a useful interpretive tool, one suited not only to the classroom or to academic research but also to judges deciding constitutional cases. Yet Amar pays no attention at all to the institutional capacities of the judges who would be charged with *practicing* intratextualism. That is no small lacuna in the argument. Interpreters cannot choose among possible interpretive rules solely on the basis of some first-best theory of constitutional meaning. Rather, interpretive doctrine must combine a theory of constitutional obligation with an assessment of the capacities and competence of the interpreters who will apply the doctrine.[156]

Judges are officials in a public bureaucracy that labors under systemic constraints of time, information, and expertise. They are, consequently, less like Hercules than like another character in Dworkin's story: Herbert, the less brilliant, less resourceful, less patient judge who serves in *Hard Cases* as a foil for Hercules.[157] No doubt because he shares many of the same constraints as real judges, Herbert has never formulated a top-down theory of the Constitution. And Herbert, unlike Hercules, makes mistakes. The constraints under which judges like Herbert act predictably cause them to err, and particular interpretive tools may cause them to err in predictable directions. Interpretive doctrine, moreover, must consider not only error but also the costs of decision to the judiciary and litigants. In short, any recommendation about interpretive doctrine must take into account the possibility that judges may do better, in light of the relevant theory of constitutional obligation, by applying a second-best[158] interpretive doctrine that minimizes the risks and gravity of error and inefficiency. Viewed in this light, intratextualism may be a poor choice for Herbert even on Amar's premises about constitutional meaning; it is not at all clear

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156 *See* Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CAL. L. REV. 535, 537 (1999) ("Determining which constitutional theory would best promote [widely shared] goals requires a partly instrumental calculation, including an assessment of who our judges and Justices are likely to be.").

157 *See* Dworkin, *Hard Cases*, *supra* note 2, at 1103–09.

158 The second-best was originally a technical idea in economics. *See* R.G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11, 11–13 (1956). The idea is used here in the looser but now-standard sense of any account that assumes imperfect information, competence, or honesty on the part of relevant agents. *See* Bruce Talbot Coram, *Second Best Theories and the Implications for Institutional Design*, *in* THE THEORY OF INSTITUTIONAL DESIGN 90, 90–92 (Robert E. Goodin ed., 1996).

that intratextualism is a better interpretive strategy for limitedly competent judges than the alternatives.

This Part will illustrate the gaps in Amar's argument by examining the alternative approach of clause-bound interpretation. Clause-bound interpretation encompasses any approach that resolves constitutional cases by reference to the local text, history, or precedent of particular constitutional provisions, rather than to the collateral sources Amar examines. For present purposes the intramural differences among clause-bound textualism, clause-bound originalism, and clause-bound versions of common law constitutionalism are less important than the differences between this family of approaches, on one hand, and Amar's approach, on the other hand.[159] Our aim is neither to champion clause-bound interpretation nor to prove that it always outperforms intratextualism. But Amar cannot advocate intratextualism without making a comparative assessment of judicial performance under alternative approaches, and without considering the possibility that some alternative, like clause-bound interpretation, may be justified as a second-best interpretive doctrine. Because Amar has not addressed these questions, the intratextualism proposal is radically incomplete.[160]

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[159] Two qualifiers are important here. First, as previously discussed, Amar's strong intratextualism includes clause-bound interpretation as an essential component. The strong intratextualist must form an understanding of one clause in order to compare it to another. So Amar's approach introduces sources and arguments in addition to the sources and arguments used by clause-bound interpreters. *See supra* p. 739. Second, clause-bound interpreters often use a weak form of intratextualism to confirm arguments based on other sources, or simply as a tiebreaker. *See* Amar, *Intratextualism*, *supra* note 1, at 802–06 (discussing Justice Scalia's use of weak intratextualism in his dissent in *Morrison v. Olson*, 487 U.S. 654, 715–23 (1988)); *supra* p. 734 (discussing the wide acceptance of weak intratextualism). In this Part, we follow Amar by drawing an artificially sharp contrast between clause-bound interpretation and strong intratextualism, in order to highlight the *marginal* effects of intratextualism. The stronger the form of intratextualism, the stronger the effects, so the costs that flow from those effects provide a more serious objection to Amar's strong version of intratextualism than to any less ambitious version. *See supra* pp. 735–36 (discussing the linear character of arguments for and against intratextualism).

[160] Although this section focuses on the institutional capacities of interpreters, Amar's implicit assumption that constitutional amendments should be read to cohere with all other parts of the document raises parallel concerns about the institutional capacities of the framers and ratifiers of constitutional amendments. *See infra* p. 761 (describing Amar's implicitly Herculean picture of constitutional amenders). If Hercules himself is unavailable to formulate amendments, we might begin to worry about a theory of amendment that magnifies the ripple effects of constitutional change in this way. In an intratextualist world, it would be difficult for drafters and ratifiers to anticipate exactly how much of the Constitution they were amending; a virtuoso like Amar, after all, may frequently dazzle us with his ability to draw unexpected parallels between seemingly unrelated constitutional provisions. Anyone partial to incremental change over more radical alternatives may balk at a theory of constitutional change that tends to magnify, rather than limit, the impact of amendments.

Amar's theory of amendment may, of course, have advantages that overwhelm these cautions. For present purposes, we simply note that *Intratextualism*'s implicit theory of amendment is unexplored and undefended. Amar's fascinating work on constitutional amendment has fo-

A. *Interpretive Romanticism and Judicial Competence*

Amar is an unabashed romantic of constitutional interpretation. The panorama of constitutional history implicit in his work glows with the colors of interpretive heroism. "Think of the genius of John Marshall in *McCulloch* when interpreting the genius of the Founder's Constitution,"[161] Amar tells us. For Amar, Marshall is a sort of historical counterpart to Dworkin's Hercules:[162] a jurist of unsurpassed learning and wisdom, capable of "elegant" constitutional arguments that integrate a "rich[] mixture" of sources into a "masterpiece."[163]

It is not that Amar thinks that all judges are intratextualist heroes, or even that all judges are competent interpreters. Romantics rarely think that; if they did, there would be no dull background to throw the foreground hero into relief. Justice Douglas's opinion in *Griswold v. Connecticut*,[164] generalizing a right to privacy from the penumbras and emanations of specific provisions of the Bill of Rights, moves "all too quickly" and therefore misreads particular provisions such as the Fifth Amendment's Self-Incrimination Clause.[165] Justice Blackmun's opinion in *Roe v. Wade*[166] engages in "classically intratextualist exegesis"[167] to show that a fetus is not a "person" within the meaning of the Fourteenth Amendment, but Blackmun's intratextualist technique is "wooden" and "less compelling" than Marshall's use of intratextualism in *McCulloch*.[168]

No matter. Dworkin advised Herbert simply to try harder to be like Hercules.[169] So, too, with Amar: his view seems to be that these examples of incompetent intratextualism reveal nothing interesting or

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cused on the method of amendment, rather than the consequences of an amendment for the rest of the text. *See, e.g.*, Amar, *Popular Sovereignty*, *supra* note 82, at 89–115.

161 Amar, *Intratextualism*, *supra* note 1, at 794.

162 *See* DWORKIN, LAW'S EMPIRE, *supra* note 72, at 239. For a critique that highlights Dworkin's disregard for the institutional roles and limited capacities of the judges, see Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269, 1289–93 (1997); and Cass R. Sunstein, *From Theory to Practice*, 29 ARIZ. ST. L.J. 389, 395–404 (1997).

163 Amar, *Intratextualism*, *supra* note 1, at 750.

164 381 U.S. 479 (1965).

165 Amar, *Intratextualism*, *supra* note 1, at 797 & n.196.

166 410 U.S. 113 (1973).

167 Amar, *Intratextualism*, *supra* note 1, at 774.

168 *Id.* at 775.

169 *See* DWORKIN, LAW'S EMPIRE, *supra* note 72, at 264–65; Dworkin, *The Arduous Virtue of Fidelity*, *supra* note 34, at 1249–50 (asserting that ordinary "[l]awyers and judges" — not simply Hercules — "must try to construct a coherent, principled, and persuasive interpretation of the text of particular clauses, the structure of the Constitution as a whole, and our history under the Constitution — an interpretation that both unifies these distinct sources, so far as this is possible, and directs future adjudication"); *see also* CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 50 (1996) (noting that Dworkin expects ordinary judging to be less comprehensive than that which Hercules could undertake, but to have the same basic character).

troubling about intratextualism itself. They show only that it should be done well. "All legitimate constitutional techniques can be used well or used poorly," and intratextualism "works best when it coheres with other types of constitutional argument and is part of a larger constitutional vision."[170] The test of intratextualism's worth, for Amar, is simply "whether it in fact ever works: does [intratextualism] in real and hard cases ever help us to reach satisfying and sound legal results?"[171]

But that standard is far too lenient. It is unsurprising and uncontroversial that intratextualism "used well" contributes to a sound legal result in at least *some* cases. Probably every interpretive tool that has ever appeared in a judicial opinion does that. Yet Amar's criterion says almost nothing about the critical question: whether, under Amar's own first-best criteria, intratextualism will outperform its competitors (such as clause-bound interpretation) when applied over the aggregate of both hard and easy cases by the judges, the Herberts of the world, who will actually employ it.

If every judge possessed full information about all textualist and originalist sources and all precedents, if all judges could reason as ingeniously as Amar, if no judges ever made mistakes, and if constitutional litigation were costless, then the first-best and second-best criteria would converge. But in our world fewer judges are like Hercules or Marshall than like Herbert: constitutional litigation is costly, judges often possess incomplete information about the content of constitutional (particularly originalist) sources, and they must assess the information they do possess with limited time and expertise. It is by no means clear that in such a world judges should attempt to use the same interpretive techniques and sources that they would use in a first-best world. In practice, Amarian intratextualism would promote not "symmetry and harmony"[172] but rather damaging incoherence, infidelity to the original understanding, and instability. Conversely, second-best judges would do better, even on Amar's criteria, by applying second-best interpretive techniques such as clause-bound interpretation.

A difficulty for the institutional analysis is that Amar's theory of constitutional obligation, and his criteria for determining error, remain somewhat obscure. Although he frequently emphasizes his commitment to textualism,[173] Amar is continually at pains to situate the text in its historical context. Much of his work thus has a distinctly origi-

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170 Amar, *Intratextualism*, *supra* note 1, at 775–76.

171 *Id.* at 801.

172 *Id.* at 799.

173 *See, e.g.*, Akhil Reed Amar, *Textualism and the Bill of Rights*, 66 GEO. WASH. L. REV. 1143, 1143 (1998) (characterizing his recent book as a "textual analysis of the Bill of Rights").

nalist cast.[174] At other times, however, he proves willing to consider an eclectic range of sources, including precedent and political theory.[175] It is clear, at least, that Amar is not a nihilist; he believes that constitutional questions have right answers. Whatever theory of obligation supplies those answers, the critical question that Amar overlooks is a comparative question of doctrinal choice: will real judges do better, in light of that theory, under a regime of intratextualism or under a regime of clause-bound interpretation?

The following sections sketch the case against using a strong form of intratextualism in a second-best world. Section B examines the comparative error costs of intratextualism, Section C examines decision costs, and Section D examines the dominant place of clause-bound interpretation in the practice of constitutional interpretation.

B. Error Costs

Intratextualism does not ignore relevant "local" or "clause-bound" evidence concerning the meaning of the constitutional provision at issue in a given case (text *A*).[176] Rather, it supplements that evidence through a series of steps. First, the intratextualist identifies another text (text *B*) for purposes of intratextualist comparison. Second, the meaning of text *B* must be independently identified on the basis of its *own* local evidence, using some interpretive theory (originalism, for example) to arrive at a clause-bound interpretation of *B*. The intratextualist thus typically consults the local text, history, and precedent relevant to text *B*. Third, the meaning of text *B* is then employed to inform the interpretation of the disputed text *A*.

Although this method raises the risks of error regardless of the interpretive theory employed for clause *B*, we will first provide a concrete illustration by stipulating that originalism is the underlying interpretive theory and thus supplies the criteria by which error is to be judged. We will then examine two sources of error that arise from intratextualism on any theory of constitutional obligation — namely, the extreme manipulability of intratextualism, and also its potentially disastrous proclivity for extending coherent and holistic error across the whole Constitution.

1. Originalism and Error. — From an originalist standpoint, intratextualism might well prove less attractive than clause-bound interpretation. Amar seems to assume that the added material judges will consult under strong intratextualism will often provide significant in-

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[174] *See supra* pp. 744–45 and note 82.

[175] *See, e.g.*, Amar, *Intratextualism*, *supra* note 1, at 815 (democratic theory); *id.* at 822–23 (precedent).

[176] *See supra* p. 738 and note 48.

cremental evidence of the original understanding. But parallel constitutional provisions will often provide little evidence of the original understanding of the provisions most immediately at issue, and intratextualism may provoke *erroneous* determinations of the original understanding in some cases.

Once judges have assimilated the textual and originalist material provided by clause-bound interpretation, the marginal utility of originalist evidence will diminish sharply as judges move to other provisions and their histories. The clause-bound sources will usually provide the best, if not the only, evidence of the original understanding of the clause at issue, because those sources have what Dworkin refers to as "local priority."[177] If, to use one of Amar's examples, litigants claim that the core meaning of Free Speech Clause of the First Amendment protects political rather than commercial speech, then the best evidence of the original understanding will be found in the usual clause-bound sources bearing on free speech. Turning for guidance to the Speech or Debate Clause of Article I, as Amar would,[178] is likely to provide only indirect illumination. That text predated the First Amendment, was enacted separately, and addressed different problems.

Another reason for the diminishing utility of collateral evidence involves the timing of constitutional enactments. The best cases for Amar are those in which all of the relevant provisions were enacted at the same time, as part of the same package. In those circumstances, originalists might look to parallel provisions and their history to shed light on the original understanding, just as intentionalists in statutory interpretation often look to other parts of the statute to discern legislative intent. But many of Amar's most critical examples are not that sort at all. Rather, the relevant constitutional provisions in those examples were enacted by different lawmakers at different times — in some cases years apart, in some cases centuries apart — making the Constitution look less like a single statute enacted at one time and more like the *Statutes at Large*, a cumulative record of enactments over time.[179] Thus, Amar's analysis of the right to vote on juries de-

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177 DWORKIN, LAW'S EMPIRE, *supra* note 72, at 250–51.

178 *See* Amar, *Intratextualism*, *supra* note 1, at 814–17.

179 Amar is thus mistaken to analogize intratextualism to the practice of reading one statutory section in light of other sections of the same enactment. *See, e.g.*, Smith v. United States, 508 U.S. 223, 233–34 (1993) ("Just as a single word cannot be read in isolation, nor can a single provision of a statute. . . . 'A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme' . . . ." (quoting United Savings Ass'n v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988))). The correct analogy is to the practice of reading a statutory provision in light of separately enacted statutes found elsewhere in the code. *See, e.g.*, West Virginia Univ. Hosps. v. Casey, 499 U.S. 83, 100 (1991) ("Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most

scribes the Fifteenth Amendment, ratified in 1870, as relevant evidence about the meaning of the Twenty-Sixth Amendment, ratified in 1971;[180] and his analysis of *Bolling v. Sharpe* suggests that the Fourteenth Amendment's Due Process and Equal Protection Clauses, from 1868, illuminate the meaning of the Fifth Amendment's Due Process Clause, enacted in 1791.[181]

As previously discussed, this temporal layering of the Constitution creates a first-best problem for Amar (maybe "the Constitution" as a document has no original meaning; only particular parts of it do),[182] but it also creates a second-best problem. When the parallel provisions featured by intratextualist analysis are found in parts of the document enacted at different times, the originalist evidentiary value of the comparison drops off sharply. In a case like *Bolling*, in which the legal claim arises under the first-enacted provision (the Fifth Amendment's Due Process Clause), Amar seems to think that the framers of the second-enacted provision (the Fourteenth Amendment's Equal Protection Clause) may have reflected upon the meaning of Fifth Amendment Due Process in a helpful way, and included the Equal Protection Clause as a "clarifying gloss" that should be read back into the earlier provision.[183] Yet there is little reason to think that the Fourteenth Amendment's framers and ratifiers had any special insight into the Fifth Amendment's original meaning. It is an empirical question whether the framers of later provisions are skilled interpreters of the original meaning of earlier provisions, and Amar has not addressed that empirical question. The beliefs of the Fourteenth Amendment's framers and ratifiers are authoritative background for the Fourteenth Amendment (on an originalist methodology), but Amar has given us no reason to think that their beliefs should be given any special weight when interpreting earlier provisions.[184]

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logically and comfortably into the body of both previously and subsequently enacted law."). But there are so many differences between statutes and the Constitution, between the institutions that enact them and the conditions under which they are interpreted, that it is doubtful whether any of these analogies are helpful. Amar acknowledges this doubt. *See* Amar, *Intratextualism*, *supra* note 1, at 801 n.204 ("Some of the arguments I have offered . . . may not readily transfer to the realm of statutory interpretation."); *see also* SCALIA, A MATTER OF INTERPRETATION, *supra* note 113, at 37–41 (1997) (discussing differences between constitutional and statutory interpretation).

180 *See* Amar, *Intratextualism*, *supra* note 1, at 789.

181 *See id.* at 766–73.

182 *See supra* pp. 749–50.

183 Amar, *Intratextualism*, *supra* note 1, at 772.

184 Amar might avoid this objection by arguing that, on his theory of constitutional amendment, the Fourteenth Amendment would be presumed to have altered *all* the Constitution, so that the only opinions that matter anymore, even regarding provisions that pre-date the amendment, are those of the amendment's own framers. *See supra* p. 743. But this approach has the obvious cost of unsettling the established approach to cases arising under the original Constitution; those cases debate the meaning of the original Constitution itself, rather than the meaning of its

Moreover, Amar's methodology extends equally to cases in which the disputed provision was enacted *later* than the parallel provision, so that the framers of the parallel provision *cannot* have known about the later, disputed provision (as where Amar uses the Fifteenth Amendment to interpret the Twenty-Sixth).[185] True, the framers of the later-enacted provision might have deliberately shaped their enactment to parallel (or contrast with) the earlier provision, but that information would be captured by a clause-bound interpretation of the later provision. Why an originalist would possibly give any *independent* weight to the text and original understanding of an earlier-enacted provision, as evidence of the original meaning of a later-enacted provision, passes all understanding; but Amar's methodology seems to demand exactly that. All these arguments suggest that the incremental evidence supplied by intratextualism may be much less than Amar supposes.

An equally serious problem for Amar is that judges of limited interpretive competence will err more frequently when relying upon intratextualism to find original meaning than they err when relying upon clause-bound interpretation. The whole bite of Amar's methodology is that intratextualist sources must sometimes trump the (clause-bound) textual, historical, and decisional materials relevant to the provision most immediately at issue.[186] Intratextualism will increase accuracy in the determination of original meaning *only* when (1) judges err in reading the clause-bound text, originalist materials, and precedent directly relevant to the disputed provision (text *A*); (2) they choose the right second provision (text *B*) for intratextual comparison;[187] (3) judges correctly determine the meaning of text *B* based on collateral sources; *and* (4) they then draw the correct inferences from text *B* for purposes of construing text *A*.[188] Each of the last three steps intro-

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amendments. *See, e.g.*, Lee v. Weisman, 505 U.S. 577 (1992) (debating the original meaning of the Establishment Clause without reference to the Fourteenth Amendment).

185 *See* Amar, *Intratextualism*, *supra* note 1, at 789.

186 *See supra* p. 735.

187 This choice will not always be obvious. For instance, if Justice Marshall had chosen to inform his construction of "necessary" in *McCulloch* by looking to Article I, Section 7 (requiring presentment to the president of every order, etc., "to Which the Concurrence of the Senate and House of Representatives shall be necessary"), he might have concluded that "necessary" meant "essential" or "indispensable." Instead, however, he looked to "needful" in Article IV, Section 2, and reached a quite different conclusion. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 418, 422 (1816). So picking the right cross-reference matters a great deal. Amar never tells us *which* provisions are to count as candidates for intratextualist consideration. Must the provisions have at least one common word? Or perhaps one common word that is sufficiently important, like "speech"? Maybe the interpreter must consider every provision in the Constitution (and their histories) and then decide which are sufficiently relevant to have weight in the intratextualist calculus. (This is what Hercules would do. *See supra* note 53.) That procedure would, of course, heighten concerns about the decision costs of intratextualism. *See infra* pp. 772–73.

188 It is important to realize that much room for error remains at this fourth step. After all, Amar concludes that, given identical terminology in text *A* and text *B*, the right answer is some-

duces the potential for error. Hence, intratextualism will *reduce* decisional accuracy when judges correctly read the relevant clause-bound materials yet are driven away from that correct meaning by either (1) choosing the wrong text *B* for comparison; (2) incorrectly determining the meaning of text *B*; or (3) drawing the wrong inference in relating text *B* back to text *A*. Amar gives us no reason to think that the first, accuracy-enhancing combination of circumstances will occur more frequently than the second, error-provoking combination.

Note that this set of difficulties arises irrespective of whether originalism or some other approach provides the criteria for defining interpretive error. Clause-bound interpretation requires judges to construe one text correctly in any given case. Intratextualism always triples the potential for error by requiring judges to select the proper second text, construe it correctly, and draw the right inferences concerning its relation to the first text. This increased potential for error exists whether the meaning of each provision involved is derived from originalist history, judicial precedents, political theory, or any other source.

2. Manipulability. — If intratextualism provides little guidance for the judge who is simply seeking the right answer, it also proves wholly ineffective in constraining the judge who has a more definite idea of where he wishes to go. The manipulability of Amar's method is the most striking feature of *Intratextualism*. The method can reach the following pairs of results:

- *Bolling v. Sharpe*[189] correctly read the words "due process of law" in the Fifth Amendment to have the *same* meaning as "due process of law and equal protection of the laws" in the Fourteenth Amendment.[190] But *McCulloch v. Maryland*[191] correctly read the word "necessary" in the Necessary and Proper Clause *differently* than the words "absolutely necessary" in the Imposts Clause.[192]
- *Martin v. Hunter's Lessee*[193] correctly read the Vesting Clause of Article III as mandatory because the same language ("shall be vested"), when used in the Vesting Clauses of Articles I and II, is "manifestly mandatory."[194] But Christopher Columbus Langdell incorrectly read the phrase "throughout the United States" in Article I to have the same

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times that their meanings should be the same, and sometimes that their meanings should be different. *See infra* pp. 767–69.

189 347 U.S. 497 (1954).

190 *See* Amar, *Intratextualism*, *supra* note 1, at 772–73.

191 17 U.S. (1 Wheat.) 316 (1819).

192 *See* Amar, *Intratextualism*, *supra* note 1, at 756–57. Amar notes this discrepancy. His answer is that, in the former case, the "[equal protection] clause is best read as declaratory, glossing earlier words and making explicit what those words only implied." *Id.* at 773. This argument reiterates Amar's view of *Bolling* but says nothing at all to justify the discrepancy.

193 14 U.S. (1 Wheat.) 304 (1816).

194 Amar, *Intratextualism*, *supra* note 1, at 760.

meaning as the phrase "throughout the United States" in Article II — a blunder because "the precise hue of [the phrase] will sensibly vary depending on the surrounding legal context."[195]

That is to say, the intratextualist may read different phrases differently (*McCulloch*), different phrases similarly (*Bolling*), similar phrases similarly (*Martin*), and similar phrases differently (as Langdell should have). Amar notices this, and falls back upon the claim that "similarity of context" or "contextual difference" will help the interpreter decide what to do.[196] On this modest construal, "[i]ntratextualism demands only that in thinking about the one clause, we should think about the other as well and justify differential treatment if upon reflection such treatment makes sense (as it sometimes will)."[197] But this response retreats toward a particularly pallid and uncontroversial form of *weak* intratextualism, and thus threatens to give away the game. If the "sense" supplied by local context always dominates any inferences that might be drawn from collateral texts and their histories, then intratextualism has little bite. If, on the other hand, intratextualism sometimes dominates local context, then the plasticity of intratextualism becomes a concern that cannot be minimized.

To be sure, no interpretive approach is perfectly constraining, and constraining power must be assessed comparatively. But unless clause-bound interpretation *never* constrains, it cannot fare worse than intratextualism fares in the examples above; and if clause-bound interpretation never constrains, then intratextualism cannot either, for the intratextualist judge may use *all* of the sources and arguments available to the clause-bound interpreter, and the sources added by intratextualism hardly narrow the field of possible interpretations. That intratextualism is designed to supplement, not replace, other theories of interpretation magnifies the indeterminacy of Amar's overall approach. Just as legislative history, in Justice Scalia's view, has "augmented" the manipulability of other techniques of statutory construction,[198] so too the addition of another layer of complexity to constitutional interpretation is likely to magnify the problem of manipulability.[199] Amar's examples suggest that intratextualism simply gives the clever interpreter another set of tools to play with in reaching the desired result.

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[195] *Id.* at 785.

[196] *Id.* at 801 n.203.

[197] *Id.* at 817.

[198] *See* SCALIA, A MATTER OF INTERPRETATION, *supra* note 113, at 36.

[199] *See, e.g.*, Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 4 (1992) ("Ironically, rules and institutions that are designed to reduce the law's indeterminacy may actually *increase* it, due to the cumulative effect of their density, technicality, and differentiation. Indeterminacy then, may be a consequence, as well as a defining feature, of complexity.").

In principle, it is possible that any interpretive method expanding the amount of relevant information might narrow the range of possible meanings generated by clause-bound interpretation, thus generating greater constraint than clause-bound interpretation could provide. It is an empirical question whether, in the total set of cases, such instances will outnumber cases in which intratextualism loosens constraint by contradicting the meaning suggested by clause-bound sources.[200] But for intratextualism to *increase* constraint, all the possible intratextual references (or at least the overwhelming majority of them) would have to point toward the same meaning for text *A*. Any other set of circumstances would expand the interpreter's options by providing a choice of analogies. Our claim is that, judging by Amar's own examples, the most likely answer to the empirical question is that intratextualism produces more ambiguities than it resolves, and thus loosens judicial constraints. At the very least, Amar has failed to present the sort of counter-examples that might rebut this intuition.

3. Coherence and Error. — Many interpretive accounts attempt to secure coherent, holistic readings of the Constitution. Dworkin's idea of "law as integrity,"[201] Richard Fallon's "constructivist coherence,"[202] and John Hart Ely's "representation reinforcement"[203] all share this aspiration to some degree. *Intratextualism* shows obvious affinities to these theories: Amar prefers broadly based, holistic readings of the Constitution to narrow, clause-bound ones, albeit with a textualist spin not prominently featured in other holistic approaches.

Yet not just any coherent reading will do. Amar wants judges to arrive at the coherent reading that is also correct on other grounds, principally textualist and originalist ones. That combination of views is internally consistent given Amar's deep, usually unexpressed assumptions about the Constitution. "We the People" are supposed to have enacted a text that reflects a deeply theorized and integrated account of government and its relations with the citizenry.[204] A search for broadly coherent "patterns and implicit principles"[205] of constitutional meaning is simply the form of interpretation most appropriate to

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200 *Cf.* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 368–70 (1994) (noting that legislative history sometimes broadens the field of argument by impeaching clear statutory text, and sometimes narrows the field of argument by resolving textual ambiguity).

201 DWORKIN, LAW'S EMPIRE, *supra* note 72, at 225–75.

202 Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1192–94 (1987).

203 JOHN HART ELY, DEMOCRACY AND DISTRUST 77–88 (1980).

204 *See* Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 457 (1994) ("Concretely, the U.S. Constitution is a far more majoritarian and populist document than we have generally thought . . . .").

205 Amar, *Intratextualism*, *supra* note 1, at 796.

the fundamental coherence of the framers' and ratifiers' understandings.

Under less optimistic assumptions, however, Amar's unique blend of textualism, originalism, and coherence comes apart. Even setting aside the first-best question whether the original meaning of the Constitution does indeed reflect deep structural coherence,[206] Amar's theory raises two serious problems from a second-best perspective.

First, the totalizing character of intratextualism removes all constraint on implausible, even "cabalistic" and "mystical"[207] claims of patterns and resonances ranging over the whole Constitution and the whole of constitutional law. The Fifth Amendment's Due Process Clause must be read in light of the Fourteenth Amendment's Due Process Clause, which is given a clarifying gloss in the Equal Protection Clause, which is itself declaratory of the meaning of the Citizenship Clause of the Fourteenth Amendment; and all of these have hidden links to the Bill of Attainder Clause and the Titles of Nobility Clause.[208] It all fits together. There is a feverish quality to intratextualist interpretation, a lack of proportion, a propensity to see "deep design"[209] where there is only coincidence and contingency and the localized messiness of our constitutional history. It is the same quality found, in a more exaggerated form, in the attempts to prove by close textual analysis that Shakespeare was Francis Bacon or the Earl of Oxford.[210]

The second problem is a consequence of the first. Intratextualism can support a range of deeply coherent readings, yet some of them will be profoundly misguided when judged by the standard criteria of (local) text, history, and precedent. Such readings force interpreters like Herbert to choose among the various goods of coherence, textual plausibility, and fidelity to the original understanding and clause-bound precedent. Because he is a romantic about adjudication, Amar gives no indication about how that choice is to be made, but judges of limited interpretive competence will inevitably make decisions that force the choice to the surface, highlighting the internal tensions in Amar's views. An Amarian judge may be a contradiction in terms.

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206 *See supra* pp. 749–50, 765.

207 *See* Amar, *Intratextualism*, *supra* note 1, at 799.

208 *See id.* at 767–73.

209 *Id.* at 814.

210 *See, e.g.*, H.N. GIBSON, THE SHAKESPEARE CLAIMANTS: A CRITICAL SURVEY OF THE FOUR PRINCIPAL THEORIES CONCERNING THE AUTHORSHIP OF THE SHAKESPEARE PLAYS (1962) (discussing and ultimately rejecting theories suggesting that the true author of the Shakespeare plays was either Francis Bacon, the Earl of Oxford or Derby, or Christopher Marlowe).

Justice Douglas's opinion in *Griswold v. Connecticut*[211] illustrates this dynamic. Douglas thinks that the Bill of Rights has a deep coherence: it is a charter of libertarian rights that rests upon, and can be generalized to protect, the "right of privacy."[212] Amar, by contrast, thinks that the Bill is in some deep sense a coherently majoritarian and populist document; that its key criminal procedure provisions rest not on a libertarian idea of privacy but on a concern for adjudicative accuracy that serves to sort violators of the People's law from non-violators;[213] and that the *Griswold* opinion accordingly overstates the role of privacy in, for example, the Fifth Amendment's Self-Incrimination Clause. But Amar actually applauds Douglas's opinion for its (bungled) attempt to implement intratextualist coherence.[214]

That is an odd judgment. True, an intratextualist analysis of the whole Bill of Rights done correctly (by Amar's populist lights) would be more coherent than a clause-bound, and possibly incoherent, analysis of each part of the Bill separately. But *Griswold*, of all cases, should show Amar that there is another possibility: a holistic, highly coherent, but fundamentally mistaken analysis that produces a disastrous misreading of the whole set of relevant provisions all at once. An Amar with a more realistic view of judges' abilities as constitutional interpreters might prefer the limited incoherence of clause-bound interpretation to a sweeping, integrated, but erroneous universal account, so long as the clause-bound reading better satisfies Amar's independent textualist and originalist criteria. Amar suggests, for example, that *City of Boerne*'s restricted reading of the Fourteenth Amendment's Enforcement Clause ignores the parallel case of *Jones v. Alfred H. Mayer Co.*,[215] in which the Court correctly interpreted the Enforcement Clause of the Thirteenth Amendment to authorize "broad substantive legislation."[216] Now that *Boerne* has been decided, however, intratextualism supports extending *Boerne* to the Thirteenth Amendment just as much as it supports extending *Jones* to the Fourteenth. On Amar's logic, intratextualism may simply amplify the pernicious effect of the blunder (if blunder it was) in *Boerne*.

Griswold and *Boerne* thus show the critical problem that judicial error poses for Amar's blending of textualism, originalism, and coherence. Intratextualism raises the stakes for constitutional interpretation: because clauses are read together, both correct readings and in-

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211 381 U.S. 479 (1965).

212 *Id.* at 484–86.

213 *See* Akhil Reed Amar, *The Future of Constitutional Criminal Procedure*, 33 AM. CRIM. L. REV. 1123, 1133–34 (1996).

214 *See* Amar, *Intratextualism*, *supra* note 1, at 797.

215 392 U.S. 409 (1968).

216 Amar, *Intratextualism*, *supra* note 1, at 823.

correct readings tend to snowball, sweeping up other clauses as they proceed. On realistic assumptions about the judiciary's ability to do textualism and originalism well, judges will frequently and predictably be forced to choose between a strong preference for coherence and the textualist and originalist criteria by which they evaluate coherent readings of the Constitution. Clause-bound interpretation, by contrast, lowers the stakes by creating barriers between clauses, thus minimizing the alarming possibility that holistic interpretation will propagate holistic error. Clause-bound interpretation is the more risk-averse of the two approaches, and that is probably a good idea when the risks being run are of constitutional magnitude.

All this sketches a problem. Whether an Amarian should prefer clause-bound interpretation depends on empirical assessments of judicial competence and the risks of disastrously coherent error. It will not do, though, to insist upon the first-best solution — readings that are both coherent and correct — while prescribing an interpretive tool for second-best judges, a tool that will sometimes, as in *Griswold*, drive those judges to third-best outcomes. Amar's romantic preference for coherence in interpretation produces prescriptions that do not even engage these critical issues.

C. Decision Costs

Error aside, intratextualism imposes enormous demands upon judges, who must gather, read, and interpret the voluminous and heterogeneous mass of originalist materials and precedents relevant to all the collateral provisions. Amar has read all of these materials and is justly renowned for the breadth and depth of his historical scholarship, but the same cannot be said for most judges. Attempts to reason like Amar will strain their resources, especially time, and test their abilities as historians. True, judges' limited information and expertise are objections even to clause-bound interpretation (especially to the extent it relies on originalist materials). But the whole point of a second-best approach is to choose the comparatively best set of interpretive rules. Intratextualism is necessarily more demanding on these counts than clause-bound interpretation, because the intratextualist must absorb all of the sources that the clause-bound interpreter must absorb *plus* all relevant intratextualist sources, including originalist material relevant to parallel or contrasting provisions.

These demands make the decision costs of intratextualism extravagant — far greater than those of clause-bound interpretation. If judges were to pursue intratextualism in the time-intensive fashion that Amar does, by reading everything before deciding anything, and if judicial resources were relatively constant, then something would have to give: either the time spent on other cases (including other constitutional cases) must decrease or the number of cases decided must de-

crease. Neither consequence would clearly be a price worth paying for the increased accuracy that Amar supposes intratextualism would produce. More probably, judges purporting to apply intratextualism would selectively read and refer to collateral sources, reducing the costs of adjudication but reducing accuracy itself in the bargain.

Could a division of labor between the academy and the bench solve the problem, with academics doing all the intratextualist work while judges defer to their conclusions? That unlikely regime would do nothing to reduce the total decision costs of intratextualism; it would just shift them around, and not in very attractive ways.[217] And lawyers would still have to incur all the costs of research, in order either to support or to rebut academic conclusions.

The significance of intratextualism's extravagant decision costs is certainly contestable. Although one view holds that interpretive rules should be chosen to minimize the sum of error costs and decision costs,[218] many other combinations are possible. Perhaps some minimal threshold level of decisional accuracy should be achieved before decision costs are even considered in the choice of interpretive rules; conversely, perhaps any interpretive rule that produces decision costs judged excessive relative to some threshold should be rejected, no matter how (in)accurate the alternative interpretive rules would prove. But all of these criteria might well converge in condemning intratextualism. When compared to clause-bound interpretation, intratextualism produces accuracy benefits that are at best speculative and may well be negative, while ringing up decision costs that are clearly higher than its competitor. Even if decision costs play only a tiebreaking role between interpretive rules, intratextualism fares poorly indeed.

Of course, many of the questions raised here about the evidentiary value of intratextualist sources, and about the comparative error and decision costs of intratextualism and clause-bound interpretation, rest on plausible but difficult empirical claims and assessments of institutional competence. The questions are hard, but also inescapable. Whatever Amar's theory of constitutional obligation, his desire to recommend an interpretive tool for judicial use makes it necessary to confront the issue of judicial competence and to compare the judiciary's likely performance under the alternative interpretive rules, for interpretive rules are the product of both a theory of obligation and an account of institutional capacities. Amar's failure to consider these insti-

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[217] It is at least in tension with elementary norms of due process and nondelegation for a judge to tell litigants, "I have no need independently to examine the interpretive sources; I have the latest articles from the *Yale Law Journal* to tell me what the Constitution means." *Cf.* United States v. Microsoft Corp., 147 F.3d 935, 955–56 (D.C. Cir. 1998) (holding that the district court's referral of a nonjury action to a special master constituted abuse of discretion).

[218] *See* Cass R. Sunstein, *Problems With Rules*, 83 CAL. L. REV. 953, 972–74 (1995).

tutional issues makes intratextualism a proposal that is at best incomplete.

D. The Puzzling Persistence of Clause-Bound Interpretation

As we have said, Amar is not the first to argue for some form of ambitious, holistic approach to constitutional interpretation.[219] But judges do not, and plausibly should not, behave the way the holistic theorists would have them behave. The courts continue, in many areas of constitutional law, to practice clause-bound interpretation, relying upon locally relevant text and originalist materials combined with heavy doses of precedent. This practice is admittedly a tendency rather than a universal pattern. But it is a strong tendency. We see Establishment Clause cases, free speech cases, Fourth Amendment cases or due process cases — not Bill of Rights cases. Cases concerning the separation of powers and federalism are more frequently decided in holistic terms, posing as they do questions of governmental structure and institutional relations, yet even here the provisions most immediately at issue display a gravitational pull. Consider *INS v. Chadha*,[220] which struck down the legislative veto largely through a clause-bound reading of the Bicameralism and Presentment Clauses.[221]

The widespread practice of clause-bound constitutional interpretation poses both normative and descriptive problems for Amar. Normatively, it supports the choice of clause-bound interpretation over intratextualism because it shows that Amar is proposing a potentially destabilizing departure from the status quo. Where judges have generated long lines of precedent under particular clauses, a shift to intratextualism would require judges to discard the clause-bound precedents and rethink their holdings in light of the text and precedent of parallel provisions, imposing dramatic transition costs in return for interpretive benefits that, even judged by Amar's own lights, are speculative.[222] When, for example, the Free Speech Clause is read in light

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219 *See supra* pp. 739–40.

220 462 U.S. 919 (1983).

221 *See id.* at 946.

222 *See* Vermeule, *Interpretation, Empiricism, and the Closure Problem*, *supra* note 81, at 706–07 (discussing the role of transition costs in the choice of interpretive rules). Amar does not directly state whether, or to what extent, the results of intratextualist interpretation should override existing precedents. He does, however, urge adoption of legal rules that would, if implemented, require wholesale overrulings. *See, e.g.*, Amar, *Intratextualism*, *supra* note 1, at 817 (arguing that "content-based discriminations are not themselves (even presumptive) violations of the freedom of speech," and that continued adherence to the present content discrimination doctrine by judges is "obtuse and self-dealing"). And his obvious contempt for certain decisions makes it hard to believe that he would, as a judge, adhere to them as a matter of stare decisis. *See id.* at 802–12 (discussing *Morrison v. Olson*, 487 U.S. 654 (1988)). Amar's examples do not solely concern the proper decision of future cases of first impression; rather, he offers an outright critique of large

of the Speech or Debate Clause, Amar thinks it clear that "content-based discriminations are not themselves (even presumptive) violations of the freedom of speech,"[223] even where political speech is concerned. This seems to mean that courts ought not, as they do currently and have done for a long time, subject content-based restrictions to strict scrutiny — in other words, that a central line of modern constitutional precedent[224] would have to go. We are at least entitled to ask what is being gained for the shock that such a transition would inflict.[225]

The persistence of clause-bound interpretation also poses an interesting descriptive puzzle for holists and coherentists of every stripe. The puzzle is not that judges do not listen to academic complaints about blinkered interpretation; it is hardly clear that judges listen to academics about very much anyway. The puzzle is that the very actors whose business it is to formulate rules of constitutional interpretation have somehow overlooked the superiority of ambitious, holistic constitutional interpretation.

One explanation for the persistence of clause-bound interpretation would emphasize its institutional advantages to judges deciding constitutional cases under conditions of limited information and expertise, and (at the upper levels of the judiciary) sitting on multimember panels riven by chronic disagreement over constitutional issues. The continued sway of interpretive regimes that appear simplistic to constitutional holists is plausibly understood as a product of the courts' awareness of the limits of their own institutional capacities, and of the judges' desire to emphasize sources on which interpreters with different theories of obligation can converge. Judges of differing views are frequently able to reach consensus by agreeing on a result or a set of low-level justifications while bracketing broader theoretical or structural differences.[226] Such agreements sacrifice theoretical purity, but make collective choice possible.

For many standard constitutional sources, clause-bound (rather than holistic) interpretation helps to promote this sort of overlapping consensus. For example, judges' heavy reliance on the text of specific clauses, as opposed to the intra-text of the whole document, comports with a wide range of constitutional first principles. Originalists might

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sections of existing doctrine. Our discussion of stare decisis assumes that Amar wants intratextualist outcomes to trump existing precedents.

223 Amar, *Intratextualism*, *supra* note 1, at 817.

224 *See* DANIEL A. FARBER, THE FIRST AMENDMENT 21 (1998) ("The content distinction is the modern Supreme Court's closest approach to articulating a unified First Amendment doctrine.").

225 The abandonment of large swaths of precedent would also increase decision costs by reopening settled questions. *See* Strauss, *supra* note 81, at 912 (emphasizing the avoidance of such costs as a primary benefit of conventionalism).

226 *See* Sunstein, *Incompletely Theorized Agreements*, *supra* note 64, at 1746–47.

see locally relevant text as the best evidence of the original understanding of the question at issue and might fear that the burdens and distractions of ambitious intratextualism will make interpretation inefficient and error-prone. Nonoriginalists who favor the incremental development of constitutional principles through common law adjudication might still respect the text of specific clauses as focal points around which social consensus and coordination have formed.[227] The importance of collateral textual provisions for these purposes is probably far lower than for intratextualist purposes.[228]

Reliance upon clause-bound precedent also makes good sense for interpreters with differing first principles. Common law nonoriginalists will obviously give great weight to such precedent, and if they are also Burkeans, skeptical of the rationalizing powers of any particular interpreter, they will discourage judges from attempting a grand synthesis of precedents ranging across the whole of constitutional law, preferring instead attempts to bring local coherence to particular bodies of doctrine.[229] The epistemologically humble originalist judge might see precedent relating to the provision at hand as valuable information about how earlier judges have understood the original meaning of the provision. In this respect, clause-bound precedent is more valuable than precedent concerning collateral provisions; the judges deciding the collateral cases were not focused upon the local question currently at hand, and their indirect reflections about it, if any, will supply only low-value information and analysis — "dictum."

If clause-bound interpretation enables and promotes judicial agreement, Amar's commitment to a completely theorized view of constitutional coherence undermines the ability of multimember panels to reach agreement in hard cases. Perhaps a panel of Marshalls (or Herculeses) would converge on a single coherent reading of the document supported by intratextualist analysis of all collateral provisions, their histories, and relevant precedent. But a panel of Herberts will make mistakes and disagree about interpretive first principles. Intratextualism makes it more difficult to reach agreement in that it requires judges to agree on how constitutional provisions beyond those directly at issue in a particular case fit together. Not only does such a requirement raise the stakes of disagreement,[230] it also increases the likelihood that judges who might have been able to agree on a low-level approach to text *A* will encounter various sticking points when the debate expands to include text *B*. This is, in part, why a coher-

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[227] *See* Strauss, *supra* note 81, at 907.

[228] *See supra* pp. 746–47 (arguing that intratextualist reliance on collateral provisions would muddy the clarity and accessibility that make the Constitution a democratic focal point).

[229] *See* Young, *supra* note 29, at 690–91.

[230] *See supra* pp. 774–75.

ence-minded judge like Hercules "could not really participate in ordinary judicial deliberations. . . . On a multimember panel, he would lack some of the crucial virtues . . . [such as] collegiality and civility, which incline judges toward the lowest level of abstraction necessary to decide a case."[231] Intratextualism, like the less insistently textualist versions of ambitious coherence theory, likewise pulls against the need for collegiality and civility, and consequently cannot offer interpretive prescriptions that make sense of judicial practice.

CONCLUSION

Amar's *Intratextualism* is an intriguing effort to push an interpretive tendency or weak canon of interpretation a little farther down the road toward becoming a full-fledged theory of interpretation. He does not recommend going all the way, and it is possible that we have exaggerated his commitment to strong intratextualism in this essay. But the weaknesses we have identified are general liabilities of the intratextualist method, no matter whether it is applied in a strong or weak version. Any recourse to intratextualism will, for example, increase decision costs by multiplying the number of constitutional provisions that must be interpreted. And interpreters are likely to be distracted from the constitutional context of particular provisions to the extent they are encouraged to draw cross-provisional inferences based on textual similarities. The only difference between the strong and weak versions of intratextualism is the magnitude of the resulting distortion, which will vary according to the degree to which intratextualism is allowed to trump other sources of meaning. In Amar's examples, intratextualism seems to trump other sources of meaning quite frequently, so the resulting distortion is serious.

Sometimes, particularly when used as a brainstorming device or a weak presumption in favor of common meanings, intratextualism will produce helpful insights. This result should not be surprising. While Amar's conclusions are often controversial, his work always inspires productive thought, discussion, and debate. But the allure of those insights must be weighed against intratextualism's normative and descriptive liabilities, as well as the practical difficulties that non-Herculean judges will experience in following the intratextualist prescription. In a world where few are brilliant, brilliant theory may be a temptation best resisted.

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231 Sunstein, *Incompletely Theorized Arguments*, *supra* note 64, at 1759.