

# AMERICA'S CONSTITUTION, WRITTEN AND UNWRITTEN

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Americans and Englishmen, wags remind us, are divided by a common language. Something similar (if less amusing) might be said about constitutional scholars in law schools, history departments, and political science departments. We all seem to be speaking the same language—the language of American constitutionalism—but each department speaks that language with a distinctly disciplinarian dialect. Rarely do scholars in each discipline fully and fairly engage those in other departments.

Today, the editors of the *Syracuse Law Review* are doing their part to bridge these disciplinary gaps, by bringing together a remarkable collection of constitutional scholars from law, history, and political science. I am deeply grateful to the editors for their sponsorship of this important contribution to constitutional conversation. And I am also deeply grateful to the individual contributors to this book symposium for their sympathetic engagement with my own attempt in *America's Constitution: A Biography* to write something that might be of interest to all three disciplines.

Now is not the proper time, nor is this the proper place, for me to attempt to respond to every (or indeed, to any) symposium essay in elaborate detail, point for point. Ideally, authors should thank reviewers, not quarrel with them, and I hereby thank each of my colleagues for his generous words and constructive engagement with my project. While I am saddened that my words of thanks cannot be directly expressed to the late President Kermit Hall, I am especially grateful to his family and friends,

who have helped to ensure that some of his final thoughts on the Constitution have been preserved for posterity.

My remarks today unfold in three parts. In Part I, I present a general overview of my next book, tentatively entitled *America's Unwritten Constitution: Between the Lines and Beyond the Text*, which I hope to complete next year for publication in 2009. In Part II, I offer a more detailed outline of one chapter of this book-in-progress. There is a key caveat: Both Parts I and II are highly tentative. I expect to do an enormous amount of rethinking as I finish my research and complete the actual writing of this book. (At this point, only the first chapter has been written.) But in the spirit of interdisciplinary constitutional conversation—the spirit animating today's symposium—I offer these sneak previews in the hope that they might prompt reactions and elicit suggestions from readers in all three fields. In my concluding Part III, I try to draw a few quick connections between my current work-in-progress, and the themes that have characterized the bodies of work of my colleagues in today's symposium.

#### I. A TENTATIVE OVERVIEW OF AMERICA'S UNWRITTEN CONSTITUTION

In *America's Constitution: A Biography*, I took readers on a walking tour of the written Constitution, from its first words to its last clause. In my envisioned sequel, *America's Unwritten Constitution: Between the Lines and Beyond the Text*, I will invite readers to join me in exploring parts of America's constitutional system that cannot quite be found in—and that may even exist in tension with—the explicit words of the written Constitution.<sup>1</sup>

The concept of an “unwritten” American Constitution actually

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1. The concluding passage of the postscript of *America's Constitution: A Biography* highlighted the need for:

at least one more book to start where this one ends, giving readers a detailed account of America's *unwritten* Constitution. Such a book could canvass Supreme Court case law; could assess quasi-constitutional framework statutes that have emerged and endured in America; could ponder other foundational American legal texts such as the Declaration of Independence and the Northwest Ordinance; could examine unwritten customs of Americans worthy of constitutional protection; could systematically consider other modern constitutions across the globe for the wisdom doubtless embedded in many of these documents/traditions; could reflect on the teachings of past and present political philosophers; and could assess particularly plausible proposals for new constitutional amendments. In other words, such a future book could profitably take the interested reader in any number of directions that today's narrative has not.

AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 477 (2005). My proposed sequel is designed to redeem the promissory note of this passage.

involves several different, intertwined ideas. Over the course of twelve chapters, I shall trace twelve distinct strands of unwritten constitutionalism and in the process say some things that (I hope) are fresh and accessible—fresh even to constitutional law experts and accessible to general readers.

A one-page preface will introduce the project. I have in mind something like this:

America prides herself on a written Constitution that lays down the supreme law of the land. The scope and limits of federal authority; the division of labor between the legislative, executive, and judicial branches; the powers and duties of state governments; the privileges and immunities of citizens; the rights of aliens—all these are covered in a single and remarkably concise multigenerational document distilling enduring lessons of the national experience from the Founding to the present.

Yet there is far more to American constitutionalism than the several thousand words that form the document itself. Alongside America's written Constitution lies a vast *unwritten* Constitution, whose interpretation requires us to range beyond the terse text. But once we venture outside the written Constitution's confines, where and how should we start? When and why should we stop? What rules, if any, should guide our reading of America's unwritten Constitution?<sup>2</sup> How can unwritten constitutionalism be squared with fidelity to the written text?

This book tackles these questions. I aim to take readers on a trip well beyond America's written Constitution, but along paths that nonetheless connect up in one way or another to the canonical text itself. For example, the written Constitution's Ninth Amendment refers to "rights . . . retained by the people" that are not strictly "enumerate[ed]" within the four corners of the constitutional document itself.<sup>3</sup> To take this patch of constitutional text seriously, Americans must go beneath and beyond the Constitution's textually enumerated rights. But unless we want our unwritten Constitution to swallow up our written one and become all things to all people, we should proceed in a disciplined fashion and with considerable care, as I hope to explain and illustrate.

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2. A quick clarification to forestall confusion: Much (though not all) of the "unwritten Constitution" explored in this book does involve written materials—for example, Supreme Court opinions, landmark congressional statutes, state constitutions, and classic expressions of American ideals such as the Gettysburg Address. These materials, while surely *written texts*, are nonetheless distinct from the *written Constitution* and are thus properly described as parts of America's *unwritten Constitution*.

3. U.S. CONST. amend. IX.

The Ninth Amendment is hardly the only constitutional portal bidding us to journey beyond the Constitution's text, and the trail of unenumerated rights is only one of several routes worth traveling in search of America's unwritten Constitution. In the pages that follow, I invite readers to revisit many of our Constitution's most important topics, from federalism, congressional practice, executive power, and judicial review to race relations, women's rights, popular constitutionalism, criminal procedure, voting rights, and the amendment process. In my closing chapter, I conclude with some thoughts about whether foreign law sources have a proper role in the American constitutional conversation and with some suggestions about how America's Constitution—both written and unwritten—might serve as a model for desperately needed reforms of the current world order.

Chapter One will excavate America's *Implicit* Constitution. This approach to America's unwritten Constitution digs beneath the written Constitution's explicit rules to discover their underlying premises and entailments. For example, the written Constitution explicitly says that the Vice President presides over the Senate. It also explicitly says that the Senate sits as the nation's court of impeachment. So does this mean that the Vice President may preside at his own impeachment trial? Heaven forbid! But where does the Constitution bar such blatant self-dealing? I will show how one particular impeachment clause—which says nothing *explicit* about the Vice President—may properly be read to mean rather more than it says and to *implicitly* bar Vice Presidential self-dealing. I shall then canvas an assortment of other case studies and hypotheticals to illustrate how faithful constitutional interpreters must at times read between the lines.

Chapter Two will introduce readers to America's *enacted* Constitution. The Founders' "Constitution" was not merely a document, but a deed, not just a text, but an action—an enactment, an ordainment, an establishment. Proper interpretation of this Constitution requires attention to what was done by the deed, as well as what was said by the text. For example, the process of constitutional ordainment featured uninhibited, robust, and wide-open political speech and press, free from any notable censorship by governmental officials or agencies, even though much of the vigorous expression constituted a sharp rebuke to the existing authorities. Even before the First and Fourteenth Amendments, the ordainment process itself thus gave legal validity to a robust right of political criticism and political expression, without which the Constitution would never have come into existence, and the people's vaunted right to alter or abolish government would have become a grim joke rather than a genuine legal reality.

There is yet another aspect of the *enacted* Constitution: the act of establishing the Constitution at the Founding did not really end with the ratification of the document by state conventions as provided for in the document's Article VII. As a practical matter, the written Constitution's words needed to be made flesh—especially the rather open-ended words summoning into existence a new-fangled “President.” To do justice to the written Constitution, we must go beyond its explicit text—first, by taking note of its unwritten, between-the-lines delegation of power to George Washington in Article II, and second, by paying special heed to how Washington in fact performed (that is, how he enacted, as a thespian might enact a script) the textually open-ended Presidency. Certain basic features of America's constitutional system were established less by the Constitution's text than by President Washington's actions, which he undertook with scrupulous constitutional consciousness and with the acquiescence of the other branches of government and the American people themselves.

Just as the paper Constitution was actually embodied and fleshed-out during the Washington administration, so too, the paper Reconstruction Amendments were made flesh by a series of landmark Civil Rights Acts passed by Congress in the late 1860s and 1870s. These statutes, too, deserve to be understood as foundational aspects of America's unwritten Constitution. Whereas the Philadelphia framers, led by presiding officer George Washington, drafted the language of Article II in a way that effectively delegated broad power to shape the Presidency to the first President (who of course would be Washington himself), so the Reconstruction Congress drafted the Thirteenth, Fourteenth, and Fifteenth Amendments in a manner that gave itself broad authority to shape the full meaning of these amendments. Yet the Supreme Court has not always seen the matter this way, and has repeatedly failed to give canonical status to these landmark Reconstruction enactments.

Chapter Three will discuss America's *Unenumerated Rights*. The famously cryptic Ninth Amendment proclaims, in its entirety, that “[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.” What exactly are these “other rights”? Where are they to be found, and how, if at all, are they to be enforced by courts? What are we to make of the words “the people” in this Amendment? Next, consider the Fourteenth Amendment, which proclaims that “[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens.”<sup>4</sup> Alas, the Amendment

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4. U.S. CONST. amend. XIV, §1.

does not expressly enumerate these fundamental, non-abridgeable privileges and immunities, or explicitly specify where they are to be found. Nor does the Fourteenth Amendment say in so many words that these unspecified privileges and immunities should be protected against the federal government as well as against the states. How should faithful interpreters read this key Reconstruction provision? Which branch or branches of government should take the lead in defining fundamental rights? Where should these governmental officials look for guidance?

These are among the most difficult and contentious questions in modern constitutional theory. In this chapter, I shall offer my own answers, elaborating and illustrating several overlapping ways in which the Ninth Amendment's vision of unenumerated rights and the Fourteenth Amendment's promise of privileges and immunities might sensibly be interpreted and enforced. I will also analyze whether certain narrow but unenumerated *limitations* on rights may also exist. For instance, military courts-martial do not provide regular jury trials, and there is no explicit exception for such courts in the Constitution's general promise of jury trials for criminal defendants. Nevertheless, the Constitution has in practice been read to exempt such courts from the jury trial right.

Chapter Four will explore America's *Governmental* Constitution. England has never had a single written document comprehensively setting out the nation's basic ground rules, yet it was commonplace at the Founding to refer to the "English Constitution" to describe the overall English system of government. America, too, has a system of government, and that system, as it actually operates, sometimes does so in ways nowhere set forth in—and even in tension with—the actual written text of the Constitution.

Chapter Five will analyze America's *Doctrinal* Constitution—the sprawling mass of judicial opinions proclaiming do's and don'ts in the name of the Constitution (and thus insulating the resulting judicial decrees from ordinary legislative override). Some of the most famous instances of modern constitutional case law have involved judicial enforcement of the core meaning of various provisions of the written Constitution. Such cases are relatively easy to justify. Far more problematic is that some things that courts have done in the name of the Constitution seem flatly inconsistent with what the written Constitution itself says and was understood to mean when it was adopted. In such cases, judges are not coloring within the written Constitution's lines so much as they are painting their own pattern—drawing their own conclusions, so to speak—with no real guidance from or link to the written Constitution. This chapter will identify and analyze some of the most significant and controversial areas where the

doctrine has arguably strayed far from the document itself. It will also try to address the \$64,000 doctrinal question: If a judicial case or a line of judicial cases is ultimately deemed to be out of sync with the basic outlines of the Constitution itself, rightly read, to what extent should judges nevertheless follow this case or this line out of respect for precedent?

Chapter Six will introduce and elaborate on the notion of America's *Lived* Constitution. Many Americans' most basic rights are simply facts of life, the residue of a virtually unchallenged pattern and practice in domains where citizens act freely and governments lie low. As noted in Chapter Three, the Ninth Amendment speaks of rights "retained by the people"<sup>5</sup> and the Fourteenth Amendment promises respect for the fundamental "privileges [and] immunities of citizens."<sup>6</sup> Both these open-ended provisions can be read to direct constitutionally scrupulous government officials to tread with special care when entering domains that, as a matter of general practice, have been free from governmental intrusion.

Chapter Seven will explore America's *Symbolic* Constitution. In a polyglot nation of many faiths, languages, ethnicities, and opinions, the Constitution stands as a unifying icon, a republican version of England's Queen Elizabeth. But the written Constitution is not the only text that has achieved an especially exalted status as a basic statement of what it means to be an American. We thus should take a close look at a handful of other iconic American texts that have, at one point or another, been informally ratified in the hearts and minds of Americans—even Americans who may never have actually read these texts (just as many have not read the written Constitution). The following five documents are illustrative, albeit not exhaustive, of America's symbolic constitution: the Declaration of Independence, the Northwest Ordinance, Lincoln's Gettysburg Address, the Supreme Court's decision in *Brown v. Board of Education*, and Dr. King's "I Have a Dream" speech.

Several large symbols of national identity are *negative* symbols, crystallizing what America today rejects—indeed, abhors. This chapter will present five negative symbols to accompany the five above-mentioned positive icons. To begin with, three Supreme Court opinions occupy the lowest level of Hell: *Dred Scott v. Sandford*,<sup>7</sup> *Plessy v. Ferguson*,<sup>8</sup> and *Lochner v. New York*.<sup>9</sup> Each case presents an example of unwritten constitutionalism run amok, and thus powerfully reminds us of the need to

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5. U.S. CONST. amend IX.

6. U.S. CONST. amend XIV, § 1.

7. 60 U.S. 393 (1856).

8. 163 U.S. 537 (1896).

9. 198 U.S. 45 (1905).

place some principled limits on judges who venture beyond the words and enactment history of the written Constitution. Of course, the Supreme Court is hardly the only entity to have generated powerful negative symbols; so have Congress and the Executive Branch. No one branch has a monopoly of constitutional vice or virtue. Therefore, just as this chapter will examine iconic positive symbols from a wide range of sources, so too, it will examine negative symbols from all federal branches. From the Congress it will examine the Alien and Sedition Acts of 1798. From the Presidency it will examine Nixon's Watergate mentality that he stood above the law by definition. ("When the President does it, that means it is not illegal.")

Chapter Eight will ponder America's *Feminist Constitution*. The written Constitution explicitly describes itself as ordained by "the People" and also explicitly proclaims itself "the supreme law," superior to ordinary congressional statutes. These two explicit texts were implicitly linked by an overarching political theory of legitimacy, based on principles of popular sovereignty: the Constitution of 1787-88 should trump an ordinary statute enacted later because a mere statute passed by the Congress was not on the same democratic level as a Constitution ratified more directly and democratically (albeit earlier) by "the People themselves" in a process that allowed an unusually wide slice of Americans to vote (by the standards of 1787). But then something happened in America that the Founders did not fully anticipate, and whose transcendent implications for American Constitutionalism were not fully understood even when it happened: women got the vote via the Nineteenth Amendment. Almost overnight, the proportion of eligible voters doubled in the most dramatic extension of the franchise in all of American history. And this event profoundly complicated the standard democratic story for why the Constitution should trump a later statute.

To see why, suppose that Congress tomorrow were to enact a new civil rights law designed to protect women's rights. Suppose further that this new civil rights law is thought by some to go beyond the powers given to Congress by the Founding text, and even to go beyond the powers given to Congress by the Reconstruction Amendments. If we allow the old Constitution to trump the new statute, in what sense can this trumping be said to be democratic and consistent with popular sovereignty? "The People" who voted for the Founding text and who voted for the Reconstruction Amendments did not generally include women voters, but the Congress that passed our hypothetical modern civil rights laws *was* voted for by women. Indeed, women themselves—lots of them—serve in modern Congresses but never served in the constitutional ratifying



conventions of the 1780s or the legislatures who approved the Reconstruction Amendments in the 1860s.

Thus, if we are to vindicate the written Constitution's deepest legitimating principle—popular sovereignty—we should embrace the following as a basic precept of America's unwritten Constitution: congressional laws enacted after the Nineteenth Amendment and designed to protect women's rights should be entitled to a special measure of respect because of their special democratic pedigree. True, the various pre-1920 constitutional enactments and amendments were enormously democratic for their times. Yet when they are instead viewed retrospectively through the lens of the Nineteenth Amendment, they suffer from a notable democracy deficit. Nor can the problem be wished away by blithe assertions that earlier generations of men “virtually represented” women, because *at the very heart of the adoption of the Nineteenth Amendment was a repudiation of this particular version of virtual representation of women by men.*

Chapter Nine introduces the idea of America's *Conscientious Constitution*. Enacted and amended by a collective (and often capitalized) People, the Constitution needs to be enforced by individual persons wielding official powers. The Presidency is the document's most personal office, revolving, as it does, around one lonely figure vested with all executive power. But judges and jurors are persons, too. Often, one hopes, they are persons of *conscience*. The written Constitution envisions the individual conscience of the government officer as a powerful force in the law; hence, the multiple references to “oaths” in the written document.

As a general matter, perhaps persons interpreting the Constitution may properly consult their conscience as a tie-breaker if the legal materials are a toss-up. And in one particular domain—the domain of criminal punishment and criminal sentencing—the written Constitution was in fact structured so as to give even wider room to the consciences of the individuals personally responsible for inflicting pain or even death on fellow creatures, with the rules generally structured to privilege the conscience or consciences inclined towards mercy. The precise occasions for mercy are not, and probably cannot be, exhaustively codified in a written Constitution. Hence, the written Constitution structures decisional space for uncodifiable conscience. Alas, much of this structure today lies in disrepair.

Chapter Ten will canvass America's *State Constitutions*. Fifty state constitutions buttress their federal counterpart. Without these state buttresses, the entire federal constitutional edifice would collapse. State constitutional voting provisions, for example, define voting eligibility for

both House and Senate races. State legislatures determine how state presidential electors will be chosen. State judiciaries sit as trial courts in the great run of cases ultimately subject to final resolution in federal tribunals. And so on.

Chapter Eleven addresses the topic of America's *Unfinished Constitution*. One aspect of an unwritten Constitution is the Constitution still-to-be-written, the hoped-for Constitution of, say, 2050. Careful study of our existing Constitution and its history can also help us to identify areas where dramatic changes can occur even without formal textual amendments. For example, we have seen revolutionary changes in the treatment of gender discrimination, even in the absence of a formal Equal Rights Act.<sup>10</sup> So too, the manner of selecting presidents has shifted radically without any formal amendment; today it is virtually unthinkable that a state legislature would pick presidential electors itself with no regard to the views of the voters. Yet as late as 1812, this was indeed a relatively common practice. Similarly, many states in effect moved to the direct election of Senators before the Seventeenth Amendment codified and constitutionalized the new regime.

With these lessons in mind, it may be useful to see how, for example, America in the early twenty-first century might move towards direct national election of the President, even without a formal Article V amendment. In this chapter, I will show how direct national election could indeed be accomplished by the coordinated actions of less than a dozen large-state legislatures.<sup>11</sup> I will also show how direct national election could be achieved through a "gentlemen's agreement" between the two

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10. See discussion of Chapt. 8 *supra*.

11. This section will build on a short op-ed I published on a legal website in December, 2001. See Akhil Reed Amar & Vikram David Amar, *How to Achieve Direct National Election of the President Without Amending the Constitution*, FINDLAW, Dec. 28, 2001, <http://writ.news.findlaw.com/amar/20011228.html>. Here is the opening passage: "Imagine this: Americans could pick the President by direct national election, in 2004 and beyond, without formally amending our Constitution. A small number of key states—eleven, to be precise—would suffice to put a direct election system into effect." *Id.* In essence, I suggest that a group of states, through coordinated legislation and/or an interstate compact, could decide to give all of their electoral votes to the national popular vote winner, regardless of the electoral returns within each state (or the group of states as a whole). See *id.* These state laws would go into effect only when the group of coordinating/compacting states included enough states to control a majority of the electoral college (270 votes), thus guaranteeing that the national popular vote winner would also win the electoral college. In late August 2006, the California legislature actually adopted a version of this plan, which, alas, was vetoed by Governor Schwarzenegger on September 30. If California were to readopt this proposal, perhaps by statewide initiative, and if ten other big states were to follow suit, then the national vote count would determine the presidential election.



major parties' presidential candidates and their two running mates.<sup>12</sup>

This chapter will also describe how various institutions and voters who currently have the ability to block constitutional amendments that would reduce their own powers might nonetheless be induced to endorse these amendments if these institutions and voters were convinced of the genuine justice of such amendments in principle. So, for example, why would voters or legislators in Wyoming ever vote to reduce the Senate's malapportionment given that the existing (if unjust) constitutional rules favor Wyoming? Why would Wyoming's U.S. Senators ever sign their own electoral death warrants? Why would Congressmen ever support an amendment to limit congressional terms? And so on. The key concept I will introduce is the idea of a time-delay between the vote and the start date. We are accustomed to laws that automatically lapse—that “sunset”—after a certain time period. Here I highlight the category of rules that go into effect—that “sunrise”—only after a considerable time delay.

The concluding (twelfth) chapter will invite readers to imagine a new form of *World* Constitutionalism, American-style. It will begin by considering what role, if any, foreign law and norms should play in construing the American Constitution. It will conclude by discussing how America's Constitution, written and unwritten, might serve as a model for the world. America's Constitution was originally designed, of course, as a kind of World Constitution—a Constitution, that is, for the New World, separated by vast oceans from the Old World. But at the dawn of a new millennium, it is clear that Planet Earth is one world, and that global solutions are needed to solve genuinely global problems—the warming of the Earth at an alarming rate, overpopulation, mass starvation and genocide, international terrorism, free and fair trade, and on and on.

Many of the existing world institutions are inadequate—in ways that call to mind the similar inadequacies of the Articles of Confederation in addressing the problems of the New World in the 1780s. The United States in 1785 looked rather like the United Nations today, whose General Assembly bears an uncanny resemblance to the Confederation Congress: one-state, one-vote in a body that declares a lot and does much less, where member states sometimes obey and sometimes do not.

The solution of the Framers was to create a strong community of New World democracies. In today's world, there is not a true international counterpart of any real importance. The U.N.—in both the General Assembly and Security Council—seats thuggish regimes alongside admirable ones. NATO is focused overwhelmingly on military issues and

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12. Amar, *supra* note 11.

excludes non-European nations. The E.U. is likewise just a regional body. The GATT and G7/8 feature the world's economic powerhouses, whether or not they are democratic. OPEC is only for the oil-rich, the Arab League for Arabs, and so on. What is needed is a new international group that would start out quite informally and gradually gain legitimacy and informal authority as a powerful moral force in the world—a genuinely international community of democracies combining rich states and poor ones, North and South, East and West. It would include the U.S., of course, but also India, Mexico, Old Europe, and New Europe—only the truly democratic countries in Europe or elsewhere. This, in effect, would be the internationalization of the “sleeping giant” of the American Constitution, the republican government clause requiring individual states in the Union to meet minimum standards of democratic decency—free speech, fair votes, respect for minorities, and so on.

## II. A SNEAK PREVIEW OF CHAPTER 10: *AMERICA'S STATE CONSTITUTIONS*

When state constitutional systems are examined, a striking pattern emerges: across a large number of large issues, virtually all state constitutions have converged on a single distinct model of government. When it comes to at least ten fundamental constitutional features, virtually every state for the last half century has resembled every other state and the federal model, too. As to these features, there is a distinctly American way, with elements that differ dramatically from those on display in at least one prominent non-American constitution either currently in operation or of recent vintage. Here, then, are ten basic features of American constitutionalism:

- First, a written Constitution adopted and amendable by some expression of popular sovereignty above and beyond enactment by an ordinary legislative majority. (Compare this with England and Israel, although note that both countries may be moving closer to the American model.)
- Second, a Bill of Rights textually separate from the rest of the document. The fifty-one American Bills of Rights also overlap a great deal in their language and substantive coverage, generally including, for example, freedom of speech, press, religion, and arms bearing; protections against unreasonable searches and seizures; procedural guarantees of rights of criminal defendants; and safeguards of jury trial. (Compare this with England, which, for almost all of the twentieth century, has no entrenched Bill of Rights. Note that here, too, England may be moving closer to the American model in

recent years.)

- Third, a bicameral legislature (except in Nebraska), with fixed rather than variable legislative terms. (Compare this with the English Westminster model and also the French model, where the President may call for special legislative elections.)
- Fourth, a legislative lower house composed entirely of representatives from equally populous single-member districts, each of which picks its representative via majority or plurality rule. Geographic districts are regularly redrawn to maintain equal population. No at-large representatives exist that would ensure that the number of legislative seats held by a political party tracks the overall percentage of party votes across the entire jurisdiction. (Compare this with Germany, Israel, and Italy.) The legislature is dominated by two main political parties—the same two parties across the continent, with minor variations. (Compare this with multi-party regimes in most other countries.)
- Fifth, a strong “presidential” system consisting of a one-person executive head elected independently of legislature, at fixed terms, wielding powers of pardon, appointment, and veto (capable of being overridden). (Compare this with parliamentary models abroad. Even some strong presidential systems abroad do not give the president a formal veto, for example, in France.)
- Sixth, an executive understudy (Vice President/Lieutenant Governor) explicitly provided for in the constitution, though with few important powers of his/her own. This understudy usually has a fixed term of office coextensive with the chief, and is not simply able to be appointed and removed by the chief. Rather, the understudy is typically elected by the people at the same time they elect the chief executive. (Compare this with the parliamentary models abroad and note that even presidential systems abroad do not always have American-style vice presidents—consider Russia, for example.)
- Seventh, a universal understanding that the constitution is judicially-enforceable law, unable to be invoked in ordinary courtrooms, even between two private litigants, without the government formally being a party. (Compare this with modern European “Constitutional Court” systems in which constitutional issues are often treated differently from ordinary legal questions arising in ordinary private litigation.)

- Eighth, a system blending judicial independence and accountability in a distinctive way. Although judges, once chosen, may not simply be fired at will by the executive or the legislature, the process of selecting and promoting judges is highly political. Judges do not generally appoint other judges, nor is promotion to a higher court based strictly on seniority or on one's reputation among fellow judges. (Compare this with, for example, German and French systems in which the judiciary is much more self-regulating and closer to a bureaucratic civil service.)
- Ninth, a common-law style of adjudication featuring judicial precedent as an important source of law. (Compare this with continental systems as in France.)
- Tenth, juries, which comprise a prominent feature of both civil and criminal litigation. (Compare this with continental systems as in France.)

What follows from this pattern? There is not any strong claim that every state must slavishly adhere to this basic American model in every respect as a matter of federal constitutional law. It would be silly, for example, to think that Nebraska is under any constitutional obligation to repudiate its unicameral tradition. But in a less rigidly legal and more sociological sense, this basic American model defines the boundaries of realistic constitutional reform in America. Variation *within* the basic American model described above are much more likely to be taken seriously than amendment proposals outside this model, which are apt to be viewed as “foreign,” “alien,” or “un-American.”<sup>13</sup> More specifically, proposals to amend the *federal* Constitution are far more likely to be taken seriously if comparable proposals have already been adopted and shown their worth at the state level. In fact, most of the federal amendments that have thus far succeeded were copycats or adaptations of pre-existing state constitutional texts or practices.

And within the Basic Model described above—indeed, amazingly enough, within *each* of the ten observed similarities across American Constitutions—there are important variations between the federal Constitution on the one hand, and certain widespread state practices on the

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13. Examples of “alien” concepts might include variable—as opposed to fixed—terms of office for legislature and chief executive; multi-party regimes; cumulative voting or other proportional-representation systems for anything other than local elections; multi-member districts for a state-wide or national legislature; parliamentary systems of legislative selection of executive officers; and civil service models of self-appointing and self-perpetuating judiciaries.

other. Let us, then, revisit our ten basic elements, note the interesting variation between state and federal constitutionalism, and ask ourselves several questions as to each element: Should states change to fit the federal model more closely? Or should the federal Constitution instead be amended to fit the contrary state practice? Or might there be reasons why the two levels of American constitutions should differ?

- First, written state constitutions are typically much longer, and more clearly amendable by direct popular action (initiative or referendum) than their federal counterpart.

Law-reform questions: Are state constitutions too easy to amend by direct popular action; or is the federal Constitution too hard to amend? Consider the argument that a system of majoritarian state amendment and super-majoritarian federal amendment is “just right,” as Goldilocks might say. Precisely because the federal Constitution sets the basic ground rules that states cannot violate, state amendments are already constrained by a stable framework of fundamental freedom, and frequent state amendment is not as great a threat to liberty—especially given that it is easier for state dissenters to move to a sister state than for national dissenters to move to a foreign country.

- Second, state constitutions are conventionally viewed as having more explicit “positive” and “social” rights, such as the right to education.

Law-reform questions: Should the federal Constitution be construed to protect more “positive” rights? Or has state experience shown that courts (and other governmental enforcers) do a rather bad job of protecting such rights?

- Third, many states have term limits for legislature and also allow voters to “recall” elected officials (making individual state legislators’ terms slightly less fixed, formally). Many states also have ways of passing ordinary statutes that supplant or supplement legislature, including initiative and referendum.

Law-reform questions: Should states abandon term limits for state legislators, or should the federal Constitution be amended to provide for term limits? If so, how could members of Congress ever be induced to support such a Congress-limiting amendment under Article V?<sup>14</sup> Note also how the current asymmetry between state and federal lawmakers might give

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14. See discussion of Chapt. 11 *supra* § I.

Congress various “repeat player” advantages in the state-federal tug of war, and also a stronger position vis à vis a powerful president. On one view, because the president is so much stronger than state governors, we need a more experienced group of legislators to counterbalance him than is needed at the state level. Thus, one argument for status quo might be that it leads to a strong federal government that is not overly tilted towards the president.

- Fourth, under the Supreme Court’s case law, no malapportionment of the upper house of state legislatures (i.e., one county, one vote) akin to that of the U.S. Senate is permitted.<sup>15</sup> See *Reynolds v. Sims* (1964).

Law-reform questions: If the deep principle of *Reynolds v. Sims* is right, and state upper houses may not be malapportioned by giving unequally populated counties equal seats, is the basic apportionment principle of the U.S. Senate a vicious one? Or, once again, is federalism somehow the answer? Some would say yes, federalism is the answer, and counties are not the same as states in an inherently federal system. The better view is that giving Nevada and California equal representation may benefit some political interest groups (at the expense of other groups), but does little to protect states qua states. So perhaps the federal Constitution should be changed to reduce Senate malapportionment—say, by giving each state at least one senator and capping even the largest state at eight senators. But could small states ever be induced to agree to a federal amendment?<sup>16</sup>

- Fifth, each state chief executive is elected by direct popular vote rather than by something akin to federal electoral college. Some state governors are subject to popular recall. State governors have no strong foreign affairs powers. Most important, virtually no state has a strongly “unitary” executive. Almost all states, for example, have an attorney general elected separately from the governor rather than appointed by him. Many states feature a wide variety of “cabinet” positions elected by the people rather than hand-picked (and removable) by the governor. In these respects, state governors seem much weaker than the president. On the other hand, state governors are often empowered to exercise a “line item veto.”

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15. *Reynolds v. Sims*, 377 U.S. 533 (1964).

16. For a discussion on how small states might be induced, see discussion on Chapt. 11 *supra* § 1.



Law-reform questions: If the federal Electoral College is so good, why does no state (or foreign country, for that matter) follow it?<sup>17</sup> Here, examination of state constitutions helps us see with distinctive clarity a good candidate for federal constitutional reform. Note that originally, the Electoral College did indeed sound in federalism concern—but none of these concerns seem apt today. Also, can state experience with line-item veto inform federal debate? Perhaps one argument for current difference is that the president is already so much more powerful than state governors that yet another arrow in his quiver would be threatening to liberty. But does this really ring true? Finally, even if (for reasons explained earlier in the discussion of Chapter 4) the 1978 federal independent counsel statute was plainly unconstitutional, should we formally amend the federal Constitution to permit such a device, which has worked well at the state level?<sup>18</sup> If we do so, should we adopt

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17. Actually, Mississippi has a variant of the electoral college: unless a gubernatorial candidate wins both a statewide popular majority and a majority of legislative districts, the race is decided by the state legislature. But this system, designed in 1890, was conceived in sin—designed to prevent a Black candidate from ever winning the governorship. And in fact, a close look at the federal electoral college shows that its roots also lie in political racism, enabling states like Virginia to disenfranchise Blacks without penalty in presidential elections.

18. Although the federal independent counsel statute ill fit the architecture of the federal Constitution, it initially seemed not “foreign,” but natural, because it resembled schemes that had worked in various state constitutions that seemed at first almost identical to the federal model. In fact, however, these constitutions are different in key respects, and so piecemeal borrowing here was a big mistake. As I explained in *The New Republic* in October, 1999:

It is not particularly surprising that [Janet] Reno came to town supporting the independent counsel statute; when she assumed office, she had relatively little understanding of the how things work in Washington. Coming from Florida, she had seen independent counsel regimes work rather well. But in Florida—and virtually every other state—the executive branch is not designed to be unitary; attorney generals are constitutionally separate from governors. At the federal level, however, the attorney general serves at the pleasure of the president, in whom all executive power is vested; a wholly independent prosecutor doesn't fit into this template.

State law enforcement rarely affects international relations, whereas federal law enforcement more routinely touches upon foreign affairs. For example, the plight of American hostages in the middle east (the Oliver North case), the status of Puerto Rico under international law (the F.A.L.N. case), and the gravity of espionage on behalf of Israel (the Jonathan Pollard case) are issues that fall squarely in the president's portfolio. Independent investigations wholly inattentive to the president's foreign policy goals and duties are constitutionally awkward. Only after several years in the job did Reno begin to grasp that, constitutionally, she wasn't in Florida anymore—that a system that might work in

special rules about investigations that affect foreign policy? Or instead, should we try to develop informal traditions of independence within the Justice Department?

- Sixth, many states allow voters to vote separately for governor and lieutenant governor, but at the federal level, voters have generally been denied the option to split their ticket by voting for Party A for president and Party B for vice president. An interesting wrinkle is that in some states, when governor leaves the jurisdiction, his or her powers devolve upon the lieutenant until he or she returns.

Law-reform questions: Is the current federal practice of selecting a vice president as a mere adjunct to the president—without allowing ticket-splitting—a sensible way of conferring legitimacy on the person who, if tragedy strikes, may need to be the national leader? Conversely, should state rules conferring power on the lieutenant governor whenever the governor leaves the state be abandoned as creating needless mischief? The lack of a federal counterpart (combined with the fact that this rule does not exist in all state constitutions) might suggest that this rule is of doubtful utility.

- Seventh, many state supreme courts can issue “advisory” opinions directly to the legislature before a law is passed or a private lawsuit crystallizes; the U.S. Supreme Court cannot.

Law-reform questions: Should federal courts be allowed to render anticipatory opinions, before a proposed law has been adopted by legislature? Doesn’t state experience show that these opinions are sometimes useful and rarely harmful? Would the federal Constitution need to be amended here, or just reinterpreted to offer a less sweeping reading of early court decisions like the *Correspondence of the Justices* with President Washington?

- Eighth, state judges typically lack life tenure, and many are subject to being voted on (at time of appointment, or later in a retention context) by the general electorate, sometimes in a contested election featuring full-blown media campaigns and explicit party endorsements.

Law-reform questions: Do federal judges enjoy too much

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individual states cannot work for the nation.  
Akhil Reed Amar, *Scandalized*, THE NEW REPUBLIC, Oct. 11, 1999, at 16.

independence? Do state judges enjoy too little? Here it seems that both are true—that the best model would be one that gave judges more than most states (sparing them popular election and retention), but less than the federal Constitution (with, say, a fixed fifteen year nonrenewable term, or mandatory retirement at age seventy rather than life tenure).

- Ninth, state court precedents misconstruing state constitutions are easier to overturn by state constitutional amendments. (See point one, above.)

Law-reform question: Shouldn't the U.S. Supreme Court be especially open to reconsider its own previous constitutional rulings that are alleged to be in error, given the special difficulty of correcting misrulings by federal amendments?

- Tenth, many states have done away with grand juries, and a few have moved away from a unanimity requirement in criminal cases.

Law-reform questions: Why shouldn't states be required to use grand juries, just as they are required to honor virtually all the other guarantees of the Bill of Rights via the Fourteenth Amendment? If the argument is that the grand jury has truly out-lived its usefulness, then perhaps the Constitution should be amended to relieve the federal government of this "nuisance." The status quo—grand juries for federal crimes but not for state crimes—seems rather hard to justify. Also, perhaps state experiment with non-unanimous criminal juries should be emulated by the federal government. Note that voting rules need not be symmetric: perhaps it should take only a simple majority (or less) to acquit. (Currently, unless all federal jurors vote to acquit, the jury is hung, and retrial is permissible.) But perhaps a very strong supermajority (say, ten of twelve) should be required to convict. (Note that in impeachment, it takes two-thirds to convict, but anything short of this counts as an acquittal.)

### III. CONTINUING THE INTERDISCIPLINARY CONVERSATION

The preceding book overview and chapter outline were composed shortly after I learned the names of the other contributions to today's book symposium. What follows are a few connections between my book projects and the distinctive contributions that have been made over the years by my symposium colleagues.

First, as with my last book, my next book aims, ambitiously, to cover a vast amount of ground and to do so in a way that is scholarly and yet accessible to general interest readers—say, a high school student in Advanced Placement History or Advanced Placement Government, or a high school teacher of such a course. This ambition might not seem particularly remarkable to leading scholars in history and in political science. Indeed, all the professors in today's symposium have written grand books with comparable ambition. But for those of us who teach primarily or exclusively in law schools, there are rather fewer models to emulate. Many of the twentieth century's most distinguished constitutional scholars in law schools concentrated on articles and teaching materials written for lawyers, judges, law professors, and law students—not books aimed at general readers. (Henry Hart and Herbert Wechsler spring to mind.) Perhaps the most epic achievement by a law professor in the last century was Laurence Tribe's towering treatise—but this, too, was aimed at those within the legal profession and not beyond it.<sup>19</sup>

Still, there were several models of books about law—books with a distinctively legal focus, books that actually analyzed legal questions from a legal point of view with excellent legal analysis—that also managed to engage a much broader, non-professional audience. Kermit Hall wrote books like this. Les Benedict writes books like this. While it is true that both Hall and Benedict got most of their training in history departments rather than in law schools, both did stints as professors of law as well as of history. Thus, their work has given me useful templates for the sort of interdisciplinary work that I have aspired to do—work that seeks to engage law as lawyers, law students, and judges understand law, but work that also tries to speak to those outside the profession.<sup>20</sup>

A second theme evident in both my last book and my next one is federalism, with particular emphasis on the significance of state constitutions. Here, too, I have found inspiration from the life work of many of the members of today's symposium—especially Professors Lutz, Rossum, and Benedict. Professor Lutz has powerfully demonstrated that no account of the federal Bill of Rights can ignore its state constitutional antecedents. In my last book, I tried to show how a similar point could be

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19. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978).

20. I cannot resist mentioning one other towering role model for me in this regard—Syracuse's own Professor William Wiecek, who earned an LL.B. in law as well as a Ph.D. in history and who has taught in both law schools and history departments. Though not an official member of today's symposium, Professor Wiecek's gentle spirit hovers over it, and I should like to take this special opportunity to salute him for a lifetime of extraordinary work in legal history. He has been a true inspiration for me.

made about the entire federal Constitution of 1787-88; and in my next book—especially in chapter ten—I hope to demonstrate the ongoing relevance of state constitutions even after the adoption of the Bill of Rights. Professor Rossum has written an engaging account of the federalism dimensions of the Senate, both as originally conceived, and as that institution evolved as a result of informal election practices and, later, the Seventeenth Amendment. And much of Professor Benedict's work has illuminated the complex issues of federalism that arose in the aftermath of the Civil War.

Which brings me to a third theme. My work in both books aims to focus not merely on the Founding, but on the subsequent two hundred years of American constitutionalism, with special emphasis on the Reconstruction. On Reconstruction in particular, I owe an enormous debt to Les Benedict (and also to William Wiecek). More generally, I have benefited greatly from Rogers Smith's epic work, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History*.<sup>21</sup> The broad chronological sweep of Smith's work—ranging far beyond the Founding period—stands in sharp contrast to much of the more narrowly time-framed (and Founding-obsessed) work by other leading scholars. Like Smith, I believe we must understand the Founding and also get past it in order to have an adequate account of our constitutional present and a sense of what is realistically imaginable for our foreseeable constitutional future. Professor Lutz has also written very interestingly on the amendment process over time. With my focus on formal amendments and informal ways of effecting constitutional change, I see myself following in Lutz's footsteps.

A final point worth mentioning is that even in a book about unwritten constitutionalism, I shall aim to offer an account in which the written Constitution is not ignored or swallowed up. Unwritten constitutionalism needs to connect to written constitutionalism in certain ways—or so I shall argue. Here, I am particularly heartened by the work of Ralph Rossum, given his special interest in textualism, originalism, and more general issues of interpretive methodology in constitutional law. Many political scientists—and many historians, for that matter—have a tendency to be somewhat dismissive of such legal issues. Professor Rossum's work stands as a powerful, and to my mind, an admirable antidote. Come to think of it, so does the work of virtually every member of today's symposium.

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21. ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997).

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