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Taking Text too Seriously: Modern Textualism, Original Meaning, and the Case of Amar's *Bill of Rights*

William Michael Treanor
Fordham University School of Law

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TAKING TEXT TOO SERIOUSLY: MODERN TEXTUALISM, ORIGINAL MEANING, AND THE CASE OF AMAR'S *BILL OF RIGHTS*

*William Michael Treanor**

Championed on the Supreme Court by Justice Scalia and Justice Thomas and in academia most prominently by Professor Akhil Amar, textualism has emerged within the past twenty years as a leading school of constitutional interpretation. Textualists argue that the Constitution should be interpreted in accordance with its original public meaning, and in seeking that meaning, they closely parse the Constitution's words and grammar and the placement of clauses in the document. They have assumed that this close parsing recaptures original meaning, but, perhaps because it seems obviously correct, that assumption has neither been defended nor challenged. This Article uses Professor Amar's widely acclaimed masterpiece of the textualist movement, The Bill of Rights, as a case study to test the validity of that assumption.

Amar's work has profoundly influenced subsequent scholarship and case law with its argument that the creation of the Bill of Rights primarily reflected republican rights of "the people" rather than individual rights. This Article shows that Amar's republican reading is incorrect and that his textualist interpretive approach repeatedly leads him astray. Amar incorrectly assumes that words have the same meaning throughout the document, assigns a significance to the placement of clauses that is belied by the drafting history, and incorrectly posits that the Bill of Rights reflects a unitary ideological vision. The textualist search for original public meaning cannot be squared with an interpretive approach that assumes that all word choices were made with a high degree of care, that the significance of location can be assessed simply by examining the four corners of the document, and that the Constitution must be understood holistically. Analysis of Professor Amar's Bill of Rights indicates that, paradoxically, close reading is a poor guide to original meaning: rather, careful study of the drafting history is necessary to recapture any such understanding.

* Dean and Paul Fuller Chair of Law, Fordham University School of Law. Earlier versions of this article were presented at a Fordham Law School Faculty Workshop and at the Boston College Legal History Roundtable. I am grateful to the participants in those workshops and to Mary Bilder, Matthew Diller, Jill Fisch, Martin Flaherty, James Fleming, Roger Goebel, Phyllis Goldfarb, Abner Greene, Edward Hartnett, Tracy Higgins, Vicki Jackson, Robert Kaczorowski, Larry Kramer, Mike Martin, Mary-Rose Papandrea, Jim Rogers, Peter Schuck, Paul Schwartz, Howard Shapiro, and Ben Zipursky for their helpful comments and suggestions. I am also grateful to Kate McLeod and the other members of the staff of the Fordham Law Library for invaluable research support.

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INTRODUCTION

In less than twenty years, textualism¹ has moved from the periphery of constitutional discourse to a position of the greatest prominence. Two justices of the Supreme Court, Antonin Scalia and Clarence Thomas, champion this interpretive approach, as do a cadre of influential academics, Akhil Amar most prominently among them. Constitutional textualists share a view that the Constitution should be read to reflect the original meaning of its text. They also share an assumption that they have not defended—that the original meaning of the text is determined by reading the document *closely*. In uncovering constitutional meaning, textualists stress precise word choice, placement of text in the document, and grammar: they compare related parts of the constitutional document and accord weight to subtle similarities and differences. They interpret the Constitution using the same close textual analysis more often associated with literary critics explicating poetry.²

1. Although usage among academics is inconsistent, in this Article textualism refers to the school of thought that interprets the Constitution in accordance with the text's original meaning for the public at the time of its adoption. Many leading textualists embrace this approach. See ROBERT H. BORK, *THE TEMPTING OF AMERICA* 144 (1990) ("The search is not for subjective intention [W]hat counts is what the public understood."); Akhil Reed Amar, *The Supreme Court: 1999 Term, Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 29 (2000) ("What counts as text is the document as understood by the American People who ratified and amended it, and what counts as history is accessible public meaning, not secret private intent."); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 548 n.22 (1994). Others seek to interpret the Constitution in accord with "original intent"—the intent of the framers of constitutional text. A third approach seeks to interpret the Constitution in accordance with the "original understanding" of the ratifiers. I use the word originalism to refer collectively to the latter two approaches (original intent and original understanding). For further discussion, see *infra* Part I.

2. For the classic work of New Criticism, the literary movement associated with such close reading, see WILLIAM K. WIMSATT, JR., *THE VERBAL ICON: STUDIES IN THE MEANING OF POETRY* (1954).

There is an obvious appeal to this approach. When textualists offer an interpretation that draws on an apparently close reading—when they see patterns previously unseen or construct a reading that appears illuminating—it would seem that they are on to something. It is like a puzzle: if all the pieces fit, then the puzzle has been solved. And who would argue that text should not be read closely? Yet a close reading may not reflect original meaning. It may instead reflect the creativity of the interpreter or the way a text is read today.

Here is an example: Justice Thomas, Professor Amar, and others have assigned critical interpretive weight to the fact that, “[i]n the Constitution, after all, ‘the United States’ is consistently a plural noun.”³ This grammar would appear to suggest that the Constitution reflects the view that the United States is a collection of states rather than one nation. What this reading misses, however, is the fact that in the late eighteenth century, nouns ending in the letter *s* were commonly assigned plural verbs, regardless of whether or not the noun itself was plural. This rule was gradually displaced as the nineteenth century progressed.⁴ It is true that “United States” was often matched with a plural verb in 1787 and consistently matched with a singular verb after the Civil War. But one cannot conclude simply from this change in grammatical practice that the dominant political theory

3. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 846 n.1 (Thomas, J., dissenting). See also AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 29 (2005). Amar notes as follows:

Thus, the text of the Constitution did not say, and the act of constitution did not do, something like the following: “Because the United States is [sic] already one sovereign and indivisible nation, the ratification of nine states shall suffice to establish this Constitution in all thirteen States.”

Id. The “[sic]” is from Professor Amar’s book. For other examples of writers assigning significance to the fact that the “United States” takes a plural verb in the Constitution, see FORREST McDONALD, *STATES’ RIGHTS AND THE UNION: IMPERIUM IN IMPERIO, 1776–1876*, at 20–22 (2000); Jay S. Bybee, *Common Ground: Robert Jackson, Antonin Scalia, and a Power Theory of the First Amendment*, 75 TUL. L. REV. 251, 324 n.445 (2000); and Robert F. Nagel, *Real Revolution*, 13 GA. ST. U. L. REV. 985, 994 n.34 (1997). While Professor Amar and Justice Thomas both accord weight to the verb choice, they understand its significance differently. Justice Thomas contends that “the people of each State retained their separate political identities.” *U.S. Term Limits*, 514 U.S. at 849 (Thomas, J., dissenting). Professor Amar contends instead that ratification of the Constitution ended each state’s sovereign status. AMAR, *supra*, at 33.

It should be noted that earlier in his career, Amar had taken a somewhat different approach, noting that “United States” takes a plural verb in the Constitution but, in light of other textual evidence, simply dismissing the significance of the grammar:

Indeed, the Constitution’s consistent use of the phrase “the United States” as a plural noun only serves to cast further doubt on the self-evident correctness of the conventional reading of the Preamble’s opening phrase. However, a closer look at the rest of the Constitution reveals several other provisions that can help the Preamble’s overworked opening words bear the argumentative load.

Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1455 (1987) (footnote omitted).

4. See STERLING ANDRUS LEONARD, *THE DOCTRINE OF CORRECTNESS IN ENGLISH USAGE, 1700–1800*, at 221 (1962).

changed—the same verb shift occurred for the word news,⁵ and there was no reconceptualization of news. Grammar offers a full explanation for the grammar.⁶

As this example indicates, close readings of the text do not always capture original meaning. The close reading advanced by textualists with respect to the meaning of the “United States” in the original Constitution reflects the erroneous premise that a modern rule regarding plural verbs was also the rule in effect in the late eighteenth century. This example illustrates a larger point: textualists have simply assumed that close readings reliably capture original meaning. Critics of textualism have not questioned that assumption. This Article challenges the equation of a modern (and a historical) close reading with the actual original public meaning of the text, and instead it argues for the critical importance of evidence such as drafting and ratifying history—evidence many textualists minimize or ignore—as a guide.

In a recent article on the origins of judicial review, I looked at early cases involving constitutional challenges of statutes. I found that these opinions reflect an approach to interpretation that is, at its core, structural, not textualist. When engaged in constitutional interpretation, as a general matter, early judges did not closely parse text. Instead, their approach reflected a concern with the larger purposes underlying the text.⁷

Rather than studying judicial opinions, this Article approaches the problem of the relationship between modern textualism and original meaning from a different angle, using a case study to show the dramatic gap between textualist readings and original meaning. The case study is Professor Amar’s book *The Bill of Rights*.⁸

Amar’s book has had a broad influence on scholarly debate and case law as the leading academic work championing a republican, group-rights (rather than a liberal, individual-rights) reading of the Bill of Rights. This

5. See 10 OXFORD ENGLISH DICTIONARY 374 (2d ed. 1989) (providing usages of the word news). The last example of the word news taking a plural verb is a usage by Shelley in 1821. *Id.*

6. My point here is not that the founders thought of the United States as a single sovereign but rather that the usage of a plural verb in conjunction with “United States” in the Constitution does not prove one way or the other what the founders’ political theory was. Both Martin S. Flaherty and Henry Paul Monaghan offer further discussion of the founders’ theory on sovereignty. Martin S. Flaherty, *John Marshall, McCulloch v. Maryland, and “We the People”*: Revisions in Need of Revising, 43 WM. & MARY L. REV. 1339 (2002) (analyzing competing schools of thought); Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 138 (1996). Monaghan notes as follows:

To my eyes, neither completely state-centered nor completely nationalist views of the founding capture the original understanding. . . . A significant number of Americans simultaneously held—in varying mixtures and intensities—some concept of a “We the People” of the United States and (more importantly for my argument) some concept of a “We the People” of Delaware, and so on.

Monaghan, *supra*, at 138.

7. William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455 (2005). For further discussion of what the conclusions in my earlier article suggest about the founding generation’s interpretive approach, see *infra* Part I.

8. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998).

Article shows why his argument is dramatically misconceived. My primary concern here, however, is on textualism, and I have chosen to focus on Amar and his book for several reasons.

First, Amar has written more extensively on textualism and has worked out its methodology and implications far more fully than anyone else, including Justice Scalia. His *Harvard Law Review* Foreword *The Document and the Doctrine*⁹ and his article *Intratextualism*¹⁰ develop his approach and discuss the various textualist techniques he applies. In *The Bill of Rights* he brings those techniques to bear in an extended, textualist study of the Bill of Rights and the Fourteenth Amendment. In applying his textualist approach, Amar evidences a trait shared by many leading practitioners of textualism: while not wholly ignoring drafting history and textual usages outside the constitutional document, he relegates these evidentiary sources to secondary importance. His central focus is on the text, and it is assumed that close reading yields original meaning.

Second, while Amar is politically liberal, his textualism has been enthusiastically and repeatedly embraced by leading conservatives as the preeminent embodiment of proper textualist methodology. Michael Paulsen has proclaimed Amar's *America's Constitution*¹¹ the finest book about the Constitution since the *Federalist Papers*.¹² *The Bill of Rights* and the articles from which it was derived have been repeatedly cited by Justice Thomas and Justice Scalia,¹³ and leading textualist Gary Lawson has called *The Bill of Rights* "one of the best law books of the twentieth century."¹⁴ Stephen Calabresi, another leading textualist, has declared *The Bill of Rights* to be "one of the most valuable works of constitutional scholarship written in the modern era."¹⁵ He adds that "Professor Amar has now indubitably proven that we *can* reconstruct original meanings with a very high degree of

9. Amar, *supra* note 1.

10. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) [hereinafter Amar, *Intratextualism*]; see also Akhil Reed Amar, *America's Constitution and the Yale School of Constitutional Interpretation*, 115 YALE L.J. 1997 (2006) [hereinafter Amar, *Yale School*].

11. AMAR, *supra* note 3.

12. Michael Stokes Paulsen, *How To Interpret the Constitution (and How Not To)*, 115 YALE L.J. 2037, 2038 (2006).

13. See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 50 (2004) (Thomas, J., concurring); *Zelman v. Simmons-Harris*, 536 U.S. 639, 679 (2002) (Thomas, J., concurring); *Printz v. United States*, 521 U.S. 898, 939 (1997) (Thomas, J., concurring); *California v. Acevedo*, 500 U.S. 565, 581 (1991) (Scalia, J., concurring); see also Akhil Reed Amar, *An Open Letter to Professors Paulsen and Powell*, 115 YALE L.J. 2101, 2109 n.24 (2006) (describing Professor Amar's influence on Supreme Court jurisprudence).

14. Gary Lawson, *The Bill of Rights as an Exclamation Point*, 33 U. RICH. L. REV. 511, 511 (1999) (reviewing AMAR, *supra* note 8).

15. Stephen G. Calabresi, *We Are All Federalists, We Are All Republicans: Holism, Synthesis, and the Fourteenth Amendment*, 87 GEO. L.J. 2273, 2274 (1999) (reviewing AMAR, *supra* note 8).

accuracy.”¹⁶ As the preeminent textualist scholar, Amar is an appropriate representative of the methodology.¹⁷

Third, if the panoply of close-reading techniques that Amar and other textualists champion and employ ever tracks original meaning, the Bill of Rights is precisely where one would expect that tracking to occur. While Amar, in what is essentially a companion volume to his book on the Bill of Rights, has written a textualist interpretation of the entire Constitution,¹⁸ his view that constitutional provisions are each “part of a single coherent Constitution”¹⁹ and that they are reflective of a “deep design”²⁰ does not easily fit with the reality of the framing. The series of compromises between sharply divided factions at the Constitutional Convention and a textual finish by Gouverneur Morris produced many of the constitutional features that textualists highlight. But members of the Convention often dispensed with them after little, if any, significant discussion.²¹ And the adoption of subsequent amendments makes it more difficult to see the Constitution as a text to be understood as one piece. In contrast, the Bill of Rights avoids these problems. It is a significant body of text, permitting links to be explored without considering other parts of the Constitution. It was also produced at one time and in large part written by one person. This avoids reading too much into similarities in language written at different times or that was the result of political compromises. The Bill of Rights is the part of the Constitution for which the close reading of Amar and other modern textualists would seem most likely to accord with original meaning.

Finally, Amar is a constitutional scholar of remarkable intelligence and interpretive skill. He is not simply the leading textualist scholar: he is one of the most creative, insightful, and influential constitutional law scholars of the modern era.

In sum, in choosing this author and this book as a test case, I have very consciously chosen both textualism’s preeminent academic advocate and the case in which strong claims for close reading would appear most plausible. The textualist approach that Professor Amar employs, however, does not

16. *Id.* at 2275.

17. The fact that leading textualists have embraced Amar’s historical account does not mean that it has won universal acceptance. Perhaps the most sustained challenge has come from Professor Henry Monaghan. Professor Monaghan’s article *We the People[s], Original Understanding, and Constitutional Amendment* argues at length that Professor Amar’s contention “that despite Article V, the Framers intended that a simple majority of a national ‘We the People’ could amend the Constitution” is “historically groundless.” Monaghan, *supra* note 6, at 121. Monaghan’s challenges are aimed at two of Amar’s articles: Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994); and Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988).

18. AMAR, *supra* note 3.

19. Amar, *Intratextualism*, *supra* note 10, at 822.

20. *Id.* at 814.

21. *See infra* Section I.B.

allow us to “reconstruct original meanings with a very high degree of accuracy,”²² to put it mildly.

Part I of this Article discusses textualism’s rise as a response to the power of the scholarly critique of originalism and Professor Amar’s leading role in the academy as an expositor and practitioner of textualism. It sets forth the canons of interpretation he has articulated—his focus on placement, unified ideological vision, and textual linkages among parts of the document—and the republican reading of the Bill of Rights that he uses textualism to defend.

Part II then examines one of Professor Amar’s central claims to illustrate how his textualism leads him far from the original meaning he seeks to recover. Amar argues that the Ninth Amendment is primarily concerned, not with the protection of individual rights, but rather with the people’s right to alter or abolish government. In advancing this view, he stresses location—and in particular the fact that the Ninth and Tenth Amendments are next to each other and should thus be read together. He also relies on a close reading of the text: the Amendment protects “rights . . . retained by the people,”²³ and he argues that the words “the people” have a “conspicuously collective meaning.”²⁴ I show, however, that the Ninth and Tenth Amendments are next to each other by purest happenstance. They were originally parts of Madison’s proposed Fourth and Eighth Amendments, respectively. They were meant to be inserted into the constitutional text rather than appended at the end, and they ultimately came together because of a series of decisions that had nothing to do with any sense that they were a unit. Similarly, examining the history of the Constitution’s ratification and the Ninth Amendment’s drafting shows that, at the time of the Bill of Rights, the phrase “rights [of] the people” was not conspicuously collective but instead encompassed individual rights at least as much as collective rights.

Part III shows how Amar’s misreading of the Ninth Amendment exemplifies the fundamental problems that undermine his analysis of the Bill of Rights and, more basically, his claim that his textualism reveals original meaning. Specifically, it examines the three critical premises of his interpretive approach: (1) that through the repetition of words and phrases, constitutional clauses gloss each other and reveal underlying meaning; (2) that the location of clauses in the Constitution reveals meaning; and (3) that the document must be understood as a coherent whole. Each tenet is deeply flawed: (1) a focus on the way words are used in the document overlooks other, equally relevant evidence concerning meaning; (2) the location of clauses is of very limited significance, and that significance cannot be determined without close consideration of drafting history; (3) and the Constitution does not reflect a consistent underlying ideology.

22. Calabresi, *supra* note 15, at 2275.

23. U.S. CONST. amend. IX.

24. AMAR, *supra* note 8, at 120.

This Article is a work of history, not of constitutional theory. My concern here is not to argue that close-reading textualism should be rejected as a matter of constitutional theory. Modern textualists embrace an approach that, at its core, involves interpretation of a popularly enacted document (the Constitution) using a methodology that reflects neutral principles (the principles of close-reading textualism) rather than the constitutional ideology of the interpreter. It thus has two theoretical justifications. First, it constrains judges from deciding cases in accordance with their own values by giving them interpretive principles to apply.²⁵ One can question how true this is. Given that Professor Amar, its leading academic proponent, is a liberal and that Justice Scalia, its leading judicial practitioner, is a conservative, it would appear that close-reading textualism is not terribly constraining. Nonetheless, I am not concerned with rebutting the argument that close-reading textualism is an attractive interpretive approach because it strongly anchors judicial decision making.

My concern is with the historical underpinning of the second justification of textualism: that it has a majoritarian basis because it recaptures the meaning that the document had when adopted.²⁶ Using Amar's *Bill of Rights* as a case study, this Article argues that close-reading textualism is a deeply flawed guide to original meaning because the assumptions a reader such as Amar brings to bear in interpreting a text are not those of the founding generation. While Amar's account reflects a significant number of mistakes concerning the historical record, the critical problem with his approach is caused not by those errors but by his underlying assumption that careful reading of the text consistently reveals original meaning. To recover drafters' and ratifiers' intent, originalists look carefully at drafting and ratifying debates and background usages of constitutional terms. Although Amar examines these materials, he does not do so rigorously because he is primarily concerned with text. But close attention to historical sources is necessary to recapture the text's original meaning.

Amar writes: "Textualism presupposes that the specific constitutional words ultimately enacted were generally chosen with care. Otherwise, why bother reading closely?"²⁷ But while the Constitution and Bill of Rights were the product of extensive deliberation, they were not written with either the extraordinary concern for word choice and placement or the common vision that Amar posits. The founders were not writing a poem, and the interpretive assumptions a modern reader makes in closely reading the text can lead her dramatically astray from original meaning.

25. ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 44–47 (1997); Amar, *supra* note 1, at 53–54; Amar, *Intratextualism*, *supra* note 10, at 798; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 857 (1989); see also RALPH A. ROSSUM, ANTONIN SCALIA'S JURISPRUDENCE 27 (2006).

26. Amar, *supra* note 1, at 27–37; Amar, *Intratextualism*, *supra* note 10, at 748–55; see also SCALIA, *supra* note 25, at 37–41.

27. Amar, *supra* note 1, at 29.

I. TEXTUALISM, HOLISTIC TEXTUALISM, AND THE SEARCH FOR ORIGINAL MEANING

Textualism's prominence in constitutional law is a recent phenomenon: in the late 1980s, for instance, legal commentators observed that direct reliance on text played comparatively little role in constitutional adjudication.²⁸ The rise of textualism reflects several factors.

It was, in part, a reaction to the perception that Warren and Burger Court decisions reflected the justices' personal values and thus were unconstrained by principle or majoritarian sanction.²⁹ Because the basic premise of textualism is that judges should decide cases by construing a popularly adopted text on the basis of what that text meant at the time it was adopted, textualism responded to concerns about constraining judges and providing majoritarian legitimacy. Thus, Justice Scalia observed, "the text of the Constitution, and our traditions, say what they say and there is no fiddling with them."³⁰ Champions of textualism argue that textualism is appropriate because it gives judges a set of rules that were adopted by the people and that the people have never changed.³¹

Textualism's rise to prominence is also due to the power of academic attacks on originalism. Textualism and originalism are closely allied schools of interpretation. Justice Scalia described himself as an originalist in an article he wrote in 1989.³² However, in *A Matter of Interpretation*, his most recent scholarly work on constitutional interpretation, Justice Scalia classifies his approach to the Constitution as textualist³³: "What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended."³⁴ In his Harvard Foreword

28. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 234 (1980) (noting that text is of limited importance in case law); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1195 (1987) ("If there is any surprise, it is how seldom the text is relied on directly, in comparison with arguments based on historical intent, precedent, and social policy or moral principle."); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 707-08 (1975) ("In the important cases, reference to and analysis of the constitutional text plays a minor role."). Justice Scalia was not the modern era's first textualist on the Supreme Court. Justice Black was a textualist. For a comparison of the textualism of Justice Scalia and Justice Black, see Michael Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25 (1994).

29. See Jeffrey Rosen, *Textualism and the Constitution: Introduction*, 66 GEO. WASH. L. REV. 1081 (1998).

30. *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 998 (1992) (Scalia, J., dissenting).

31. For examples of this argument, see KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 152-57 (1999); Lillian R. BeVier, *The Moment and the Millennium: A Question of Time, or Law?*, 66 GEO. WASH. L. REV. 1112 (1998); Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1121 (1998); and Scalia, *supra* note 25, at 862.

32. See Scalia, *supra* note 25, at 862.

33. See SCALIA, *supra* note 25, at 24-25, 37-41.

34. *Id.* at 38.

The Document and the Doctrine, Professor Amar offers a similar conception of textualism:

I mean to defend a spacious but not unbounded version of constitutional textualism. On this view, textual analysis dovetails with the study of enactment history and constitutional structure. The joint aim of these related approaches is to understand what the American People meant and did when We ratified and amended the document.

... What counts as text is the document as understood by the American People who ratified and amended it, and what counts as history is accessible public meaning, not secret private intent.³⁵

Following Justice Scalia and Professor Amar, I use the term textualism to refer to the school of thought that seeks to construe the Constitution in accordance with the original meaning of the text. Originalism, in contrast, is the overarching term for two related approaches: proponents of original intent seek to interpret the Constitution in accordance with the intent of the drafters, while proponents of original understanding seek to interpret the Constitution in accordance with the understanding of the ratifiers.³⁶ Textualism thus represents a search for the public meaning of constitutional text at the time that text was written and ratified; originalism reflects a search for the subjective intent of particular sets of historical actors.

Originalism, rather than textualism, was the first prominent response to value-based constitutionalism.³⁷ But academics criticized originalism on historicist grounds. They questioned whether original intent or original understanding could be discovered. They argued that discerning how a group of people interpreted particular words was problematic—even if there were strong evidence as to how the text was interpreted—because some in the group may not have considered particular issues and because many may have disagreed.³⁸ Perhaps more importantly, in a widely influential article, *The Original Understanding of Original Intent*,³⁹ H. Jefferson Powell argued that the original understanding was that original understanding was irrele-

35. Amar, *supra* note 1, at 28–29.

36. For helpful discussion of relevant terminology, see JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 8 (1996).

37. See RAOUL BERGER, GOVERNMENT BY JUDICIARY 363 (1977); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Edwin Meese III, Address before the D.C. Chapter of the Federalist Society Lawyers Division, in INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER 25 (Sanford Levinson & Steven Mailloux eds., 1988); Edwin Meese III, *The Battle For The Constitution: The Attorney General Replies to His Critics*, 35 POL'Y REV. 32, 34 (1985), reprinted in 19 U.C. DAVIS L. REV. 22, 26 (1985); Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL'Y 5 (1988); William H. Rehnquist, Observation, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

38. See, e.g., RONALD DWORKIN, A MATTER OF PRINCIPLE 38–57 (1985); Brest, *supra* note 28, at 209–17; Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 726 (1988).

39. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

vant.⁴⁰ Powell thus neatly turned originalism on its head: if Powell were right, a true originalist would reject original intent.

Significantly, neither of these arguments from history undermined textualism. Powell's evidence only bore on whether the framers' intent (original intent) was relevant to constitutional interpretation, not whether the ratifiers' intent (original understanding) was relevant.⁴¹ More fundamentally, as Henry Monaghan observed, the problematic character of searching for how a group of people read constitutional text (a search at the heart of both original intent and original understanding) suggested a distinct strategy:

The relevant inquiry must focus on the *public* understanding of the language when the Constitution was developed. Hamilton put it well: "whatever may have been the intention of the framers of a constitution, or of a law, that intention is to be sought for in the instrument itself, according to the usual & established rules of construction."⁴²

Similarly, historian Jack Rakove argued that the record of the founding indicates that the framers believed "[t]he text and structure of the document would provide the locus of interpretation; historical evidence of the debates would not be relevant."⁴³ In short, textualism has the same fundamental appeal as originalism—both interpretive schools claimed the virtues of determinacy and majoritarian sanction—but it was not subject to the same historical attacks.

Finally, textualism's rise is a product of the fact that two textualists, Justice Scalia and Justice Thomas, were named to the Supreme Court. Their opinions have given textualism an important place in modern constitutional case law, and Justice Scalia's academic writings⁴⁴ have been widely influential.⁴⁵

In reading constitutional text, Justice Scalia and Justice Thomas have not limited themselves to the Constitution and contemporaneous dictionaries. Although in one case Justice Scalia pointedly refused to join the part of a majority opinion that relied on the legislative history of the Fourteenth Amendment, implying that he viewed this history as irrelevant to constitutional interpretation,⁴⁶ in other cases he and Justice Thomas have drawn on

40. *Id.* at 948.

41. For a convincing analysis in this regard, see Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT 77 (1988).

42. Monaghan, *supra* note 38, at 725 (quoting Alexander Hamilton, Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank (1791), in 8 PAPERS OF ALEXANDER HAMILTON 97, 111 (Harold C. Syrett ed., 1965)) (footnote omitted).

43. Jack N. Rakove, *The Original Intention of Original Understanding*, 13 CONST. COMMENT 159, 164–65 (1996).

44. *See supra* note 25.

45. For further discussion of the rise of originalism and the subsequent rise of textualism, see Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1134–48 (2003), and Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 611–29 (1999).

46. *See City of Boerne v. Flores*, 521 U.S. 507, 511 n. (1997). For discussion, see Kesavan & Paulsen, *supra* note 45, at 1119–20.

constitutional debating history, including the nonpublic debates of the Philadelphia framers.⁴⁷ Because Justice Scalia strongly rejects legislative history when analyzing statutes, his use of debating history is arguably inconsistent. John Manning, however, has defended this practice as consistent with textualism because textualists “might examine the way reasonable persons *actually* understood a text, giving such evidence particular force if those persons had special familiarity with the temper and events of the times that produced that text.”⁴⁸ Justice Scalia has offered a similar justification:

I will consult the writings of some men who happened to be delegates to the Constitutional Convention—Hamilton’s and Madison’s writings in *The Federalist*, for example. I do so, however, not because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood. Thus I give equal weight to Jay’s pieces in *The Federalist*, and to Jefferson’s writings, even though neither of them was a Framers. What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.⁴⁹

Debating history is relevant as evidence of usage, particularly as it illuminates the use of terms in their relevant context.⁵⁰

Even as they draw on history, Justice Scalia and Justice Thomas’s inquiry is about the public meaning of text. In propounding what they see as the public meaning of various constitutional provisions, they have created a substantial body of opinions turning on close readings. Thus in *Harmelin v. Michigan* and again in *Walton v. Arizona*, Justice Scalia stresses that the

47. See *infra* note 50.

48. John F. Manning, *Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1355 (1998); see also William N. Eskridge, Jr., *Should the Supreme Court Read The Federalist but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301, 1319–20 (1998) (suggesting that textualists might use constitutional history but not legislative history because of the possibility that the latter will be subject to manipulation by legislative participants in the future while the relevant materials in constitutional history have already been produced).

49. SCALIA, *supra* note 25, at 38.

50. Justice Scalia’s testimony during his confirmation hearings was to the same effect. He observed that, “if somebody should discover that the secret intent of the framers was quite different from what the words seem to connote, it would not make any difference” as far as he was concerned. *Nomination of Judge Antonin Scalia to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 99th Cong. 108 (1986), quoted in George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1307 (1990). This rejection of drafters’ intent does not mean that Justice Scalia has categorically refused to draw on the nonpublic debates of the Philadelphia drafters: he has. See, e.g., *Printz v. United States*, 521 U.S. 898, 915 n.9 (1997); *Edmond v. United States*, 520 U.S. 651, 660 (1997); *Morrison v. Olson*, 487 U.S. 654, 720 (1988) (Scalia, J., dissenting); *Sun Oil Co. v. Wortman*, 486 U.S. 717, 723 (1988). Justice Thomas has also relied on the Philadelphia debates. On Justice Thomas’s use of historical sources, see Melvyn R. Dutschlag, *The Supreme Court and the Federalist Papers: Is There Less Here than Meets the Eye*, 14 WM. & MARY BILL RTS. J. 243, 248–49, 303–04 (2005). For an example of Justice Thomas’s use of the Philadelphia debates, see *United States v. Int’l Bus. Mach. Corp.*, 517 U.S. 843, 859–60 (1996). For discussion of the use of the Philadelphia debates by Justice Scalia and Justice Thomas, see Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1119–20, 1186 (2003).

Eighth Amendment bars “cruel *and* unusual” punishment, not “cruel *or* unusual” punishment.⁵¹ In his dissent in *Morrison v. Olson*, Justice Scalia posits that the use of the word “inferior” in the Vesting Clause of Article III illuminates the use of the word “inferior” in the Appointments Clause of Article II,⁵² and in his opinion in *Freytag v. Commissioner* he turns to the usage of the term “Courts of Law” in Article III to support his understanding of that term in the Appointments Clause of Article II.⁵³ In *Kelo v. City of New London*, Justice Thomas defines “public use” in the Fifth Amendment’s Takings Clause by reference to the way in which the word “use” is employed in Article I clauses governing the levying of duties on imports and exports by states and the raising of an army by Congress, and he argues that if the original understanding of federal eminent domain power had been a broad one, the phrase “general welfare,” employed in the Preamble and in the General Welfare Clause of Article I, would have been employed in the Fifth Amendment instead of “public use.”⁵⁴ In *United States v. Lopez*, Justice Thomas supports his argument that the word “commerce” in the Commerce Clause is limited to sale and transport by arguing that that is how the word “commerce” is understood in the Port Preference Clause,⁵⁵ and in *U.S. Term Limits, Inc. v. Thornton*, he finds significance in the fact that, in the Constitution, the term “United States” takes a plural verb.⁵⁶

While they closely parse the Constitution’s text, neither Justice has tried to systematically work out canons of textualist interpretation. The scholar who has most fully attempted to work out and apply a textualist methodology is Professor Amar. His article *Intratextualism* and his Harvard Foreword *The Document and the Doctrine* are largely methodological, and his books *The Bill of Rights* and *America’s Constitution* demonstrate that methodology at work. Leading textualist scholars have repeatedly and consistently

51. *Harmelin v. Michigan*, 501 U.S. 957, 966 (1991); *Walton v. Arizona*, 497 U.S. 639, 670 (1990) (Scalia, J., concurring and dissenting). A textualist might respond to my highlighting of these cases by observing that Justice Scalia was simply following the constitutional text and that the Eighth Amendment, after all, uses “and,” not “or.” But Justice Scalia is making an assumption here about how people at the time of the Eighth Amendment’s ratification would have construed the phrasing, and his assumption reflects current usage. Eighteenth-century courts, however, were capable of reading “and” as “or” when the facts warranted. See *Kerlin’s Lessee v. Bull*, 1 U.S. (1 Dall.) 175, 178 (Pa. 1786) (“The words of the Act are, after the death of any father *and* mother, so that he was not within the words; but I am of opinion, that the word *and*, in this place, must be construed *or* . . .”). Professor Eskridge uses *Kerlin’s Lessee* to illustrate the fact that courts at the time of the founding engaged in equitable interpretation of statutes. William N. Eskridge, Jr., *All About Words: Early Understandings Of The “Judicial Power” In Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1022–23 (2001). The related point here is that it cannot be assumed that eighteenth-century interpreters would have read constitutional text closely the way Justice Scalia, Justice Thomas, and Professor Amar do.

52. *Morrison*, 487 U.S. at 719–20 (Scalia, J., dissenting).

53. *Freytag v. Comm.*, 501 U.S. 868, 902 (1991) (Scalia, J., concurring in part and concurring in the judgment).

54. *Kelo v. City of New London*, 545 U.S. 469, 509–10 (2005) (Thomas, J., dissenting).

55. *United States v. Lopez*, 514 U.S. 549, 587 (1995) (Thomas, J., concurring).

56. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 846 n.1 (Thomas, J., dissenting). For discussion, see *supra* text accompanying note 3.

applauded Amar's approach as constitutionalism of the highest order and have embraced his conclusions.⁵⁷ His work is therefore a fitting subject of analysis to determine whether constitutional textualism tracks original meaning.

This Part discusses Professor Amar's methodology and its implications in *The Bill of Rights*. Before beginning that discussion, however, I would like to discuss prior scholarship on the interpretive approaches of the founding generation. While constitutional textualists embrace what I call close-reading textualism, no one has explained why the conventions they employ capture the way the text was originally read.⁵⁸ Amar and others such as Justice Scalia and Justice Thomas simply assume that close readings capture original meaning. No one has argued that textualists' interpretive practices do *not* capture original meaning.

This Article grapples with the question of whether close-reading textualism captures original meaning. The most relevant scholarly debate concerns the original interpretive practices governing the reading of statutes (rather than the Constitution). John Manning, the leading academic voice in the modern textualist movement in statutory interpretation, has argued that originalist evidence best comports with the "faithful agent" theory under which "judges have a duty to discern and enforce legislative instructions as accurately as possible and to abide by those commands when legislative intent is clear."⁵⁹ Although not rigidly literal, Manning's account stresses the extent to which, in the founding era, statutes were seen as determinate in meaning, and the judicial role was highly constrained because of this textual determinacy. William Eskridge has responded with his own, very different, analysis of founding-era historical evidence of statutory interpretation:

The central lesson of the early period, best embodied in the work of John Marshall, is that statutory interpretation is all about words, but words are about much more than dictionaries and ordinary usage; they also involve policies chosen by the legislature and enduring principles suggested by the common law, the law of nations, and the Constitution.⁶⁰

In the realm of constitutional interpretation, this Article reaches conclusions that parallel those Eskridge reached with respect to statutory interpretation. Eskridge stresses the nontextual sources of statutory meaning and the ways in which equitable concerns shaped judicial decisions. Similarly, I challenge the view that text-focused interpretation—paying careful

57. See *supra* text accompanying notes 11–16.

58. Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 519–21 (2003) (noting the dearth of work on recovering the founders' interpretive conventions). Professor Nelson's superb study is, in a limited way, an exception. He is concerned with a particular convention (which is not one at issue in this Article)—whether the founding generation thought that early practice "fixed" the meaning of ambiguous constitutional text. See *id.* at 521–23.

59. John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1648 n.1 (2001); see also John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001) (presenting a historical case for "faithful agent" approach).

60. Eskridge, *supra* note 51, at 998.

attention to the words of the Constitution and their placement and assuming a unitary ideological vision—captures original meaning. I show that that approach reflects erroneous assumptions about the way the founders understood the document.

This Article is also consistent with my earlier work on the original understanding of judicial review, although that earlier work did not primarily address textualist claims.⁶¹ My previous article showed that judicial review was more common than previously recognized. I argued that early case law reflects a structural and process-based approach to judicial review rather than a textualist approach. Structural concerns, rather than the parsing of texts, were the dominant influence on these decisions. Courts understood constitutional prohibitions very broadly in certain areas and viewed statutes with complete deference in others.

Both Eskridge's work on the original understanding of statutory interpretation and my work on the original understanding of judicial review indicate that the founding generation, when confronted with questions of interpretation, did not closely parse text. But modern constitutional textualists such as Amar assume that the founders approached constitutional text with extraordinary care; they posit that the Constitution reflects a coherent, unified vision and that its words were chosen and its clauses placed with extraordinary attention. This is an error, and this Article shows how it leads to misunderstandings of original meaning.

A. Amar's Textualism

In his Foreword *The Document and the Doctrine* and in his article *Intratextualism*, Professor Amar sets forth a series of interpretive techniques for reading the Constitution. He posits that the Constitution should be read holistically, that the words and phrases used in the Constitution should be used to gloss other words and phrases in the Constitution, and that location matters.

In arguing for "read[ing] holistically,"⁶² Amar claims that the various parts of the Constitution reflect a common vision: "How could we forget that our Constitution is a single document, and not a jumble of disconnected clauses—that it is *a* Constitution we are expounding?"⁶³ It is a "single coherent constitution"⁶⁴ manifesting "a deep design"⁶⁵:

The American People ratified the Philadelphia Constitution not clause by clause, but as a single document. Later generations of Americans have added amendments one by one, but no amendment stands alone as a

61. See Treanor, *supra* note 7.

62. *Id.* at 30.

63. AMAR, *supra* note 8, at 125; see also Amar, *Intratextualism*, *supra* note 10, at 795 (arguing that interpreters should "take[] seriously the document as a whole rather than as a jumbled grab bag of assorted clauses").

64. Amar, *Intratextualism*, *supra* note 10, at 822.

65. *Id.* at 814.

discrete legal regime. Each amendment aims to fit with, and be read as part of, the larger document. Indeed, because the People have chosen to affix amendments to the end of the document rather than directly rewrite old clauses, a reader can never simply look to an old clause and be done with it. Rather, she must always scour later amendments to see if they explicitly or implicitly modify the clause at hand. To do justice to these basic facts about the text, we must read the document holistically and attend to its overarching themes.⁶⁶

Thus Amar's approach to constitutional interpretation begins, as Adrian Vermeule and Ernest Young have observed, with the assumption that the Constitution "displays strong substantive coherence across different provisions."⁶⁷

Amar calls his glossing technique "intratextualism."⁶⁸ Intratextualism assigns interpretive weight to the "important word patterns in the Constitution."⁶⁹ This analysis can proceed in three ways. Uses of a word elsewhere in the Constitution can illustrate what the term means: "[T]he Constitution . . . thus serves a basic dictionary function."⁷⁰ Intratextualism can also involve "[u]sing the Constitution as a [c]oncordance . . . enabling and encouraging us to place nonadjoining clauses alongside each other for analysis because they use the same (or very similar) words and phrases. Once we accept the invitation to read noncontiguous provisions together, we may see important patterns at work."⁷¹ The final type of intratextualism "demands that two (or more) similarly phrased constitutional commands be read *in pari materia*. . . . [W]e read the commands *as if* a metacommend clause existed telling us to construe parallel commands in parallel fashion."⁷² Summing up the three types of intratextualism, Amar writes: "To oversimplify slightly: dictionary-like intratextualism tells us what the Constitution *could* mean; concordance-like intratextualism tells us what it *should* mean; and rulebook-like intratextualism tells us what it *must* mean."⁷³

Finally, Amar argues for "squeeze[ing] meaning from the Constitution's organization chart."⁷⁴ While intratextualism focuses on word patterns, this approach focuses on the placement of clauses and figures heavily in Amar's book on the Bill of Rights. In *Intratextualism*, Amar suggests a variety of other ways in which this approach could illuminate constitutional meaning:

66. Amar, *supra* note 1, at 29–30; *see also* Amar, *Yale School*, *supra* note 10, at 2001 ("Because the document forms a coherent whole, sensitive readers must go beyond individual clauses to ponder the larger constitutional systems, patterns, structures, and relationships at work.").

67. Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730, 749 (2000).

68. Amar, *Intratextualism*, *supra* note 10, at 748.

69. Amar, *supra* note 1, at 30.

70. Amar, *Intratextualism*, *supra* note 10, at 791.

71. *Id.* at 792–93.

72. *Id.* at 794–95.

73. *Id.* at 795.

74. *Id.* at 797 n.197.

Arguments in this tradition might point to the special place of textual honor held by the Constitution's first three words as evidence of popular sovereignty as the document's first principle; or to the very existence of separate Articles I, II, and III as evidence of the separation of powers and the coextensiveness of the three great federal departments; or to the firstness of Article I as evidence of Congress' primacy; or to the location of the Veto clause in Article I as evidence that this presidential power is legislative in nature.⁷⁵

Amar believes that some of the textual linkages that holistic readings reveal were consciously intended. "Other times," he acknowledges, "the pattern that we discern upon reflection may not have been specifically intended, but is still far from random."⁷⁶ Yet regardless of whether it is specifically intended or not, this form of textual analysis is a source of insight for the constitutional interpreter:

A great play may contain a richness of meaning beyond what was clearly in the playwright's mind when the muse came; ordinary language contains depths of association that not even our best poets fully understand, even as they intuit; and a judicial opinion may build better than its author knew. So too with the Constitution.⁷⁷

Amar believes that textual readings should reflect an understanding of history:

By pondering the public legislative history of these carefully chosen words, we can often learn more about what they meant to the American People who enacted them as the supreme law of the land. Thus, good historical narrative, in both a broad (epic-events) sense and a narrow (drafting/ratification) sense, should inform good textual analysis; with uncanny economy, the text often distills hard-won historical lessons and drafting insights.⁷⁸

Both debating history and the broader history of an era bear on constitutional understanding. But the words of the document remain at the center of the analysis. In Amar's formulation, "[a] good historical narrative . . . should *inform* good textual analysis."⁷⁹ History is relevant, not as an independent guide to meaning, but because it illuminates text.

75. *Id.* Amar also describes a related interpretive doctrine that he calls intertextualism. Intertextualism involves "comparisons between clauses in the Constitution on one hand and clauses in other documents on the other." *Id.* at 795 n.186. In practice, however, he accords great weight interpretive weight to intratextualism (related words in the Constitution) and little to words in other documents. See Patrick O. Gudridge, *Remember Endo?*, 116 HARV. L. REV. 1933, 1961 n.134 (2003) ("[Amar] notes but does not make much use of 'intertextualism,' juxtapositions of constitutional wordings with other phrasings in other documents."). Not surprisingly, while he has written a major article on intratextualism, he has not written an article on intertextualism. A fundamental element of his interpretive approach is to privilege the constitutional text above other sources.

76. *Amar, Intratextualism, supra* note 10, at 793.

77. *Id.* at 793–94.

78. *Amar, supra* note 1, at 29.

79. *Id.* (emphasis added).

B. Amar's Bill of Rights and Original Meaning

Professor Amar provides only a limited number of case studies of his approach in *The Document and the Doctrine* and *Intratextualism*. His book *The Bill of Rights* provides a richer illustration of his textualist approach. This Section will look at the conclusions he reaches in that book and discuss his claim that the conclusions he derives from close-reading textualism reflect original meaning. Subsequent Parts will show how he uses his close reading of the text to reach the conclusions embraced in *The Bill of Rights* and how those conclusions are fundamentally at odds with original meaning.

In *The Bill of Rights*, Amar employs textualism to alter the pedigree of the Constitution's protection of individual liberties. "The essence of the Bill of Rights," he contends, "was more structural than not, and more majoritarian than counter."⁸⁰ The original Bill of Rights "seems largely republican and collective, sounding mainly in political rights, in the public liberty of the ancients."⁸¹ It is "a document attentive to structure, focused on the agency problem of government, and rooted in the sovereignty of We the People of the United States."⁸² The "agency problem"—the focus of the Bill of Rights—was "the danger that government officials might attempt to rule in their own self-interest at the expense of their constituents' sentiments and liberty."⁸³

While Amar sees the Bill of Rights as protecting certain individual rights, that was "not the sole, or even the dominant, motif"⁸⁴ of the document. The founders were concerned primarily with government's ability to deny the majority power: "[I]n the 1780s, liberty was still centrally understood as public liberty of democratic self-government—majoritarian liberty rather than liberty against popular majorities."⁸⁵ "Madison thought otherwise," Amar adds, "but [he] was a man ahead of his time."⁸⁶ Thus the fact that Madison, the primary author of the Bill of Rights, was not part of what Amar depicts as the consensus view is both noted and dismissed. Indeed, the vision underlying the Bill of Rights was not, at its base, a Federalist vision. Rather, the Bill of Rights reflected Anti-Federalism: "To some extent, [Madison's] sponsorship of the Bill must be seen as a sop—a peace offering—to Anti-Federalists; and many in the First Congress were relatively uninterested in the Bill, finding it a 'nauseous' distraction."⁸⁷

80. AMAR, *supra* note 8, at xiii.

81. *Id.* at 133.

82. *Id.* at 127.

83. *Id.* at 82.

84. *Id.* at xii.

85. *Id.* at 159; *see also id.* at 68 ("[T]he agency problem [was] of protecting the people generally from self-interested government policy . . .").

86. *Id.* at 159–60.

87. *Id.* at 289. *See also id.* at 302 ("The Bill of Rights . . . was initially an Anti-Federalist idea that moderate Federalists ultimately accepted and adjusted.").

Unlike the founding generation, the framers of the Fourteenth Amendment sought principally to safeguard minorities and individual liberties. Thus the Fourteenth Amendment “seems more liberal and individualistic, sounding mainly in civil rights, in the private liberty of the moderns.”⁸⁸ Amar sums up the argument of *The Bill of Rights* in the following passage:

[T]he 1789 Bill tightly knit together citizens’ rights and states’ rights; but the 1866 amendment unraveled this fabric, vesting citizens with rights *against* states. The original Bill also focused centrally on empowering the people collectively against government agents following their own agenda. The Fourteenth Amendment, by contrast, focused on protecting minorities against even responsive, representative, majoritarian government. Over and over, the 1789 Bill proclaimed “the right[s]” and “the powers” of “the people”—phrases conjuring up civic republicanism, collective political action, public rights, and positive liberty. The complementary phrase in the 1866 amendment—“privileges or immunities of citizens”—indicates a subtle but real shift of emphasis, reflecting a vision more liberal than republican, more individualistic than collectivist, more private than public, more negative than positive.⁸⁹

The proponents of the Fourteenth Amendment thus transformed the meaning of the underlying document as they incorporated protections against the states.

In analyzing textualism, this Article is not concerned with the latter half of Amar’s book treating the Reconstruction amendments. Amar argues that the text of the Constitution as it existed before those amendments should be read differently because of the later amendments. For example, according to Amar, the ratification of the Fourteenth Amendment alters the way in which we should read the Due Process Clause of the Fifth Amendment.⁹⁰ Amar’s conception that the Constitution as a whole must be reinterpreted as new amendments are adopted is not idiosyncratic,⁹¹ but neither is it representative of the approach of other textualists, and it will not be treated here. Equally important, this Article is limited to the issue of whether modern textualism captures the original meaning of the Constitution and the Bill of Rights. I am not concerned with the way in which later generations understood the Constitution and its amendments.⁹²

One final question must be addressed before examining the historical validity of Amar’s textualism: does Amar believe that his readings recapture original meaning? Like Justice Scalia and other textualists, Amar does make

88. *Id.* at 133.

89. *Id.* at 215–16.

90. See AMAR, *supra* note 8, at 282–83; see also Amar, *Intratextualism*, *supra* note 10, at 772–73 (“[A]fter the ratification of [the Fourteenth Amendment], equal protection should also be seen as implicit in the Fifth Amendment phrase ‘due process of law.’”).

91. See, e.g., Reva B. Siegel, *She the People: The Nineteenth Amendment Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002).

92. For a jurisprudential (rather than historical) critique of Amar’s use of textualism to fuse constitutional text enacted during different periods, see Vermeule & Young, *supra* note 67.

this claim. Thus in the introduction to *The Bill of Rights*, he announces that he is “offering an integrated overview of the Bill of Rights as *originally conceived*,”⁹³ and he repeatedly asserts he is recapturing original meaning.⁹⁴ Similarly, *The Document and the Doctrine* asserts that his aim is “to understand what the American people meant and did when We ratified and amended the document.”⁹⁵

Nonetheless, in *Intratextualism* Amar suggests, perhaps as a fall-back position, that it does not matter whether his interpretive techniques produce readings that were “specifically intended”⁹⁶: “[T]he pattern that we discern upon reflection may not have been specifically intended, but is still far from random.”⁹⁷ He compares the Constitution to a literary work: “A great play may contain a richness of meaning beyond what was clearly in the playwright’s mind when the muse came So too with the Constitution.”⁹⁸

This assertion is striking. It reflects the gap between Amar’s methodology of recovering original meaning and the reality of the way in which constitutional documents are understood at the time of their creation. By ignoring drafting history and treating the Constitution as emanating from the American people in the same way that a work of art comes from its author, Amar overlooks the extent to which the Constitution and the Bill of Rights were shaped by the decisions of particular historical actors.

Although the analytic flaws of Amar’s approach as applied to the unamended Constitution are beyond the scope of this Article, the gap between Amar’s conception of a document springing full blown from the brow of the American people and the reality of a document drafted by particular historical actors is important and should be noted. Two individuals played critical roles in forming the Constitution. James Madison was principally responsible for the Virginia Plan, the plan of government introduced at the start of the Philadelphia convention.⁹⁹ As historian Clinton Rossiter has observed, “[e]laborated, tightened, amended, and refined under three months of unceasing pressure—much of which Madison resented at the time—the

93. AMAR, *supra* note 8, at xii (emphasis added).

94. The Introduction and the first chapter include multiple other examples. *Id.* at xiii (“[T]his first issue was indeed first in the minds of those who framed the Bill of Rights.”); *id.* at 8 (“[T]he words that we refer to as the First Amendment really weren’t ‘first’ in the minds of the First Congress.”); *id.* at 14 (“[I]t is not surprising that the First Congress’s First Amendment attempted further fine tuning of the structure of representation in the lower house.”); *id.* at 18 (“[B]oth amendments were attempts to strengthen majoritarianism rather than check it, for both sought to tighten the link between representatives and their constituents . . .”).

95. Amar, *supra* note 1, at 29; *see also id.* at 27 (“What the American People have said and done in the Constitution is often more edifying, inspiring, and sensible than what the Justices have said and done in the case law.”); *id.* at 29 (“By pondering the public legislative history of these carefully chosen words, we can often learn more about what they meant to the American People who enacted them as the supreme law of the land.”).

96. Amar, *Intratextualism*, *supra* note 10, at 793.

97. *Id.*

98. *Id.* at 793–94.

99. CLINTON ROSSITER, 1787: THE GRAND CONVENTION 161 (1966).

Virginia Plan became the Constitution of the United States.”¹⁰⁰ At the other end of the process, Gouverneur Morris was given responsibility by the Committee on Style for taking the various proposals and votes and putting them into a final polished document. The Constitution, Morris subsequently boasted in a letter to Timothy Pickering, “was written by the fingers which write this letter.”¹⁰¹ In a letter he authored at the end of his life, Madison acknowledged Morris’s role: “The *finish* . . . fairly belongs to the pen of Mr. Morris ‘[A] better choice’ . . . ‘could not have been made.’ . . . It is true that the state of the materials . . . was a good preparation . . . but there was sufficient room for the talents and taste stamped by the author on the face of it.”¹⁰²

The Bill of Rights, like the Constitution, did not emerge whole cloth from “the People” but rather was drafted. In this case, there was only one principal author—James Madison. Madison’s initial proposal was modified in a number of ways by the House and then the Senate, but the language remained largely his.¹⁰³

As a result, if one seeks deep and unintended meanings in the Constitution and the Bill of Rights in the same way that a literary critic might seek them in a play, one is largely plumbing the minds of Madison and Morris. I do not know of any theory of constitutional interpretation under which the personal, unconscious views of the drafter are an appropriate basis for legal interpretation. (Amar certainly does not offer a justification for such a view.) Moreover, Madison and Morris are not the most representative thinkers of their era, so their unconscious thoughts are hardly a good stand-in for the unconscious thoughts of the American people. Finally, to the extent that there are hidden meanings in the Constitution, questions about Morris’s fair-mindedness as a drafter make giving legal effect to those meanings particularly problematic. There has been ongoing debate among scholars about whether Morris fairly synthesized the work of the Convention.¹⁰⁴ At the time

100. *Id.*

101. *Id.* at 225.

102. *Id.*

103. See *infra* Parts II–III; see also CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST CONGRESS xiv–xvi (Helen E. Veit et al. eds., 1991) [hereinafter DOCUMENTARY RECORD].

104. In addition to the Territories Clause, scholars have focused on the Committee of Style’s use of a semicolon before the start of the General Welfare Clause. When initially approved by the convention, the clause was preceded by a comma. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 493, 569 (Max Farrand ed., rev. ed. 1966) [hereinafter RECORDS]. When it emerged from the Committee on Style, the clause was preceded by a semicolon, *id.* at 594, arguably making it a general grant of power rather than a limitation on the taxing power. On the floor of the convention, no one objected to (or even mentioned) the punctuation change. When the Constitution was again printed, the semicolon had again become a comma. *Id.* at 655. For the allegation that Morris added the punctuation in bad faith and the claim that Roger Sherman corrected the punctuation before the Constitution was engrossed, see 3 RECORDS, *supra*, at 379 (presenting the statement of Albert Gallatin). Academic discussion of the Committee of Style’s punctuation of the General Welfare Clause takes different positions on Morris’s culpability. Compare MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 182 (1913) (“The change may or may not have been intentional . . .”), and FORREST McDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL

of the Louisiana Purchase, Morris himself suggested that he crafted the Territories Clause with the hidden purpose of ensuring that newly acquired territories could not become states.¹⁰⁵ Questions about Morris's scrupulousness are a factor weighing against reading subtleties into the document that a reasonable reader at the time would not have grasped.

More fundamentally, an approach that reads meanings into the Constitution that were not specifically intended is an approach that has no claim to majoritarian sanction. It is not plausible to say that a particular reading of a text has majoritarian approval when it is a reading that people at the time of ratification would not have been aware of. To the extent that Amar justifies his readings on this ground, they lack the claim to democratic legitimacy that is one of textualism's most compelling features.

The critical question concerning Professor Amar's textualism remains whether it accurately captures original meaning. The next Part begins the exploration of this topic by examining his analysis of the Ninth Amendment.

II. THE NINTH AMENDMENT

The original meaning of the Ninth and Tenth Amendments for Professor Amar may be gleaned from the title of the relevant chapter in *The Bill of Rights*: "The Popular Sovereignty Amendments."¹⁰⁶ The Ninth Amendment was "a federalism clause intertwined with the Tenth Amendment," and it "began as a republican affirmation of collective rights of the people."¹⁰⁷ While Amar's point that collective rights were part of the Ninth Amendment's "rights . . . retained by the people" is legitimate, his basic thesis that the amendment "began as a republican affirmation of collective rights of the people" is wrong because it denies that the amendment was fundamentally concerned with the protection of individual rights.

Amar's account of the Ninth Amendment is deeply flawed in part because, employing his textualist approach, he assumes that location is a

ORIGINS OF THE CONSTITUTION 265 (1985) ("Morris made a clever attempt . . ."), with ROSSITER, *supra* note 99, at 228–29 ("[Morris] was a faithful servant of the committee and the committee of the Convention."), and David Engdahl, *The Basis of the Spending Power*, 18 SEATTLE U. L. REV. 215, 252–53 (1995) (describing Morris's misbehavior as a "myth"). Despite his position that interpretive weight should be given to underlying meanings that "The People" did not specifically intend, *see supra* text accompanying notes 95–97, Professor Amar is aware of the claims that Morris intentionally attempted to alter the punctuation of the general welfare clause to alter its meaning. *See* Akhil Reed Amar, *Our Forgotten Constitution: A Bicentennial Comment*, 97 YALE L.J. 281, 286 n.25 (1987) ("Professor Farrand offers a fascinating account of a clause in which an apparently small change in punctuation was attempted in order to effect a large change in meaning.")

105. He wrote:

I always thought that, when we should acquire Canada and Louisiana it would proper to govern them as provinces, and allow them no voice in our councils. In wording the third section of the fourth article, I went as far as circumstances would permit to establish the exclusion. Candor obliges me to add my belief, that, had it been more pointedly expressed, a strong opposition would have been made.

3 RECORDS, *supra* note 103, at 404. For discussion, see McDONALD, *supra* note 104, at 282–83.

106. AMAR, *supra* note 8, at 119.

107. *Id.* at 280.

powerful guide to meaning and that meaning can be deduced from looking at the finished document rather than from probing drafting history. He assigns great weight to the fact that the Ninth and Tenth Amendments are next to each other. But this was a coincidence. When Madison proposed his amendments, he wanted them inserted into the constitutional document, not added to the end. And the predecessors of the Ninth and the Tenth Amendment were at very different places on *his* list of amendments. They eventually wound up together because of a series of legislative decisions having nothing to do with a sense they were linked.

While a modern reader such as Amar might naturally interpret “rights” of “the people” as reflecting principally collective rights rather than the individual’s rights—rights that “the people” rather than the individual could assert against the government—eighteenth-century usage was not so limited. The term “rights of the people” was used to encompass individual rights.

While Amar bolsters his textual account by drawing on some historical evidence concerning the demand for protection of the popular right to change governments, he ignores evidence of the demand for protection of individual rights, a demand that was at least as strongly pressed.¹⁰⁸

A. Amar’s Thesis

Amar bitingly observes that “[t]o see the Ninth Amendment, as originally written, as a palladium of counter-majoritarian individual rights—like privacy—is to engage in anachronism.”¹⁰⁹ His argument is based in part on his literal reading of the text. He understands the Ninth Amendment’s “rights . . . retained by the people” to mean rights the people collectively retain rather than individual rights: it is about the rights of the people, not the rights of the person. The “core meaning” of the phrase “the people” in the Ninth Amendment is “conspicuously collective”¹¹⁰:

[T]he most obvious and inalienable right underlying the Ninth Amendment is the collective right of We the People to alter or abolish government, through the distinctly American device of the constitutional convention. We have already seen that this clarifying gloss—with antecedents in virtually every state constitution—was initially proposed as a prefix to the Preamble, only to be dropped for stylistic reasons and resurrected in the First Amendment’s explicit right of “the people” to assemble in convention.¹¹¹

Amar also appeals to “[t]he legislative history of [the Ninth and Tenth] amendments[, which] confirms their close interrelations with each other and

108. For a helpful discussion of the literature on the Ninth Amendment and a defense of the view that the Amendment protected individual rights as well as a narrow construction of the powers of the national government, see Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006).

109. AMAR, *supra* note 8, at 120.

110. *Id.*

111. *Id.*

with the Preamble, and their obvious implications for the people's right to alter or abolish."¹¹² He argues that the discussion of such principles at the ratifying conventions of Virginia and New York is relevant to an understanding of the Ninth Amendment. Virginia declared at her convention that "the powers granted under the Constitution, being derived from the people of the United States, may be resumed by them, whensoever the same shall be perverted to their injury or oppression, and that every power not granted thereby remains with them, at their will . . ."¹¹³ New York similarly requested an amendment ensuring the following:

[T]he powers of government may be reassumed by the people whensoever it shall become necessary to their happiness; that every power, jurisdiction, and right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the government thereof, remains to the people of the several states, or to their respective state governments, to whom they may have granted the same . . .¹¹⁴

Amar further observes that both the Declaration of Independence and Hamilton's *Federalist No. 78* recognized the right to alter or abolish government. He concludes that "[t]he rights of 'the people' affirmed in the Ninth and Tenth Amendments may well mean more than the right to alter or abolish, but surely they mean at least this much at their core."¹¹⁵

He finds that placement and word choice reinforce this view:

[C]onventional wisdom today misses the close triangular interrelation among the Preamble and the Ninth and Tenth Amendments. . . . [L]ook again at these texts. All are at their core about popular sovereignty. All, indeed, explicitly invoke "the people." . . . If the Ninth is mainly about individual rights, why does it not speak of individual "persons" rather than the collective "the people"? If the Tenth is only about states' rights, why does it stand back-to-back with the Ninth, and what are its last three words doing there, mirroring the Preamble's first three?¹¹⁶

The Ninth and Tenth Amendments, Amar proclaims, are "ringing affirmations of popular sovereignty."¹¹⁷

The Ninth Amendment is also about federalism, and Amar again draws on placement and word choice to construct his argument:

[O]n a federalism-based reading, the Ninth and Tenth fit together snugly, as their words and their legislative history make clear; but each amendment complements the other without duplicating it. The Tenth says that Congress must point to some explicit or implicit enumerated power before it

112. *Id.* at 121.

113. *Id.* (quoting 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 327 (Jonathan Elliot ed., 2d ed., Washington, Taylor & Maury 1836) [hereinafter ELLIOT'S DEBATES]).

114. *Id.* at 122 (quoting 1 ELLIOT'S DEBATES, *supra* note 113, at 327).

115. *Id.*

116. *Id.* at 121.

117. *Id.* at 124.

can act; and the Ninth addresses the closely related but distinct question of whether such express or implied enumerated power in fact exists.¹¹⁸

Amar adds that “the federalism roots of the Ninth Amendment, and its links to the unique enumerated-power strategy of Article I, help explain why no previous state constitution featured language precisely like the Ninth’s—a fact conveniently ignored by most mainstream accounts.”¹¹⁹ In short, the Ninth Amendment—in addition to protecting group rights—means that a right’s presence in the Bill of Rights does not mean there is necessarily a federal power to adopt legislation abridging that right.¹²⁰

Individual rights are absent from Amar’s account of the Ninth Amendment. When he observes that the “core meaning [of] the Ninth [Amendment] is . . . collective,”¹²¹ he may be leaving open the possibility that there is protection of individual rights at the Amendment’s periphery, but that is as close as he comes to recognizing that the amendment was intended to afford any protection for individual rights.

B. Critique: Legislative History in the States

Amar’s account of the legislative history of the Ninth Amendment in the states focuses on state proposals for an amendment that would recognize the people’s right to alter or abolish government. He omits the evidence from state ratifying conventions that supports the view that the Ninth Amendment was concerned with protection of unenumerated individual rights. As a result, he acknowledges only a part of the states’ concerns. Equally significant, his account fails to recognize usages that indicate “rights” of the “people” encompassed individual rights.

As noted, Amar discusses the ratification history of Virginia and New York. He quotes the resolution of the Virginia ratifying convention concerning the right of “people of the United States” to retake “the powers granted under the Constitution . . . whensoever the same shall be perverted to their injury or oppression.”¹²² But he does not discuss the opening lines of Virginia’s resolution:

That there be a Declaration or Bill of Rights asserting and securing from encroachment the essential and unalienable Rights of the People in some such manner as the following:

FIRST, That there are certain natural rights of which men, when they form a social compact cannot deprive or divest their posterity, among which are the enjoyment of life and liberty, with the means of acquiring, possessing

118. *Id.* at 123–24.

119. *Id.* at 124.

120. *Id.*

121. *See id.* at 120.

122. *See supra* text accompanying note 113.

and protecting property, and pursuing and obtaining happiness and safety.¹²³

Virginia's resolution thus opens with a request for an amendment recognizing "natural rights." These natural rights are principally, if not wholly, rights of the individual, not the group. While "liberty" could be private or public, it is clear the right to the "enjoyment of life" was individual. Similarly, the Virginia ratifying convention focused on an individual right to protect "the means for acquiring, possessing, and protecting property." Finally, although there is much debate on what the phrase "pursuit of happiness" meant to the founding generation—and in particular what Jefferson meant in using the phrase in the Declaration of Independence—this is likewise a right of the individual, as historian Ronald Hamowy has suggested:

When Jefferson spoke [in the Declaration of Independence] of an inalienable right to the pursuit of happiness, he meant that men may act as they choose in their search for ease, comfort, felicity, and grace, either by owning property or not, by accumulating wealth or distributing it, by opting for material success or asceticism, in a word, by determining the path to their own earthly and heavenly salvation as they alone see fit.¹²⁴

The right to pursue happiness, in short, is the individual's right to pursue *personal* happiness.

The delegates at Virginia's ratifying convention put these individual rights on a list of "the essential and unalienable Rights of the People."¹²⁵ A number of the rights that follow on that list are described as rights of a "man," the "freeman," or the "person." This group includes civil and criminal procedure rights, the right of a conscientious objector not to serve in the military, and the precursor to the Fourth Amendment.¹²⁶ The terms "man," "freeman," and "person" indicate that those rights were viewed as individual rights, a point Amar makes elsewhere in his book.¹²⁷ Thus a close analysis of Virginia's proposals shows that the phrase "Rights of the People" encompassed a series of individual rights, directly undercutting Amar's assertion that "the people" in the Ninth Amendment indicates that the core meaning of the amendment is collective.¹²⁸

New York—the other state whose ratification history Amar invokes—also proposed a series of constitutional amendments sounding in natural rights, although it is omitted from Amar's account. Its second proposed

123. Amendments Proposed by the Virginia Convention (June 27, 1788), in DOCUMENTARY RECORD, *supra* note 103, at 17, 17.

124. Ronald Hamowy, *Jefferson and the Scottish Enlightenment: A Critique of Garry Wills's Inventing America: Jefferson's Declaration of Independence*, 36 WM. & MARY Q. 503, 519 (1979).

125. Amendments Proposed by the Virginia Convention, *supra* note 123, at 17.

126. *Id.* at 17–19.

127. See AMAR, *supra* note 8, at 64–65.

128. See *id.* at 120. Virginia's list included collective rights (such as the right of resistance to arbitrary government) and individual rights. See Amendments proposed by the Virginia Convention, *supra* note 123, at 17. My point is not that collective rights were not considered rights of the people; rather, it is that, contrary to Amar, they were not the core rights to the exclusion of individual rights.

amendment reads as follows: “That the enjoyment of Life, Liberty and the pursuit of Happiness are essential rights which every Government ought to respect and preserve.”¹²⁹ While New York omitted the property right embraced by Virginia, by demanding protection for the “essential rights” to “the enjoyment of Life . . . and the Pursuit of Happiness” (and perhaps by its reference to the enjoyment of liberty), the state ratifying convention was seeking protection of individual rights.

New York also requested an amendment in which the individual right to conscience was formulated as a “right” of the “People.”¹³⁰ As in Virginia, the New York ratifying convention considered an individual right to be a “right” of the “People.”¹³¹

Amar’s description of the “legislative history”¹³² of the Ninth Amendment gives a misleading picture of the proposals made at state ratifying conventions. He looks solely at the two conventions that invoked the people’s right to alter or abolish government—New York and Virginia—and fails to discuss those states’ proposed amendments regarding the natural right to pursue life, liberty, and happiness (which, in the case of Virginia, specifically recognized a property right). He does not acknowledge that the proposed amendments reflected the usage under which individual rights were rights of the people. But the evidence indicates that individual rights were at least as much the subject of the Ninth Amendment as the collective rights that are the sole focus of Amar’s analysis.

129. Amendments Proposed by the New York Convention (July 26, 1788), in DOCUMENTARY RECORD, *supra* note 103, at 21, 21.

130. *Id.* at 22 (“That the People have an equal, natural and unalienable right, freely and peaceably to Exercise their Religion according to the dictates of Conscience . . .”).

131. In his account of the Ninth and Tenth Amendments, Amar also does not mention North Carolina’s proposals, but North Carolina’s First Amendment similarly called for recognition of natural rights. Its language followed Virginia’s: “That there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity, among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety.” North Carolina Convention Debates (1788), reprinted in 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 933, 966 (1971) [hereinafter DOCUMENTARY HISTORY]. Willie Jones, the delegate who proposed the Declaration of Rights, acknowledged that “I have, in my proposition, adopted, word for word, the Virginia amendments, with one or two additional ones.” 2 DOCUMENTARY HISTORY, *supra*, at 933. The North Carolina ratifying convention did not ratify (or reject) the federal Constitution; it instead proposed amendments previous to ratification. The state ratified the federal Constitution after the Bill of Rights was adopted. *See id.* at 932–33. North Carolina did not copy the Virginia language that Amar relies on concerning the people of the United States’ right to resume powers granted under the Constitution. *See AMAR, supra* note 8, at 121–22. *See supra* text accompanying note 114. The language from Virginia that Amar quotes is not language from a proposed amendment. It is, rather, language from the state’s ratification transmittal letter. *See* 2 DOCUMENTARY HISTORY, *supra*, at 121–22, & 348 n.6 (quoting Virginia Resolution (June 26, 1788), reprinted in 1 ELLIOT’S DEBATES, *supra* note 113, at 327). Nonetheless, Virginia had a proposal that went to the same basic point, declaring that the “doctrine of non-resistance against arbitrary power and oppression is absurd slavish.” Amendments Proposed by Virginia Convention, *supra* note 123, at 17. North Carolina followed this proposal. *See* North Carolina Convention Debates, *supra*, at 966–67.

132. AMAR, *supra* note 8, at 119–22.

C. Critique: Legislative History in Congress

Examination of the Ninth Amendment's legislative history in Congress underscores the problem with Amar's approach. It provides additional evidence that "rights" of the "people" included individual rights at least as much as collective rights. Even more dramatically, it shows that the conclusions Amar draws from the placement of the Ninth Amendment are wholly mistaken.

When Madison initially proposed his amendments to the Constitution, he intended that they would be inserted into the Constitution, and his proposal identified precisely where.¹³³ What I will call Madison's Ninth and Tenth Amendments, the precursors of our Ninth and Tenth Amendments, were to be inserted into the Constitution at different places. Rather than placing them next to each other, Madison would have situated them at almost opposite ends of the document.

Madison's Tenth Amendment was part of his eighth proposal. It was to be part of a proposed new Article VII, where it would have been combined with a separation-of-powers provision to form the penultimate article of the Constitution.¹³⁴ (The current Article VII, which provides that the Constitution shall go into effect when ratified by nine states, would have become Article VIII.)¹³⁵ Placed almost at the end of the document, the separation-of-powers provision and the Tenth Amendment would have provided an interpretive gloss on the document as a whole.

In contrast, Madison's Ninth Amendment was part of his fourth proposal. It was the final provision in a series of ten provisions that he sought to insert in Article I, Section 9 between Clause 3 and Clause 4.¹³⁶ The placement of these provisions suggests their object and their purpose: they pertained to Congress and thus were to be added to Article I; they were limitations on congressional power and thus were to be added to Section 9 of Article I. Specifically, they protected rights against congressional interference and thus immediately followed the two clauses of the unamended Constitution that protect rights against congressional infringement—the Suspension of Habeas Corpus Clause and the Bill of Attainder—*Ex Post Facto* Clause.¹³⁷

When viewed in relation to the amendments that preceded them in Madison's proposal, Madison's Ninth Amendment clearly protected individual as well as group rights:

The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people; or as to enlarge the powers delegated

133. See Madison Resolution (June 8, 1789), in DOCUMENTARY RECORD, *supra* note 103, at 11, 11–14.

134. See *id.* at 13–14.

135. *Id.* at 14.

136. See *id.* at 12–13.

137. U.S. CONST. art. I, § 9, cls. 2–3.

by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.¹³⁸

The amendment thus directly glossed the preceding provisions that were already in, or were to be inserted in, Article I. Some of those provisions were unambiguously concerned with individual (as opposed to collective) rights. For example, the immediately preceding provision was the precursor to our Sixth Amendment. Even in Amar's account, in "the clustered rights of confrontation, compulsory process, and counsel . . . we see a genuine affirmation of rights of the accused and only the accused, rights of a single person standing alone against the world."¹³⁹ Madison's Ninth Amendment would have referred back to the individual rights protected in the Suspension of Habeas Corpus Clause and the Bill of Attainder-Ex Post Facto Clause of the unamended Constitution. So these individual rights are, in the language of Madison's Ninth Amendment, "rights retained by the people."¹⁴⁰ Their enumeration does not "diminish the just importance of other rights retained by the people."¹⁴¹

While Amar indicates that individual rights were at the periphery of the Ninth Amendment, if they were there at all, it is clear that Madison considered individual rights fully encompassed in the "rights" of the Ninth Amendment. Other statements by Madison provide further evidence that he believed that the rights of the "people" included individual rights. His proposal concerning free speech directly referred to individual rights as rights of the "people": "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments . . ." ¹⁴² His statement concerning his ultimately unsuccessful amendment limiting the power of the states is to the same effect. Madison would have added to the Constitution the following provision: "No state shall violate the equal rights of conscience, of the freedom of the press, or the trial by jury in criminal cases."¹⁴³ In defending this proposal on the House floor, Madison referred to these

138. *Madison Resolution*, N.Y. DAILY ADVERTISER, June 8, 1789, in DOCUMENTARY RECORD, *supra* note 103, at 11, 13.

139. AMAR, *supra* note 8, at 114.

140. *Madison Resolution*, *supra* note 138, at 13. Madison's floor statement on his Ninth Amendment also makes clear that it was a gloss on the rights provisions that would have preceded it:

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments that I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the 4th resolution [the Ninth Amendment].

I ANNALS OF CONG. col. 439 (Joseph Gales ed., 1789) (statement of Rep. Madison).

141. *Madison Resolution*, *supra* note 138, at 13.

142. *Id.* at 12.

143. *Id.* at 13.

three rights as “rights of the community.”¹⁴⁴ Even if one were to follow Amar and put the accent on the community in understanding the freedom of the press and the right of trial by jury,¹⁴⁵ it is clear that the right of conscience, an individual right, is for Madison a “right[] of the community.”

While sparse, the legislative history of the Ninth Amendment buttresses the conclusion that the Amendment was understood to encompass individual rights. Connecticut delegate Roger Sherman was the main proponent of the view that amendments should appear at the end of the Constitution rather than be interwoven throughout the original text. He apparently made a proposal to the House Select Committee demonstrating how Madison’s proposals could be revised and put at the end of the Constitution.¹⁴⁶ Madison’s Ninth Amendment was folded in with other rights to become Sherman’s Second Amendment:

The people have certain natural rights which are retained by them when they enter into society, Such are the rights of conscience in matters of religion; of acquiring property, and of pursuing happiness & safety; of Speaking, writing, and publishing their Sentiments with decency and freedom; of peaceably Assembling to consult their common good, and of applying to Government by petition or remonstrance for redress of grievances. Of these rights therefore they Shall not be deprived by the government of the united States.¹⁴⁷

Thus among the “rights” that the “people” “retain[]” are individual rights such as the right of conscience and of property.

Professor Amar’s account does not analyze the legislative history of the Ninth Amendment, but there is nothing there to suggest a repudiation of the view shared by Madison and Sherman that the rights of the people included individual rights. The significant changes in text from Madison’s version of the Ninth Amendment to the current version occurred in the House Select Committee, and we have no record of its debates. The Committee edited the proposal down to the first clause and tightened the text. The beginning of Madison’s proposal—“[t]he exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people”¹⁴⁸—was modified to become the entire proposal: “The enumeration in this Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”¹⁴⁹ There is nothing in the shift to suggest that individual rights were now omitted from the “rights retained by the people.”

144. CONG. REG., June 8, 1789, reprinted in DOCUMENTARY RECORD, *supra* note 103, at 69, 85.

145. See AMAR, *supra* note 8, at 20–26, 81–118.

146. Roger Sherman, Proposed Committee Report (July 21–28, 1789) in DOCUMENTARY RECORD, *supra* note 103, at 266, 268 n.

147. *Id.* at 267.

148. Madison Resolution, *supra* note 138, at 13.

149. House Committee Report (July 28, 1789), in DOCUMENTARY RECORD, *supra* note 103, at 29, 31.

In addition to changing the text of Madison's Ninth Amendment, the committee also slightly modified its location, although this change did not alter its meaning either. Rather than appearing in Article I, Section 9 *after* the Suspension of Habeas Clause and Bill of Attainder—Ex Post Facto Clause, the various rights provisions (culminating with what became our Ninth Amendment) were inserted *between* the two clauses.¹⁵⁰ The committee changed neither the text of Madison's Tenth Amendment nor its location: it continued to be situated alongside the separation-of-powers provision in what was intended to become a new Article VII.¹⁵¹

After the work of the Select Committee was completed, Sherman proposed that the amendments should be added to the end of the original Constitution rather interwoven within it. He argued this was more consistent with the practice for statutes. He also reasoned that the amendments should be presented separately because they were to be adopted by the states, whereas the Constitution had been adopted by the people.¹⁵² Madison voiced a slight preference for his original plan on the grounds of form—"there is a neatness and propriety in incorporating the amendments into the constitution itself"¹⁵³—but Sherman's proposal prevailed.

When the House decided the amendments should be appended to the end of the Constitution, it also reordered them in a way that had the consequence of moving what was to become the Ninth Amendment. In Madison's proposal, the amendment constraining states—"No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases"¹⁵⁴—was to be inserted into Article I, Section 10 beside the preexisting limitations on state powers, and two amendments that were principally concerned with jury-trial rights were to be inserted into Article III.¹⁵⁵ The House decided to bring all these rights provisions together. What became the Ninth Amendment was pushed back, apparently so that it could gloss all these rights provisions: both those that Madison would have inserted in Article I, Section 10 and Article III and those with which Madison's Ninth Amendment had originally been linked. The future Ninth Amendment became Article Fifteen.¹⁵⁶ The House's Bill of Rights then closed with the two provisions that had closed Madison's proposal: the separation-of-powers amendment (Article Sixteen) and our Tenth Amendment (Article Seventeen).¹⁵⁷ Presumably these last two provisions were still

150. *Id.* at 30.

151. *See id.* at 32–33.

152. *See* CONG. REG. (Aug. 13, 1789) (quoting Roger Sherman), *in* DOCUMENTARY RECORD, *supra* note 103, at 112, 117–18, 125–26.

153. *Id.* at 112, 118 (quoting James Madison).

154. *Madison Resolution*, *supra* note 138, at 13.

155. *See id.*

156. *See* House Resolution and Articles of Amendment (August 24, 1789), *in* DOCUMENTARY RECORD, *supra* note 103, at 37, 41.

157. *See id.*

intended to be read as Madison had intended they be read—as a unit to guide the interpretation of the Constitution as a whole.

Among the proposals in the House version that the Senate rejected was Article Sixteen, the separation-of-powers provision. And so as the Bill of Rights emerged from the Senate, the Ninth and Tenth Amendments appeared next to each other for the first time as the Eleventh and Twelfth Amendments.¹⁵⁸ Thus joined, they were submitted to the States and eventually amended to the Constitution.

Professor Amar is wrong to assign significance to their proximity. The history of their evolution indicates that the Ninth and Tenth Amendments were not intended to be understood as a unit and that no one conceived of them as belonging together. The ratification history in the states and the Ninth Amendment's legislative history further vitiate Amar's claim. The Ninth Amendment's "rights" of "the people" were individual rights, not fundamentally collective ones.

III. THE FLAWS OF HOLISTIC TEXTUALISM

This Part builds on Part II's discussion of the Ninth Amendment to show how the flaws of Amar's approach to the Ninth Amendment illustrate the larger problems with Amar's analysis of the Bill of Rights. More broadly, this Part shows why close-reading textualism is a poor guide to original meaning.

The basic tenet of intratextualism is that, through the repetition of words and phrases, constitutional clauses gloss each other and reveal underlying meaning.¹⁵⁹ Professor Amar, Justice Scalia, and Justice Thomas practice this method of interpretation.¹⁶⁰ Section III.A refutes Amar's exegesis of the concept of the "rights" of the "people." Amar's tight focus on the way words are used in the Constitution (without adequate consideration of uses outside the Constitution), combined with his strong presumption that the meaning of words is constant throughout the document, leads to a misconception of the original understanding. Intratextualism artificially cuts off relevant evidence, emphasizing usages that appear in the document while deemphasizing other, equally valid contemporaneous usages.

Holistic textualism insists that the location of clauses in the Constitution reveals meaning. Building on the prior discussion of the Ninth Amendment, Section III.B shows that the reason for the final placement of a clause is often unclear. Amar's interpretive technique leads to serious errors. The founders did not attach great significance to the location of clauses within either the Bill of Rights or the unamended Constitution.

Finally, Amar argues that "[p]erhaps the greatest virtue of intratextualism is this: it takes seriously the document as a whole rather than as a

158. See Articles of Amendment, as Agreed to by the Senate (Sept. 14, 1789), in DOCUMENTARY RECORD, *supra* note 103, at 47, 49.

159. See *supra* text accompanying notes 62–73.

160. See *supra* text accompanying notes 51–56.

jumbled grab bag of assorted clauses.”¹⁶¹ Perhaps because Amar (correctly) sees republican elements in the Bill of Rights, this approach leads him to a conception of the Bill of Rights as “largely republican and collective, sounding mainly in political rights, in the public liberty of the ancients.”¹⁶² But Section III.C shows that Amar’s analysis is at odds with historical reality. Holistic textualism assumes a degree of ideological coherence that the Bill of Rights lacks, and Amar stresses collective rights in a way that is inconsistent with the original understanding.

A. *Intratextualism*

The terms at the heart of Amar’s analysis of the Bill of Rights are “the people” and, more broadly, “the rights of the people”: “The phrase *the people* appears in no fewer than five of the ten amendments that make up our Bill of Rights,”¹⁶³ he observes at one point; “I hope it has not escaped our notice that no phrase appears in more of the first ten amendments than ‘the people,’”¹⁶⁴ he reminds us at another. Amar declares that “the grand idea of the original Bill of Rights [is] the rights of the people”¹⁶⁵

In analyzing the various uses of “the people” in the Bill of Rights, Amar employs a mode of analysis that calls to mind dominoes. In the beginning, literally and analytically, there is the “We the People” of the Preamble, which guides the interpretation of the First Amendment’s “right of the people peaceably to assemble.”¹⁶⁶ “The right *of the people* to assemble does not simply protect the ability of self-selected clusters of individuals to meet together; it is also an express reservation of the *collective* right of We the People to assemble in a future convention and exercise our sovereign right to alter or abolish our government,”¹⁶⁷ Amar argues: “[O]ur First Amendment’s language of ‘the right of the people to assemble’ simply made explicit at the end of the Constitution what [Virginia’s Edmund] Pendleton and others already saw implicit in its opening.”¹⁶⁸

Next there is the First Amendment’s “right to petition,” which is textually interwoven with the right to assemble.¹⁶⁹ Amar rejects the position that the right to petition is at its heart a civil right protecting the individual’s right to petition: “The language and structure of our First Amendment

161. Amar, *Intratextualism*, *supra* note 10, at 795.

162. AMAR, *supra* note 8, at 133.

163. *Id.* at 112.

164. *Id.* at 133.

165. *Id.*

166. U.S. CONST. amend. I.

167. AMAR, *supra* note 8, at 26.

168. *Id.* at 28.

169. The First Amendment recognizes “the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

suggest otherwise. As with assembly, the core petition right is collective and popular—it, too, is a right of *the people*.¹⁷⁰

The interpretation given to the two provisions of the First Amendment concerning the “right of the people” then guides the construction of the phrase in the Second Amendment:

[T]he Second Amendment was closely linked to the textually adjoining First Amendment’s guarantees of assembly and petition. One textual tip-off is the use of the magisterial Preamble phrase “the people” in both contexts, thereby conjuring up the Constitution’s grand principle of popular sovereignty and its concomitant popular right to alter or abolish the national government.¹⁷¹

Part II of this Article discussed how Amar makes similar arguments at the other end of the Bill of Rights, contending that “[t]he conspicuously collective meaning of ‘the people’ in the Tenth Amendment (and elsewhere) should alert us that its core meaning in the Ninth Amendment is similarly collective.”¹⁷² All of these readings at the beginning and end of the Bill of Rights converge near the middle to shape the interpretation of “the right of the people” protected in the Fourth Amendment¹⁷³:

We have already noted that the First and Second Amendments’ references to “the people” implied a core collective right, echoing the Preamble’s commitment to the ultimate sovereignty of “We the People of the United States.” So too with the Ninth and Tenth Amendments’ use of that phrase
¹⁷⁴

Amar recognizes there is textual evidence that weighs against finding “a core collective right” in the Fourth Amendment: “[I]n the Fourth Amendment, as nowhere else in the Constitution, the collective-sounding phrase *the people* is immediately qualified by the use—twice—of the more individualistic language of *persons*.”¹⁷⁵ Nonetheless, Amar stresses the collective aspects of the amendment’s protections (while recognizing that it also protects individual rights): “As with the First Amendment, the central role of the jury in the Fourth Amendment should remind us that the core rights of ‘the people’ were popular and populist rights—rights that the popular body of the jury was well situated to vindicate.”¹⁷⁶ He concludes that “[a]s with

170. AMAR, *supra* note 8, at 30.

171. *Id.* at 47.

172. *Id.* at 120.

173. The Fourth Amendment, in its entirety, reads as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

174. AMAR, *supra* note 8, at 64.

175. *Id.* at 67.

176. *Id.* at 73.

virtually every Bill of Rights provision thus far examined, the Fourth Amendment evinces at least as much concern with the agency problem of protecting the people generally from self-interested government policy as with protecting minorities against majorities of fellow citizens.”¹⁷⁷

This is an illustration of intratextualism at work. The various references to “the people” serve to gloss each other. Consistently interpreted, the six constitutional provisions come to represent a “core collective right.”¹⁷⁸ More broadly, the Bill of Rights comes to embody a coherent vision consistent with Amar’s view that the Constitution is a unified whole and that constitutional interpreters must “take[] seriously the document as a whole rather than as a jumbled grab bag of assorted clauses.”¹⁷⁹

The problem with this approach was revealed in Part II’s analysis of the Ninth and Tenth Amendments. When members of the founding generation spoke of rights of the people, they may have been referring to collective rights (since the people possessed such rights), individual rights (since the people also possessed such rights), or both. Which type of rights the Bill of Rights protects is contextual. The fact that the “powers . . . reserved to the . . . people” in the Tenth Amendment are not powers that an individual might possess does not mean that the “rights . . . retained by the people” in the Ninth Amendment are at their core collective rights rather than individual rights.

Amar’s disregard of this point—his attempt to interpret all usages uniformly—leads him to readings that make no sense as history. He notes with respect to the Fourth Amendment, for example, that with the exception of the Pennsylvania Constitution of 1776, in protecting against illegitimate search and seizures, all of the state constitutions described the right at stake as a right of a “freeman” or “man,” thus indicating that it was an individual right.¹⁸⁰ Similarly, in seeking an amendment to the federal constitution, state ratifying conventions formulated the right as an individual right.¹⁸¹ But Madison nonetheless opted to frame the Fourth Amendment as protecting a “right of the people.” “Was Madison’s use of the phrase ‘the people’ simply sloppy draftsmanship,” Amar asks, “or is there a way of understanding the phrase as a collective noun even in the Fourth Amendment?”¹⁸² Amar opts for the latter choice.¹⁸³

Amar’s question, however, focuses on two choices, silently excluding another possibility—that Madison referred to “[t]he right of the people” because an individual right could be a right of the people. Such an interpretation would be consistent with Madison’s commitment to individual liberty.

177. *Id.* at 67–68.

178. *Id.* at 64.

179. Amar, *Intratextualism*, *supra* note 10, at 795.

180. AMAR, *supra* note 8, at 65.

181. *Id.*

182. *Id.*

183. *See id.* at 65–67.

Amar's account, in contrast, necessarily posits that Madison, despite a commitment to individual liberty that Amar repeatedly highlights, converted into a group right a right that virtually everyone—including the Anti-Federalist-influenced state ratifying conventions—formulated as an individual right. Amar offers no evidence as to why, when it came to the Fourth Amendment, Madison might have suddenly become more republican than virtually anyone else, and it is hard to surmise what that reason might be.

Precisely the same point can be made with respect to the First Amendment's right to petition. Amar notes that in proposing constitutional amendments, "each [state ratifying] convention described the right of petition in purely individualistic language—a right of 'every freeman,' 'every person,' or 'every man.'"¹⁸⁴ Nonetheless, Amar argues that the "language and structure of our First Amendment suggest . . . [that] the core petition right is collective . . ."¹⁸⁵ But this reading is not a plausible account of history. As with the Fourth Amendment, Madison formulated the right of petition as a right of "[t]he people."¹⁸⁶ Again, Amar's reading requires Madison to have done something directly counter to both Madison's ideology and the popular will.

It is not that an interpreter has nothing to gain by comparing one use of a word or phrase in the Constitution with other uses of that word or phrase. This has been standard interpretive practice since at least Chief Justice Marshall's tenure, and it can certainly be instructive. But intratextualism seeks much more. According to Amar, the intratextualist treats the Constitution as "dictionary"¹⁸⁷ and "concordance."¹⁸⁸ What this seems to mean, based on its application in *The Bill of Rights*, is that usages outside of the Constitution are accorded much less weight than those inside. As a result, Amar overlooks what I highlighted in Part II on the Ninth Amendment: Madison's original proposal, Sherman's proposal, the proposed amendments, and the Virginia and New York ratifying conventions' proposed amendments all used the term "rights" of "the people" to include individual rights. A reader looking only at the text of the ratified Bill of Rights might, perhaps, plausibly conclude that the rights of "the people" were principally collective rights, rather than individual rights. But this narrow understanding is belied by other contemporaneous sources.

The intratextualist notion of constitution as "rulebook"¹⁸⁹ "telling us to construe parallel commands in parallel fashion"¹⁹⁰ then tightens the circle of

184. *Id.* at 30.

185. *Id.*

186. *Madison Resolution*, *supra* note 138, at 12 ("The people shall not be restrained . . . from applying to the legislature by petitions, or remonstrances for redress of their grievances.").

187. Amar, *Intratextualism*, *supra* note 10, at 791.

188. *Id.* at 792.

189. *Id.* at 795.

190. *Id.*

references even further. The intratextualist starts with a tiny dictionary and concordance. Because the Constitution is a rulebook, there is a strong presumption that when she encounters words or phrases more than once, they will have the same meaning. In the case of the rights of the people, this rule leads to misreadings: the meaning of the phrase is not consistent throughout the Bill of Rights, and original meaning is at odds with Amar's interpretation.

How often intratextualism will lead to readings consistent with original understanding, and how often it will lead to readings at odds with original understanding, cannot be answered abstractly. But one might expect that "the rights" of "the people" would be a particularly strong example of Amar's approach. The term appears repeatedly in a short document, and Amar has lavished his ingenuity and attention on exploring the term as the key to explaining the original Bill of Rights. But I have tried to show how intratextualism—at least with respect to the First Amendment's right to petition, the Fourth Amendment, and the Ninth Amendment—leads to readings that are at odds with original understanding and thus fails in its goal of recovering that understanding. Amar's own example, then, suggests that intratextualism is of limited value. It may be (as it long has been) a legitimate, limited canon of construction. But it is too unreliable to merit inclusion on the standard list of methods for interpreting the Constitution.

As pointed out in the Introduction, Justice Scalia and Justice Thomas have repeatedly argued that the way a term or word is used in one part of the Constitution is evidence of what it means in another. Thus in *Kelo v. City of New London*,¹⁹¹ Justice Thomas defines "public use" in the Fifth Amendment's Takings Clause—"nor shall private property be taken for a public use"¹⁹²—by reference to the way in which "use" is employed in limiting states' ability to tax imports and exports—"the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States."¹⁹³ In his dissent in *Morrison v. Olson*,¹⁹⁴ Justice Scalia contends that the way the word "inferior" is used in the vesting clause of Article III—"The judicial Power of the United States, shall be vested in one supreme Court, and in such *inferior* Courts as the Congress may from time to time ordain and establish."¹⁹⁵—illuminates the use of the word "inferior" in the Appointments Clause of Article II—"[T]he Congress may by Law vest the appointment of such *inferior* Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."¹⁹⁶ My study of Amar's treatment of the "rights" of the "people" shows that this approach—an instance of Amar's intratextualism—is highly

191. *Kelo v. City of New London*, 545 U.S. 469, 509–10 (2005) (Thomas, J., dissenting).

192. U.S. CONST. amend. V (emphasis added).

193. *Id.* art. I, § 10, cl. 2 (emphasis added).

194. *Morrison v. Olson*, 487 U.S. 654, 719–20 (1988) (Scalia, J., dissenting).

195. U.S. CONST. art. III, § 1 (emphasis added).

196. *Id.* art. II, § 2, cl. 2 (emphasis added).

problematic as a guide to original meaning because it privileges a small subset of contemporaneous usages (those in the constitutional document) over the larger body of relevant contemporaneous usages.

B. Location

In his article on intratextualism, Amar argues for “squeez[ing] meaning from the Constitution’s organization chart.”¹⁹⁷ This methodology plays a critical role in *The Bill of Rights*, but Amar offers no evidence indicating that the founders assigned such significance to location. This Article has shown how this approach leads him astray when interpreting the Ninth Amendment.¹⁹⁸

This is not an isolated example. Amar repeatedly assumes that location is a key to meaning in a way belied by the drafting history. Consider his treatment of the Fifth Amendment’s Takings Clause. The clause protects private property against governmental seizure.¹⁹⁹ Because it protects an individual right to property so unambiguously, it represents the most obvious challenge to Amar’s reading of the Bill of Rights as a republican document. Amar responds by maintaining that Madison “slip[ped] the takings clause through.”²⁰⁰ He did so “[i]n part by clever bundling, tying the clause to a variety of other provisions that commanded more enthusiasm”²⁰¹:

Madison no doubt knew that Article II of the then-recent Northwest Ordinance of 1787 had featured prototypes of the due-process and just-compensation clauses side-by-side. Yet camouflage is not quite compatibility, and on close inspection the takings clause is the odd man out in the Fifth Amendment—an openly substantive requirement following a string of procedural rules.²⁰²

Professor Amar repeats the point toward the end of his book: “In 1789, Madison cleverly packaged [the takings] clause and thus slipped it past a Congress that was considerably less libertarian than he”²⁰³

This is incorrect. The claim that Congress somehow overlooked the takings clause is not credible. The Bill of Rights is not so long a document that a clause would have gone unnoticed. Even more telling, Congress did not unthinkingly accept Madison’s bundling of the clauses in the Fifth Amendment: in fact, it altered it. It is that congressional rebundling that may make

197. Amar, *Intratextualism*, *supra* note 10, at 797 n.197. For discussion, see *supra* Section I.A.

198. See *supra* Section II.B.

199. The specific language of the Clause follows: “[N]or shall private property be taken for public use without just compensation.” U.S. CONST. amend. V.

200. AMAR, *supra* note 8, at 77.

201. *Id.* at 78.

202. *Id.*

203. *Id.* at 268.

it appear to a textualist like Amar, who disregards drafting history and focuses on the final product, that the Takings Clause is the “odd man out.”

When he proposed the Bill of Rights, Madison envisioned his amendments incorporated into the constitutional text, not appended to the end.²⁰⁴ And he placed the Double Jeopardy Clause, the Self-Incrimination Clause, the Due Process Clause, and the Takings Clause in the same amendment. For clarity, I will refer to this as “Madison’s Fifth Amendment.” That amendment was to be one of the amendments placed in Article I, Section 9 between Clause 3 and Clause 4. These amendments would have followed the Suspension of Habeas Corpus Clause and the Bill of Attainder–Ex Post Facto Clause of the original Constitution and, like them, were to limit the powers of Congress.²⁰⁵

The relationship among Madison’s Fifth Amendment provisions was sensible. He had separately grouped (in what ultimately became the Sixth Amendment) postindictment criminal-process rights. The first three clauses of Madison’s Fifth Amendment held the remaining process rights.²⁰⁶ The placement of the Takings Clause—the fourth clause—next to the Due Process Clause, rather than being “camouflage,” was natural. The earliest state constitutions of 1776 and 1777 did not contain takings clauses. To the extent they placed limits on governmental control of property, those limits were found in law-of-the-land provisions, the forerunners of the Due Process Clause.²⁰⁷ Those provisions contained no substantive limitations, only procedural: private property could not be taken unless authorized by the law of the land or the judgment of a jury. If such procedures were followed, the state’s authority over private property was unlimited. Thus if the legislature enacted a statute authorizing the seizure of property without compensation, the clauses did not bar such seizure.

The takings limitation was an additional restriction on legislative action, and it was appropriately linked with the due-process (or law-of-the-land) restriction that it supplemented. Taken as a unit, the two clauses mean the government can take private property only if it follows appropriate procedures and if it pays compensation. That the Northwest Ordinance “had featured prototypes of the due-process and just-compensation clauses

204. See *supra* Section II.C.

205. See DOCUMENTARY RECORD, *supra* note 103 at 12.

206. The placement of the Self-Incrimination Clause in what became the Fifth Amendment rather than in what became the Sixth Amendment reflects the fact that it was not simply a right of a defendant at his trial: it extended, for example, to witnesses. LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION 255 (1988).

207. MD. CONST. of 1776, art. XXI (“That no freeman ought to be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land.”), reprinted in 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES 1688 (Francis Newton Thorpe ed., 1909) [hereinafter ORGANIC LAWS]; see also N.Y. CONST. of 1777, art. XIII, reprinted in 5 ORGANIC LAWS, *supra*, at 2632; N.C. CONST. of 1776, art. XII, reprinted in 5 ORGANIC LAWS, *supra*, at 2788. For a discussion, see William Michael Treanor, *The Original Understanding Of The Takings Clause And The Political Process*, 95 COLUM. L. REV. 782, 789 & n.40 (1995).

side-by-side”²⁰⁸ was not happenstance.²⁰⁹ While Amar suggests that the pairing of the two rights in the Northwest Ordinance was unique, it was not. The Massachusetts Constitution of 1780—the only one of the original thirteen state constitutions to have a takings clause before 1789—also placed its due-process and takings protections in the same article.²¹⁰ Thus, linking due-process and takings clauses was natural.²¹¹

Another example of Amar’s overemphasis on location is his treatment of the amendment that was the first on the list of the amendments passed by Congress and sent to the states. This amendment would have governed the number of representatives in Congress and would have required that there initially be one representative in Congress for every thirty thousand people. It looms large in Amar’s analysis. He entitles his first chapter “First Things First” and begins his substantive discussion of the provisions of the Bill of Rights by “considering two provisions that are not part of our Bill of Rights, but were part of Madison’s”²¹²:

This would-be First Amendment obviously sounds primarily in structure Had this original First Amendment prevailed in the state-ratification process . . . it would no doubt be much harder for twentieth-century citizens and scholars to ignore the Bill of Rights’ emphasis on structure, for the Bill would begin and end with structural provisions. . . . It is poetic that *this* amendment was first, for it responded to perhaps the single most important concern of the Anti-Federalists.²¹³

The Anti-Federalists attached great importance to this amendment, which Professor Amar emphasizes by showing that five of the six states proposing amendments sought one fixing a minimum size for the House of Representatives. “This proposal,” he tells us, “was never placed lower than second on an ordinarily long list of desired amendments. Only one principle ever ranked higher—the idea of limited federal power that eventually made its way into our Tenth (their Twelfth) Amendment.”²¹⁴

208. AMAR, *supra* note 8, at 78.

209. The fourth sentence of Article II of the Ordinance reads as follows:

No man shall be deprived of his liberty or property but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary for the common preservation to take any person’s property, or to demand his particular services, full compensation shall be made for the same.

Northwest Ordinance of 1787, 1 Stat. 50, 51 n.(a), art. II (1789), *reprinted in* 1 DOCUMENTARY HISTORY, *supra* note 131, at 397, 400.

210. MASS. DEC. OF RIGHTS of 1780, art. X, *reprinted in* 1 DOCUMENTARY HISTORY, *supra* note 131, at 339, 341–42.

211. The Declaration of Rights in the Vermont Constitution of 1777 did not link the Takings Clause and its version of the Due Process clause. *See* VT. CONST. of 1777, ch. I, §§ II, IX (takings and due process clauses), *reprinted in* 1 DOCUMENTARY HISTORY, *supra* note 131, at 319, 322–23. The point is not that the linkage was inevitable but that it was commonplace, as the structure of the Massachusetts Constitution and the Northwest Ordinance suggest.

212. AMAR, *supra* note 8, at 8.

213. *Id.* at 8–9.

214. *Id.* at 14.

The legislative history, however, does not indicate that the founding generation thought Congress's First Amendment was a "first thing" that should be put "first." To begin, this was Madison's Second Amendment: Madison's First Amendment would have been a new preamble to the Constitution.²¹⁵ Amar discusses (in part) the proposed amendment to the preamble later in the book, but it is not mentioned in the first chapter, where Madison's Second Amendment is referred to as Madison's First Amendment.²¹⁶ Madison's Second Amendment, which became Congress's First Amendment, appeared second on his list because his ordering tracked the location in the Constitution where the amendments were to be inserted. Thus Madison's Second Amendment was to be inserted into Article I, Section 2, Clause 3, the clause governing the number of representatives and the states they were to represent (and regulating the power to collect direct taxes).²¹⁷ It was the second location in the Constitution (after the preamble) where Madison wanted the text amended, and so the new text to be inserted there appeared as his second amendment. The House rejected Madison's amendment to the preamble, and it decided to append the amendments to the end of the Constitution.²¹⁸ Thus Madison's Second Amendment became Congress's First Amendment by a process that reflected neither a sense that it was preeminent nor that its placement was particularly significant.

Nor does Amar offer any historical evidence to support his view that the order in which the states listed proposed amendments corresponded to their sense of the amendments' importance.²¹⁹ It should be noted that in proposing amendments, the states for the most part shared Madison's intent that they be inserted into the constitutional text.²²⁰ As Congressman Benson observed in arguing for Madison's plan to incorporate the amendments into the text, Madison's "decision was founded in a great degree upon the recommendation of the state conventions, who had proposed amendments in this very form."²²¹ Given that Madison proposed his amendments in order of where they should go in the constitutional text, one might suspect that this is also what the states did. This would suggest that the amendment concerning representation "was never placed lower than second on an ordinarily long list of

215. See *Madison Resolution*, *supra* note 138, at 11.

216. AMAR, *supra* note 8, at 17.

217. See *Madison Resolution*, *supra* note 138, at 12.

218. See House Resolution and Articles of Amendment, *supra* note 156, at 37–41.

219. The only support of any type that Amar offers is a reference to a law review article that, in discussing free speech and press, does exactly what Professor Amar does: notes the placement of the protection in various documents and assumes, without support, that placement reflects significance. See AMAR, *supra* note 8, at 316 n.42 (citing David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 482 (1983)).

220. Virginia proposed both amendments to the text and a bill of rights. Amendments Proposed by the Virginia Convention, *supra* note 123, at 17–21. New York had a list of rights that it declared could not be abridged, a list of understandings, and a list of proposed amendments. Amendments Proposed by the New York Convention, *supra* note 129, at 21–28.

221. CONG. REG., Aug. 13, 1789, *reprinted in* DOCUMENTARY RECORD, *supra* note 103, at 112, 123.

desired amendments”²²² for the same reason it was second on Madison’s list: it amended a clause near the beginning of the Constitution.

A look at state proposals suggests that tracking the Constitution was probably the basic (though not invariant) principle employed as states assembled their lists. Massachusetts, for example, the first state to propose amendments, had nine. If one assumes their first proposed amendment (the prototype of our Tenth Amendment) was conceived as either an amendment to the preamble or a clause to be inserted at the start of Article I, these amendments track the order of the constitutional text with the exception that the three clauses concerning courts or juries (proposals six, seven, and eight) are sensibly clustered together rather than divided between Article I, Section 9, Clause 3 and Article 3, Section 2 as Madison had done.²²³ New Hampshire, the next state to propose a clause concerning representation, also placed that clause second, and it did so for a fairly straightforward reason: it adopted the Massachusetts amendments essentially word for word. It then added three amendments at the end to make a total of twelve.²²⁴ These texts suggest that Professor Amar’s assumption that the states listed their proposed amendments in order of importance is incorrect.

The only hint Amar gives in his opening chapter as to why Congress’s First Amendment was listed first appears in a footnote following this sentence: “It is poetic that *this* amendment was first, for it responded to perhaps the single most important concern of the Anti-Federalists.”²²⁵ The footnote suggests an alternative interpretation: “For a less poetic and more prosaic reason for the ‘firstness’ of the original First Amendment, see Chapter 2.”²²⁶ In that chapter, Professor Amar informs the reader that Madison intended that his amendments be inserted into the constitutional text and that their order tracked their would-be placement.²²⁷ But this point receives relatively little development, and Professor Amar makes no effort to link it back to his extended discussion of Congress’s First Amendment in the previous chapter, even though it directly undercuts his thesis of that amendment’s “firstness.”

Location can be a helpful guide to original meaning. In Part II, I sought to show how analyzing Madison’s original proposal reveals that the provision that eventually became the Ninth Amendment was intended to gloss rights provisions that preceded it (rather than being linked with the Tenth Amendment that eventually came to follow it, as Amar argues).²²⁸ In the next Section, I will argue that the relationship between the Due Process Clause and the Grand Jury Clause is better understood when it is recognized that

222. AMAR, *supra* note 8, at 14.

223. Amendments Proposed by the Massachusetts Convention (Feb. 6, 1788), in DOCUMENTARY RECORD, *supra* note 103, at 14, 14–15.

224. Amendments Proposed by the New Hampshire Convention (June 21, 1788), in DOCUMENTARY RECORD, *supra* note 103, at 16, 16–17.

225. AMAR, *supra* note 8, at 9.

226. *Id.*

227. *Id.* at 37.

228. See *supra* Section II.B.

Madison wanted them inserted into different parts of the Constitution (a point Amar fails to recognize). Understanding the significance of location requires examining how the document was produced and discovering the interpretive assumptions that animated its drafters. Amar simply examines the document itself and imposes his own interpretive assumptions on the document.

Some of the readings his technique produces are fascinating, but that does not mean that they are consistent with the original understanding. For example, although he attaches no significance to it, Amar compares the Fourteenth Article of the Bill of Rights as it emerged from the House with the Fourteenth Amendment of our Constitution. When the House concluded its work, Madison's proposal to guarantee individual rights against state governments—"No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases"²²⁹—had been expanded in scope to include free speech and placed as the Fourteenth Article in the proposal it sent the Senate: "No State shall infringe the right of trial by Jury in criminal cases, nor the rights of conscience, nor the freedom of speech, or of the press."²³⁰ (The Senate rejected the proposal.)²³¹ Amar refers to the House's Fourteenth Article as "its prophetically numbered Fourteenth Amendment"²³² and as the "presciently numbered Fourteenth."²³³ While Amar does not, in fact, assign any significance to this coincidence, the happenstance illustrates how someone of Amar's creativity could find links that have nothing to do with the original understanding. His similar fixation on location, analyzed without regard to legislative history, leads him astray.

The larger point here is that the founding generation did not assign a great deal of significance to placement. The way the Bill of Rights evolved reflects this fact. Unlike Amar, no one at the time the Bill of Rights was adopted assigned a great deal of significance to which amendment might be first, and they did not think it relevant which amendments were next to each other.

A similar point can be made about the unamended Constitution. In *The Document and the Doctrine*, Professor Amar derives great significance from the Constitution's "large[] organizing schemas":

Each of the three great departments—legislative, executive, judicial—is given its own separate article, introduced by a separate vesting clause. To read these three vesting clauses as an ensemble (as their conspicuously parallel language and parallel placement would seem to invite) is to see a plain statement of separated powers.²³⁴

229. *Madison Resolution*, *supra* note 138, at 13.

230. House Resolution and Articles of Amendment, *supra* note 156, at 41.

231. DOCUMENTARY RECORD, *supra* note 103, at 41 n.14.

232. AMAR, *supra* note 8, at 22.

233. *Id.* at 38.

234. Amar, *supra* note 1, at 30.

While the Supreme Court has not yet adopted Amar's stress on location and style, other scholars have adopted approaches that accord with Amar's. In an article of great influence, Steven Calabresi and Saikrishna Prakash, the leading academic proponents of the unitary executive theory,²³⁵ have offered a comparison of the vesting clauses for each of the three branches as support for their argument that the President alone has the power to control execution of all federal laws:

There are many reasons why the Vesting Clause of Article II must be read as conferring a general grant of the "executive Power"—a grant that is in turn defined and limited by the later enumerations in Article II, Section 2. To begin with, the Clause is linguistically and structurally similar to the Vesting Clause of Article III (and different from the Vesting Clause of Article I). The Vesting Clauses of Articles II and III contain nearly identical language in parallel grammatical formulations. Both omit the "herein granted" qualification that appears in the Vesting Clause of Article I, and both confer general grants of power (executive or judicial) on federal governmental entities that are then defined and limited by later provisions of Articles II and III.²³⁶

This basic constitutional structure was not, however, the subject of debate at the Philadelphia convention. When the draft of the Constitution went to the Committee of Style and Arrangement for polishing at the end of the Convention's proceedings, the legislative power was the subject of Articles Three through Nine, the executive power was the subject of Article Ten, the judicial power was the subject of Article Eleven (along with the habeas corpus provision), and the limitations on state power were in Articles Twelve and Thirteen.²³⁷

As its name suggests, the Committee of Style and Arrangement was not supposed to be concerned with substance. From the complex structure of the prior draft, the Committee created the three-article structure (with the habeas-corpus provision and the limits on the power of the states inserted in Article I) with which we are all familiar today.²³⁸ It also added the "herein granted" language to the vesting clause of Article I, language which supporters of the unitary executive find a powerful limit on congressional authority.²³⁹ This dramatic restructuring of the document was not debated on

235. See Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1743 (1996).

236. Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541, 570–71 (1994) (footnote and emphasis omitted); see also Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 222–46 (1995) (providing an intratextual analysis of voting amendments); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1175–86 (1992) (providing an intratextual analysis of vesting clauses).

237. See Proceedings of the Convention Referred to the Committee of Style and Arrangement (1787), in 2 RECORDS, *supra* note 104, at 565–80.

238. For the Report of the Committee of Style, see 2 RECORDS, *supra* note 104, at 590–603.

239. See Calabresi & Prakash, *supra* note 236, at 563, 570–71, 574–75 (assigning significance to the fact that the vesting clause of Article I gives Congress the legislative powers "herein granted,"

the convention floor.²⁴⁰ The changes were considered stylistic rather than of great interpretive consequence.

Thus both the legislative history of the Bill of Rights and the unamended Constitution indicate that to the limited extent that location is relevant to original meaning, the significance of location can be assessed only by close study of drafting history. Amar and other close-reading textualist scholars depart from the framework of the founding generation when they think that simply by looking at the placement of clauses in the Constitution, they can recapture original meaning.

C. Substantive Coherence

Again and again in his analysis of the Bill of Rights, Amar stresses collective rights and undervalues individual rights. Guiding this approach is his premise that the Constitution is substantively coherent, a premise he developed most fully in his article *Intratextualism*. This approach requires the Bill of Rights to be about *something*, to have “a grand idea.” That grand idea, Amar argues, is “the rights of the people.” In turn, “the core rights of ‘the people’ were popular and populist rights”²⁴¹ The Bill of Rights was fundamentally “an Anti-Federalist idea that moderate Federalists ultimately accepted and adjusted.”²⁴² This approach misses both that individual rights were important to framers of the Bill of Rights and that the Bill of Rights itself sought to protect both group rights and individual rights against the national government.

In this Article, I have challenged Amar’s account of the Ninth Amendment, and I have argued that he misreads the First Amendment’s right to petition and the Fourth Amendment. This Section begins by looking at two further examples of how Amar minimizes the role of individual rights in the Bill of Rights and elevates collective rights in a way that is inconsistent with the original understanding of the relevant clauses. Amar discounts the Due Process Clause and reads too much into the various jury clauses of the Bill of Rights (which, like the Ninth Amendment, Amar treats as important evidence supporting his thesis). These are further examples of how Amar’s search for a “grand idea” consistently leads him away from the Bill of Rights’s multifaceted original meaning.

Amar’s *Bill of Rights* makes an important contribution to our thinking about the document by highlighting its republican and collective aspects. But Amar focuses on this republican dimension and minimizes the liberal, individual-rights dimension that was of much greater concern to the founders. The narrative Amar offers to situate the Bill of Rights in a political context—supposedly reflecting the Anti-Federalist vision—is wrong. The

whereas the vesting clauses of Articles II and III simply grant the Executive and the Courts the “executive Power” and the “judicial Power” without limitation).

240. For the debate on the Committee’s work, see 2 RECORDS, *supra* note 104, at 607–40.

241. AMAR, *supra* note 8, at 73.

242. *Id.* at 302.

Anti-Federalists were, in fact, unhappy with the Bill of Rights. Finally, this Section argues that Amar's premise of "substantive coherence" misses the messiness of historical reality.

Amar's treatment of the Fifth Amendment's Due Process Clause illustrates how Amar's search for substantive coherence leads him to disregard evidence that does not fit his overall vision. The words of the clause reflect a concern with the protection of individual rights: "[N]or shall any *person* . . . be deprived of life, liberty, or property."²⁴³ In his reading of the Bill of Rights, however, Amar limits his discussion of the clause to a sentence and a supporting textual footnote and, without acknowledging any paradox, offers the clause as support for his thesis of the centrality of collective rights in the Bill of Rights.

Amar discusses the Due Process Clause while arguing that juries should be viewed as republican decision makers: "The Fifth Amendment due-process clause implicated the jury even more directly [than the non-jury clauses of the Sixth Amendment], for its core meaning was to require lawful indictment or presentment by a grand jury."²⁴⁴ He concludes his paragraph on the Due Process Clause and the nonjury clauses of the Sixth Amendment: "The jury summed up—indeed embodied—the ideals of populism, federalism, and civic virtue that were the essence of the original Bill of Rights."²⁴⁵

Amar's contention about the "core meaning" of the Due Process Clause is a surprising claim for a textualist to make, particularly surprising for a holistic textualist who seeks the relationship between constitutional clauses. Amar is asking us to read the Fifth Amendment's Due Process Clause as having a "core meaning" that simply restates the Fifth Amendment's Grand Jury Clause, a point he seems to acknowledge in a very oblique way in his footnote on the Due Process Clause.²⁴⁶ Since a textualist strongly presumes that each word in the Constitution has meaning rather than being surplusage, this apparent repetition logically leads to the question, why did the founders include a Due Process Clause? Amar does not address the issue, but the only rationale I can think of that he might offer would be that the Due Process Clause had some meaning at its "periphery"—some meaning other than protection of the grand-jury right—that led to its inclusion in the Bill of Rights. But if that were the case, then the meaning at the periphery would necessarily be a core meaning because it would be the reason for the inclusion of the clause in the first place. From a purely textualist viewpoint, then, Amar's contention about the core meaning of the clause does not hold together.

243. U.S. CONST. amend. V (emphasis added).

244. AMAR, *supra* note 8, at 97.

245. *Id.*

246. He writes: "Here, as elsewhere, I do not argue that the clause cannot be applied beyond what I call its 'core' meaning. Indeed, refusal to do so here would render the provision wholly redundant, as the Supreme Court has noted." *Id.* at 342 n.62 (citing *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856)). Amar does not actually spell out what the redundancy is. Several chapters later, however, in discussing the meaning of due process in 1866, he observes "[t]here are also questions about redundancy if we assume that the Fifth Amendment's due-process clause merely replicated its grand-jury clause." *Id.* at 202.

If Amar were offering such a hard-to-justify core meaning, one would expect him to do so on the basis of strong originalist evidence. But his evidence is slight, and the sources he cites on do not actually support his reading. Amar relies on Alexander Hamilton, Justice Story, and Chancellor Kent in support of his proposition that the “core meaning [of due process] was to require lawful indictment or presentment by a grand jury.”²⁴⁷ But in each of the three statements Amar cites, the author is referring to Lord Coke’s definition of due process. These sources suggest that Lord Coke believed the core meaning of due process involved the grand jury, but they undercut Amar’s claim that the conception of due process was similarly limited in the late-eighteenth-century United States.

Amar quotes from Hamilton’s 1784 *Letter from Phocion*: “If we enquire what is meant by the law of the land, the best commentators will tell us, that it means *due process of law, that is, by indictment or presentment of good and lawful men*,* and trial and conviction in consequence.”²⁴⁸ The italicization and asterisk, which are in Hamilton’s original letter, reflect the fact that Hamilton was quoting Coke, as Amar notes.²⁴⁹ Hamilton was not suggesting that Coke’s definition reflected the core meaning of the clause. Indeed, Hamilton added the phrase “and trial and conviction in consequence” to Coke’s definition because he did not believe the phrase was limited in the way Coke indicated.²⁵⁰

In the *Letter from Phocion*, Hamilton is attacking state legislation that disfranchised and banished loyalists. Contrary to what Amar’s analysis would suggest, Hamilton clearly views the core violation as legislation that led to the denial of a trial, not the fact that punishment was not preceded by an indictment.²⁵¹

Amar’s cites Story in this discussion but does not quote him.²⁵² Amar does quote from the relevant section of Story’s *Commentaries on the Constitution of the United States* in his discussion of due process in the context of the Fourteenth Amendment: “Lord Coke says, that [the words *by the law of the land*] mean by due process of law, [which in turn means] due presentment or indictment, and being brought in to answer thereto by due process

247. *Id.* at 97, 342 n.62.

248. *Id.* The full quote is from Alexander Hamilton, *A Letter from Phocion to the Considerate Citizen of New York*, reprinted in 3 THE PAPERS OF ALEXANDER HAMILTON 485 (Harold C. Syrett and Jacob E. Cooke eds., 1962).

249. *Id.*

250. See Hamilton, *supra* note 248, at 485.

251. See, e.g., *id.* at 484 (“[T]hese men are advocates for expelling a large number of their fellow-citizens *unheard, untried*; or, if they cannot effect this, are for disfranchising them, in the face of the constitution, without the judgment of their peers, and contrary to the law of the land.” (emphasis added)); *id.* at 485 (“[T]he legislature . . . cannot, without tyranny, disfranchise or punish whole classes of citizens by general descriptions, *without trial and conviction* of offences known by laws previously established declaring the offence and prescribing the penalty. This is a dictate of natural justice, and a fundamental principle of law and liberty!” (emphasis added)).

252. AMAR, *supra* note 8, at 342 n.62.

of the common law.²⁵³ Story, like Hamilton, is referring to the whole legal process, not simply to the initiation of it by the grand jury. Amar recognizes this in his discussion of the Fourteenth Amendment (although not in his discussion of the Fifth Amendment): “We need not say that due process in 1866 meant nothing more than grand juries—Story and Stewart [an anti-slavery writer] seemed to read the clause more sweepingly”²⁵⁴ There is no basis here for the argument that the right to presentment or indictment is the core meaning of the Due Process Clause.

The passage from Chancellor Kent that Amar cites is one in which Kent discusses English usage. It is quoted in Amar’s later discussion of Fourteenth Amendment due process: “The words by the *law of the land* as used in *magna charta* . . . are understood to mean due process of law, that is, by indictment or presentment of good and lawful men; and this, says Lord Coke, is the true sense and exposition of those words.”²⁵⁵ As Amar notes in a parenthetical, Kent is “parroting Coke’s definition of due process”²⁵⁶; the passage does not reflect Kent’s understanding of the phrases “law of the land” and “due process.” In fact as chancellor, Kent played a critical role in the expansion of the concept of due process to include protection of vested rights.²⁵⁷ In the important case of *Gardner v. Trustees of Newburgh*,²⁵⁸ decided well before Kent wrote his treatise, the chancellor invalidated a statute that allowed municipal trustees to block a stream that had previously flowed onto plaintiff’s property:

A right to a stream of water is as sacred as a right to the soil over which it flows. It is a part of the freehold of which no man can be disseised “but by lawful judgment of his peers, or by due process of law.” This is an ancient and fundamental maxim of common right to be found in *magna charta*, and which the legislature has incorporated into an act declaratory of the rights of the citizens of this state.²⁵⁹

The case involved a civil statute and had nothing to do with the grand-jury right that, according to Amar, Kent thought was at the core of due process. But there is no sense in the opinion that Kent thought he was operating at the periphery of due process. Rather, he refers to the right he is protecting as “sacred.”

Amar does not mention the early state case law that, by applying law-of-the-land provisions to the review of civil legislation, cuts against his argu-

253. *Id.* at 200–01 (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1783, at 661 (1833)).

254. *Id.* at 201.

255. *Id.* at 200–01 (quoting 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 13 (2d ed. 1832)) (omission in original).

256. *Id.* at 342 n.62.

257. James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT 315, 334 (1999).

258. 2 Johns. Ch. 162 (N.Y. Ch. 1816).

259. *Gardner*, 2 Johns. Ch., at 165–66.

ment about the limited meaning of the Due Process Clause.²⁶⁰ Nor does he mention a critical piece of evidence indicating that the Grand Jury Clause and Due Process Clause had different areas of focus: in Madison's original proposal, the Due Process Clause was to be inserted into Article I while the Grand Jury Clause was to be inserted into Article III, but the Senate added the Grand Jury Clause to what became the Fifth Amendment only after it had stricken the clauses to which the Grand Jury Clause had originally been attached.²⁶¹ This history suggests that the Due Process Clause was concerned with a broad range of process rights rather than being focused on the grand-jury right.

The misreading of the Due Process Clause is understandable, however, because it is driven by Amar's premise that the Bill of Rights had one grand idea: collective rights. His narrow conception of the Due Process Clause is a prerequisite to thinking about it as a collective right. If due process at its core implicates a range of process rights, its focus is logically the individual whose interests are protected. By asserting that the core meaning of the clause concerns grand juries, and by treating the Due Process Clause only in the context of his analysis of the importance of juries as community decision makers, Amar reads the Due Process Clause as if it involved simply the grand jury's right to decide. But even accepting Amar's assertion that the Due Process Clause is at its core about indictment and presentment, it is still the individual's right, not the community's right. That is clear from its text, and Amar offers no evidence that would indicate it should not be so viewed. By giving the Due Process Clause such strikingly short shrift—one sentence of text in the six chapters on the original understanding of the Bill of Rights—by limiting its focus, and by folding it into his discussion of “[t]he [c]entrality of the [j]ury,”²⁶² Amar fails to confront important evidence that works against his claims.

Amar's search for a grand idea underlying the Bill of Rights also leads him to misunderstand the jury clauses by significantly understating the extent to which they protect individual rights. Amar all but ignores the Due Process Clause and places juries at the center of his analysis: “Juries, guaranteed in no fewer than three amendments, were at the heart of the Bill of Rights.”²⁶³ His chapter on juries is the longest chapter in the half of his book

260. *E.g.*, *Den on demise of the Trs. of the Univ. of N.C. v. Foy*, 5 N.C. (1 Mur.) 58 (1805); *State v. —*, 2 N.C. 38 (1 Hayw.) 28 (1794); *Lindsay v. Comm'rs*, 2 S.C.L. (2 Bay) 38 (S.C. 1796); *Bowman v. Middleton*, 1 S.C.L. (1 Bay) 252 (S.C. 1792). On the equivalency of “law of the land” and “due process” in English usage, see 2 DOCUMENTARY HISTORY, *supra* note 131, at 855–56.

261. See DOCUMENTARY RECORD, *supra* note 103 at 12 (providing Madison's original proposal); *id.* at 39–40 (Article X of House Resolution and Articles of Amendment of August 24, 1789; Article X contained grand jury clause and other criminal procedure protections); *id.* at 40 & n.14 (observing that on September 4, 1789 the Senate rejected all of Article X except for the grand jury clause and that on September 8, 1789, the Senate merged the grand jury clause into Article VIII). Article VIII was the precursor of our Fifth Amendment. See *id.* at 39 (providing Article VIII as adopted by the House of Representatives).

262. AMAR, *supra* note 8, at 96.

263. *Id.* at 83.

devoted to the founders' Bill of Rights.²⁶⁴ To Professor Amar, the jury is above all an institution of popular rule, the mechanism by which the people decide: "[I]t is anachronistic to see jury trial as an issue of individual right rather than (also, and *more fundamentally*) a question of government structure."²⁶⁵ Thus if the founders' vision is to be honored, the defendant cannot waive his right to a jury because the fundamental commitment of the Bill of Rights is to the community's right to judge, not to the individual's right to be judged by the community.²⁶⁶

Professor Amar's convincingly makes the case that the jury right was traditionally a right of the community as well as a right of the individual, and his view here accords with the historical scholarship. Thus Forrest McDonald has argued that Anti-Federalists championed a vision of the United States as "a nation composed of several thousand insular communities, each of which exercised virtually absolute powers over its members through two traditional institutions, the militias and the juries."²⁶⁷ Robert Palmer has written similarly that "jury trial was a better means for maintaining local communal standards than for protecting individual liberties."²⁶⁸

But Amar misses the rethinking of the jury's role that was already underway in the revolutionary era.²⁶⁹ There was less reason to stress the jury as the defender of the people against the government when the people began to elect their government postindependence. For the first time, the jury became important as a check on majoritarian abuse of individual rights. It is significant in this regard that the judicial-review cases of the revolutionary era for the most part involved individuals from unpopular groups—loyalists and creditors—who challenged statutes that took away their right to a jury trial.²⁷⁰ These individuals sought jury trials not because they thought the community was favorable to them but because they wanted an avenue to challenge hostile legislative decision making.

The 1787 North Carolina Supreme Court decision *Bayard v. Singleton*²⁷¹ supports this view of the right to a jury trial as an individual right. The court there invalidated a state statute that denied a jury trial to loyalists who chal-

264. See *id.* at 81–118.

265. *Id.* at 104 (emphasis added).

266. *Id.* at 104–10.

267. McDONALD, *supra* note 104, at 289.

268. Robert C. Palmer, *Liberties as Constitutional Provisions*, in *LIBERTY AND COMMUNITY: CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN REPUBLIC* 55, 101 (1987); see also WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830*, at 20–30 (1975); RAKOVE, *supra* note 36, at 297–302.

269. See AMAR, *supra* note 8, at 110 (noting continuity of view of role of the jury during revolutionary era).

270. See Treanor, *supra* note 7, at 474–87. In addition, Virginia's first instance of judicial review—the *Case of the Prisoners*—was also concerned with legislation affecting loyalists, although the legislation implicated was a pardon statute, rather than a statute affecting the right to a jury trial. See William Michael Treanor, *The Case of the Prisoners and the Origins of Judicial Review*, 143 U. PA. L. REV. 491 (1994).

271. 1 N.C. (Mart.) 5 (1787).

lenged the confiscation of their property. In announcing its holding, the court spoke in the unmistakable vocabulary of individual liberty:

[B]y the constitution every citizen had undoubtedly a right to a decision of his property by a trial by jury. For that if the Legislature could take away this right, and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken away without a trial by jury, and that he should stand condemned to die, without the formality of any trial at all²⁷²

Consistent with this vision, the two jury clauses of the Bill of Rights that pertain to the criminal process are framed as individual rights. The Fifth Amendment provides that “[n]o *person* shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger”²⁷³ The Sixth Amendment provides that “[i]n all criminal prosecutions, the *accused* shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed”²⁷⁴ Only the Seventh Amendment’s right to a civil jury trial is not explicitly framed as an individual right. But nor is it framed as a collective right:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.²⁷⁵

Several state proposals present the civil jury trial right as a waivable individual right. Massachusetts sought the following amendment: “In civil actions between Citizens of different States every issue of fact arising in Actions at common law shall be tried by a Jury if the parties or either of them request it.”²⁷⁶ Roger Sherman’s proposal was to the same effect: a right to jury trial in civil cases existed “if either party, request it.”²⁷⁷ This legislative history suggests that the right to a civil jury trial, like the other two jury rights, was fundamentally understood as an individual right.

The point here is not that the notion of jury as republican decision maker had disappeared by 1791, for it had not. I am contesting Amar’s claim that jury trial was “more fundamentally . . . a question of government structure” than an “individual right.”²⁷⁸ A basic premise underlying Amar’s

272. *Id.* at 7.

273. U.S. CONST. amend. V (emphasis added).

274. *Id.* amend. VI (emphasis added).

275. *Id.* amend. VII.

276. Amendments Proposed by the Massachusetts Convention, *supra* note 223, at 15. The Maryland Minority proposal and the New Hampshire proposal were also framed in terms of a waivable individual right. See THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 506–07 (Neil H. Cogan ed., 1997) (reproducing proposals).

277. Sherman, *supra* note 146, at 267.

278. AMAR, *supra* note 8, at 104 (emphasis added).

textualism—that precise word choice is evidence of original understanding—is correct (although it does not provide evidence as strong as Amar generally claims). The word choice reflected in the text of the Fifth and Sixth Amendment indicates that the right to a grand jury and to a jury trial were more fundamentally concerned with individual rights than with governmental structure. The legislative history of the Seventh Amendment suggests the same result.

There *is* a republican element of the Bill of Rights.²⁷⁹ Amar effectively argues that the Tenth Amendment's reservation of "powers . . . to the people"²⁸⁰ refers to powers that the people collectively hold,²⁸¹ that the First Amendment's right of the people to assemble is primarily a collective right,²⁸² and that the Second Amendment's "core concerns are populism and federalism."²⁸³ And concerns about community rights could reinforce concerns about individual rights, as jury-trial rights did. But Amar pushes beyond these points, and his search for a grand theme behind the Bill of Rights leads him to misinterpret constitutional provisions and downplay evidence inconsistent with his theme.

Perhaps no constitutional document can be substantively coherent if produced in a majoritarian fashion by participants with dramatically different interests. But at the very least, the Bill of Rights fails to cohere in the way Amar would have it cohere. Amar suggests that republicanism was the dominant ideology at the time of the Bill of Rights and that it guided the construction of the Bill of Rights; the true picture is more complex, as historian Isaac Kramnick has observed:

Federalists and Antifederalists . . . tapped several languages of politics None dominated the field, and the use of one was compatible with the use of another by the same writer or speaker. There was a profusion and confusion of political tongues among the founders. They lived easily with that clatter; it is we, two hundred and more years later, who chafe at their inconsistency.²⁸⁴

Drawing on the work of Claude Levi-Strauss, Mark Tushnet has used the term "bricolage"—"the assembly of something new from whatever materials the constructors discovered"²⁸⁵—to describe the founders' approach as they put together the Constitution, and the metaphor is an apt one. The Bill of Rights embraces both collective rights and individual rights.

279. Robert Palmer has provided a thoughtful analysis of the relationship between republicanism and the Bill of Rights that, unlike Amar's account, treats republicanism as fundamentally concerned with the protection of individual liberty. See Palmer, *supra* note 268, at 105–117.

280. U.S. CONST. amend. X.

281. AMAR, *supra* note 8, at 119–24.

282. *Id.* at 26–30.

283. *Id.* at 46.

284. ISAAC KRAMNICK, *REPUBLICANISM AND BOURGEOIS RADICALISM: POLITICAL IDEOLOGY IN LATE EIGHTEENTH-CENTURY ENGLAND AND AMERICA* 261 (1990).

285. Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1229 (1999).

But to the extent that one type of right was ascendant, it was individual rights. Amar's account of the revolutionary era is a static one. He misses the fact that during the revolutionary era, in response to assertions of state legislative authority that they deemed unjust, many Americans came to rethink the belief that majorities could be relied on to protect individual rights:

Americans entered the Revolutionary crisis confident that they knew what their rights were; after independence, they modified these ideas only modestly. What did evolve, far more dramatically and creatively, were their ideas of *where* the dangers to rights lay and of *how* rights were to be protected. At the outset Americans believed that arbitrary acts of the Crown and its colonial officials, including judges of the higher courts, posed the greatest threat, and they accordingly treated the rights of representation and trial by jury as their chief securities against arbitrary rule. It took a decade of experience under the state constitutions to expose the triple danger that so alarmed Madison in 1787: first, that the abuse of the legislative power was more ominous than arbitrary acts of the executive; second, that the true problem of rights was less to protect the ruled from their rulers than to defend minorities and individuals against factious popular majorities acting through government; and third, that agencies of central government were less dangerous than state and local despotisms. This reconception marked a significant departure in Anglo-American thinking about rights, and it helps to explain why Federalist qualms about the utility of bills of rights involved more than political oversight.²⁸⁶

Similarly, Gordon Wood has observed that “[i]n 1776 the solution to the problems of American politics seemed to rest not so much in emphasizing the private rights of individuals against the general will as it did in stressing the public rights of the collective people against the supposed privileged interests of their rulers.”²⁸⁷ By the end of the revolutionary era, thinking about rights had undergone a transformation:

The liberty that was now emphasized was personal or private, the protection of individual rights against all governmental encroachments, particularly by the legislature, the body which the Whigs had traditionally cherished as the people's exclusive repository of their public liberty and the surest weapon to defend their private liberties.²⁸⁸

If Amar's account explained such evidence, the fact that it differs from that of leading historians such as Wood and Rakove would not matter. But in critical ways it does not explain such evidence, as my discussion of particular clauses has sought to show.

At a broader level, Amar's account is also at odds with the ways in which the founders themselves understood the Bill of Rights. Madison's notes for his speech introducing the Bill of Rights and the newspaper accounts of that speech show that he understood and defended the Bill of

286. RAKOVE, *supra* note 36, at 289–90.

287. GORDON WOOD, *CREATION OF THE AMERICAN REPUBLIC* 61 (1969).

288. *Id.* at 609.

Rights as fundamentally concerned with the protection of individual rights against majorities. According to his notes, the amendments “relate 1st. to private rights.”²⁸⁹ He adds that the amendments will “guard 1. vs Executive . . . 2. Legislature as in Sts—. . . 3. Majority of people.”²⁹⁰ The newspaper account of the speech confirms that understanding:

[I]n a government modified like this of the United States, the great danger lies rather in the abuse of the community than in the legislative body. The prescriptions in favor of liberty, ought to be leveled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power: But this is not found in either the executive or legislative departments of government, but in the body of the people, operating by the majority against the minority.²⁹¹

Leading Anti-Federalists shared Madison’s understanding of the Bill of Rights as primarily protective of individual rights. Where Amar contends that the Bill of Rights was “an Anti-Federalist idea that moderate Federalists ultimately accepted and adjusted,”²⁹² the Anti-Federalists, in fact, were angered that Madison’s proposed Amendments were very different from the amendments they had called for during the constitutional-ratification debates. Although they supported the protection of individual liberty, above all the Anti-Federalists desired structural limitations on federal power such as further limitations on direct taxation or barriers to ratification of treaties, as evidenced by North Carolina Federalist William Davie’s reports to Madison on his home state’s Anti-Federalists: “Instead of a Bill of rights attempting to enumerate the rights of the Indivi[du]al or the State Governments, they seem to prefer some general negative confining Congress to the exercise of the powers particularly granted, with some express negative restriction in some important cases.”²⁹³ Madison gave them a very different Bill of Rights. The recurring image in the debate in Congress was that the Bill of Rights was a “tub to the whale,” an allusion to Jonathan’s Swift’s *Tale of a Tub*. In that story, Swift told how sailors had thrown “an empty tub by way of amusement” to divert a whale from pursuing their ship.²⁹⁴ “Madison’s contemporaries used the allusion to point out that he had proposed mostly rights-related amendments rather than ones designed to change the structure

289. James Madison, Notes for Amendments Speech (1789), in 2 DOCUMENTARY HISTORY, *supra* note 131, at 1042, 1042.

290. *Id.* at 1043.

291. CONG. REG., *supra* note 144, at 81. While in certain ways Madison’s thought was innovative and perhaps not completely understood by his contemporaries, the concerns he had about abuses by state governments were widely shared, see Larry D. Kramer, *Madison’s Audience*, 112 HARV. L. REV. 611, 625–26 (1999), and it is this concern about majoritarian abuse that Madison’s speech about the Bill of Rights highlights.

292. AMAR, *supra* note 8, at 302.

293. Letter from William R. Davie to James Madison (June 10, 1789), in DOCUMENTARY RECORD, *supra* note 103, at 245, 246.

294. DOCUMENTARY RECORD, *supra* note 103, at xv.

or essence of the new government. The Antifederal leviathan would be diverted and the ship of state could sail away intact.”²⁹⁵

During the ratification debate, the Anti-Federalists—the true champions of a federal system—had been outmaneuvered by the Federalists, who had seized the politically potent Federalist rubric and reduced their opponents to defining themselves by their opposition. Something very similar happened in the battle over the Bill of Rights: Madison shifted the ground under the Anti-Federalists. Madison proposed a Bill of Rights that was centrally concerned with individual liberties. The Federalists grasped this. “I thank you for the copy of the amendments proposed to the constitution which you lately inclosed to me,” Joseph Jones, a Virginia Federalist, wrote to Madison when he received a copy of his proposed Bill of Rights: “[T]hey are calculated to secure the personal rights of the people so far as declarations on paper can effect the purpose, leaving unimpaired the great Powers of the government”²⁹⁶ William Smith, a congressman from South Carolina, reviewed the amendments as they emerged from the House committee and observed “[t]here appears to be a disposition in our house to agree to some, which will more effectually secure private rights, without affecting the structure of the Govt.”²⁹⁷ The Anti-Federalists understood as well. “[T]he Enumeration stops at direct Taxation Treatys Trade,” Patrick Henry complained to William Grayson, an Anti-Federalist senator from Virginia.²⁹⁸ Grayson, in an earlier letter to Henry, had reached the same conclusion: “[L]ast munday [sic] a string of amendments were presented to the lower House; these altogether respected personal liberty”²⁹⁹

Perhaps because the Bill of Rights is so principally concerned with individual liberty, scholars have often (although not always) overlooked its republican elements.³⁰⁰ Amar’s account is a valuable corrective in this regard. But his notions that there is a “grand idea” of the Bill of Rights and that “popular and populist rights”³⁰¹ were at the core of the document obscure much more than they illuminate. Amar seeks a coherence that does not exist and dramatically overemphasizes the republican aspects of the Bill of Rights. His textualism leads him astray.

295. *Id.*

296. Letter from Joseph Jones to James Madison (June 24, 1789), in DOCUMENTARY RECORD, *supra* note 103, at 253, 253.

297. Letter from William L. Smith to Edward Rutledge (Aug. 9, 1789), in DOCUMENTARY RECORD, *supra* note 103, at 273, 273.

298. Letter from Patrick Henry to William Grayson (Mar. 31, 1789), in DOCUMENTARY RECORD, *supra* note 103, at 226, 226.

299. Letter from William Grayson to Patrick Henry (June 12, 1789), in DOCUMENTARY RECORD, *supra* note 103, at 248, 249.

300. *Cf.*, e.g., Palmer, *supra* note 268 (discussing republicanism and the Bill of Rights); RAKOVE, *supra* note 36, at 297–302 (discussing jury trials).

301. AMAR, *supra* note 8, at 73.

CONCLUSION

In a classic study of the historian's craft, James West Davidson and Mark Hamilton Lytle offered a hypothetical account of how the seventeenth-century explorer John Smith might have described a baseball game between the New York Yankees and the Boston Red Sox:

[T]hey being assembled about a great field of open grass, a score of their greatest men ran out upon the field, adorned each in brightly hued jackets and breeches, with letters cunningly woven upon their Chestes, and wearing hats upon their heades, of a sort I know not what. One of their chiefs stood in the midst and would at his pleasure hurl a white ball at another chief, whose attire was of a different colour, and whether by chance or artifice I know not the ball flew exceeding close to the man yet never injured him, but sometimes he would strike att it with a wooden club and so givinge it a hard blow would throw down his club and run away.³⁰²

The hypothetical account is based on close scrutiny of the game, but it is completely wrong because the observer "reported events *as he saw them*"³⁰³ rather than in accordance with the perspective of the participants.

This Article has used Akhil Amar's *Bill of Rights*, a leading work of the textualist movement and the product of the movement's leading scholar, as a case study to illustrate the dramatic gap between a textualist reading of the Constitution and the way in which the document was originally read. Amar's account is not unlike the hypothetical Smith's: Smith's description fails because, while it reflects careful study, it also reflects Smith's perspective, not the perspective of the participants. Amar's account reflects a close reading of the text, but it fails because it reflects Amar's perspective, not that of the eighteenth century.

Professor Amar's textualism reflects a series of assumptions: that the reader can learn about the meaning of constitutional text by looking at the placement of that text in the document; that words used at different places in the document should be construed to mean the same thing; and that the document reflects a one-dimensional, substantively coherent vision. In his study of the Bill of Rights, Amar draws on these techniques to "offer an integrated overview of the Bill of Rights as originally conceived."³⁰⁴ He concludes that "the grand idea of the original Bill of Rights" was not the rights of the individual, but "the rights of the people."³⁰⁵

This Article has sought to show that the interpretation Amar advances of the Bill of Rights is deeply flawed and that those flaws are in significant part the product of Amar's textualism: he accords significance to placement when he should not, he misreads what the founders meant when they repeatedly referred to "the rights" of "the people," and he imposes on the Bill of

302. JAMES WEST DAVIDSON & MARK HAMILTON LYTLE, *AFTER THE FACT: THE ART OF HISTORICAL DETECTION* 6 (1982).

303. *Id.* at 2.

304. AMAR, *supra* note 8, at xii.

305. *Id.* at 133.

Rights a one-dimensional vision that it did not possess. Amar assumes that the interpretive premises of his textualism capture the founders' approach to the Bill of Rights without probing to determine whether this is in fact correct, and this Article has shown that that assumption repeatedly leads to grave misreadings. It would appear that the Bill of Rights—because it is a large body of constitutional text produced at one time and in large part written by one person—would represent the best test case for close-reading textualism. But Amar's application of his interpretive approach to the Bill of Rights leads to a fundamentally erroneous understanding of individual clauses and of the document as a whole.

This evidence is of value because it shows that Amar's broadly influential reading of the Bill of Rights as republican is erroneous: his account dramatically understates how the Bill of Rights protects individual rights. Moreover, a careful study of Amar's argument illustrates that textualism—with its focus on text and its comparative (or complete) disregard of the drafting and ratification history that is central to originalism—is ill-equipped to recover original meaning. The flaws of originalism are well chronicled. In particular, drafting and ratification history are imperfect guides to how the document was understood because they may reflect idiosyncratic views of the speakers rather than generally held understandings. Recognition of these flaws played a critical role in the rise of textualism and its premise that modern constitutional lawyers should seek to recover original public meaning rather than either the framers' or ratifiers' intent. But the interpretive tools employed by textualists such as Amar are flawed guides to original public meaning.

This Article shows the dramatic gap between the Constitution's original meaning and modern textualist readings. A textualist like Amar reads the constitutional text in a way that reflects current conceptions rather than a method informed by carefully studying the evolution of the Constitution through the process of drafting and by carefully studying what the founding generation understood the document to mean. Precisely because it minimizes the significance of the historical evidence that originalists rely on to uncover original intent and original understanding, textualism offers a poor guide to original public meaning. The textualist search for original public meaning can succeed only if textualists give the evidence that originalists highlight—drafting history and ratification history—careful attention and great weight.

