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New Textualism in Constitutional Law

David A. Strauss

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No one can fail to admire the tremendous erudition and creativity that Akhil Amar brings to the project of interpreting the Constitution, particularly in the book from which his contribution to this Symposium is excerpted, *The Bill of Rights: Creation and Reconstruction.* Time after time, Professor Amar shows us many new things about how the drafters of the Bill of Rights and the Fourteenth Amendment thought about the issues they were addressing. All of us are in his debt for that.

The question is whether Professor Amar's impressive project goes beyond being intellectual history and tells us something substantial about how the difficult constitutional issues of today should be resolved. Here I have some doubts. Some of the reasons for those doubts are familiar: whatever the right answer to the questions that arise under the Bill of Rights today—questions about the proper limits on police behavior, about the right to bear arms, or any other subject—it is difficult to believe that they should be resolved primarily on the basis of judgments made in the eighteenth or nineteenth centuries by people living in utterly different circumstances. But I also want to suggest two things that are perhaps less obvious about the textualist approach to constitutional interpretation that Professor Amar uses with such extraordinary skill. First, textualism, although often defended as a particularly democratic approach to constitutional interpretation, in fact rests on a heroic view about the drafters of the Constitution and is in that sense deeply antidemocratic. Second, although textualism is prominently thought to be a way to limit the power of judges who interpret the Constitution, it in fact provides only the weakest of restraints; a purely textualist approach is an invitation to judicial creativity.

In order to try to make these points more clearly—and because you can't beat somebody with nobody—I will offer an alternative to the textualist conception of constitutional interpretation. The alternative view is that the Constitution we have today is the product of a common law-like development and is not just the document drafted in the eighteenth century and formally amended from time to time. The Constitution today is a collection of well-established principles, traditions, and precedents that, although never completely unconnected to the text, have elaborated the text in complex ways not discernible from the text itself. Today American constitutional law is, for the most part, a common law system in which the role of the text is decidedly secondary. It is the product of the wisdom not just of Madison and

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Bingham, but of other generations as well—and not only the judges of those generations.[1]

"Granted," Professor Amar writes, "lawyers and judges must often go beyond the letter of the law, but the text itself is an obvious starting point of legal analysis. Is it even possible to deduce the spirit of a law without looking at its letter?"[2] But today the text is usually not the obvious starting point for most legal analysis of the Bill of Rights. Nearly every lawyer or judge today, when faced with an issue under the Bill of Rights, starts with the established principles and precedents, not with the text. In the legal analysis of constitutional issues, as it is practiced today in our system, the text, as likely as not, never explicitly enters the picture. And although Professor Amar's point about looking at the letter to deduce the spirit is characteristically trenchant, it only raises the question of what the letter of the law is. Nothing says it has to be the text alone, in isolation from the precedents and traditions.

I. Textualism and Heroism

My first qualm about textualism, as practiced both by Amar and by those who are less nuanced, is that it takes essentially a heroic view of the Constitution. In the textualist vision, there was a time—a moment—when someone got it right. If we can just reconstruct what they decided at that time, we will have the answers we need. The "they" who got it right might be the drafters of the Constitution, or the founding generation, or "We the People" somehow defined, or perhaps certain key generations in American history. But, according to textualist views and others of the same family, there was a time when, by virtue of intense political reflection or purity of motivation (or, some might say, divine inspiration), some group of people figured out the answers. Our task today is to reconstruct—or simply recover—their answers. The reconstruction might take a lot of careful and subtle argument, as it does in Professor Amar's work. But reconstruction of their—the heroes'—judgments and conclusions, is the key.

It seems to me that things don't work that way. Constitutional principles, the basic decisions about how to govern a society like ours, are hammered out over time. They are not the product of an epiphany. They are hammered out in the courts, in the legislatures, and in society at large. After we hammer them out, we may attribute them to an earlier heroic moment. "The Framers of the Constitution well understood . . . ," we say, before attributing to the Framers the position that *we* have concluded (perhaps after many false starts) is the right interpretation of the First or Fifth or Fourteenth Amendments. Often attributing ideas to the Framers is in the nature of mythmaking. Myths serve a valuable purpose, but the reality of the way societies work is more evolutionary and organic than textualist approaches allow.

A tale of four constitutional amendments—two that were adopted and two that were not—can make this point. The two that were adopted are the

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1 For a development of this view, see David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

2 Akhil Reed Amar, *Textualism and the Bill of Rights*, 66 GEO. WASH. L. REV. 1143, 1143 (1998).

Fifteenth and Nineteenth. Anyone reading the text of the Constitution, without knowing more about American history, would conclude that African Americans were enfranchised in 1870, when the Fifteenth Amendment was adopted, and that women were not enfranchised until fifty years later. Of course that is not what happened. After the end of Reconstruction, the vast majority of African Americans in the United States could not vote. African Americans were not truly enfranchised until more than ninety years after the Fifteenth Amendment was adopted. Women, on the other hand, had the right to vote in many states even before the Nineteenth Amendment was adopted. And the ratification of the Nineteenth Amendment, unlike the ratification of the Fifteenth, did settle the issue once and for all; there was no massive resistance to women's suffrage.

In other words, although the Civil War generation added the Fifteenth Amendment, the actual decision to enfranchise African Americans took much longer. By the same token, although the ratification of the Nineteenth Amendment was perhaps a pivotal event, much of our society had made the decision to enfranchise women before the Nineteenth Amendment was adopted. The Nineteenth Amendment ratified something that had occurred at a much deeper level in society—just as the Fifteenth Amendment did not really become an operative part of the Constitution until society had changed at a deeper level. These aspects of our constitutional development do not fit with a textualist account.

It might be said, on behalf of a textualist approach, that these points are descriptive but not normative. The Fifteenth Amendment *should* have been enforced as soon as it was adopted. The Fifteenth Amendment, it might be said, was a part of the Constitution from 1870 and on, and—no argument here—it is scandalous that the Fifteenth Amendment was flouted. But just as the adoption of a new constitutional text does not always change the constitutional order, the constitutional order can be changed—in fundamental ways—by "texts" that are never adopted. The point is the same: the content of the Constitution is determined not by a heroic decision by drafters or ratifiers to add text to the Constitution, but by a messier, more complex and prolonged process.

Consider, for example the Equal Rights Amendment, which would have forbidden the denial of equal rights on the basis of gender. The Equal Rights Amendment was proposed for ratification and was rejected when three-quarters of the states did not ratify it in time. Yet the Equal Rights Amendment has, in practice, become part of the Constitution. It is difficult today to identify any legal rule that would be different if the Equal Rights Amendment had been adopted. The presence or absence of an Equal Rights Amendment in the text has, to put it bluntly, turned out to be irrelevant to the constitutional order. Surely that should give textualists some pause.

There is an even more dramatic example. Before the Civil War, there was a lively and inconclusive debate over whether the Constitution permitted states to secede. There is no longer any such debate; the issue was settled by the Civil War. No one today would seriously advance the position that the Constitution permits secession, at least the kind that the Confederacy attempted. Where is the text that settled this question? The answer, of course,

is that this question, like other important constitutional questions, is decided by something other than the text.

A textual approach to constitutional interpretation is often defended as the most democratic. The text, it is said, is what the people (often capitalized) adopted. Moreover, they adopted it in a manner and at a time that was likely to produce an especially true expression of their will. None of the gloss later added by judges or by accepted traditions has the same democratic pedigree. A common law view, the argument continues, reflects the opinion of unelected judges, a small, elite segment of society, and not of the people at large.

In fact, democracy and heroism—including heroism of the kind that undergirds textualist views—do not go together very well. Common law-like processes of evolution are not as democratic as a plebiscite, but in their own way they are highly democratic. Consider, for example, two ways in which one might try to justify the Supreme Court's decisions on gender equality—the decisions in which, for all practical purposes, the Court acted as if the Equal Rights Amendment was part of the Constitution.[3] One way would be to find a justification in the history of the Fourteenth Amendment, or (as Professor Amar may be suggesting) in some synthesis of the Nineteenth and Fourteenth Amendments. That is, one might come up with an Amar-like account of the text and history that would make a case for finding a principle of gender equality in the text of the Constitution.

The alternative would be to say that what "ratified" the Equal Rights Amendment was not a decision by the Framers of any constitutional text but the growing acceptance (not just by lawyers but by citizens) of the principle reflected in judicial decisions, legislation, and private parties' conduct that gender discrimination is not to be allowed. That principle was not adopted in any meaningful way by the people who ratified the Fourteenth Amendment, although it is obviously consistent with the text of that Amendment. Rather, it emerged as society, and particularly the role of women, changed. The change in the Constitution was the product of a gradual evolution in opinion—not one self-consciously political decision, but countless acts of people living ordinary lives. That gradual evolution is, in a real sense, far more reflective of a truly democratic mandate than any flash of progressive insight we might discover in the records of the post-Civil War generation.

II. Textualism and Restraint

Many of the most prominent exponents of textualism—notably Justice Black a generation ago and Justice Scalia today—urge that departing from the text permits judges too much leeway to read their own views into the law. Adhering to the text is the course of salutary judicial self-restraint. Professor Amar does not explicitly make this argument, although perhaps his implicit identification of "the letter of the law" with the text suggests that same view.[4]

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3 *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); Craig v. Boren, 429 U.S. 190 (1976).

4 Amar, *supra* note 2, at 1143.

In any event, it is, I believe, important to see just how little restraint textualism provides, at least in interpreting the Constitution. The Constitution is phrased in such broad terms that a judge who adheres simply to the text can do essentially anything he or she wants. It is child's play to turn the text of the Equal Protection Clause—considered in isolation—into a radical and implausible constitutional requirement that wealth be equally distributed: "'Equal protection of the laws' includes equal protection, by the laws, against the vicissitudes of the market. So long as property laws and other laws maintain a system in which some people suffer more from market forces than others, the Equal Protection Clause is being violated." At the other extreme, the Takings Clause of the Fifth Amendment has been used, by my colleague Richard Epstein, as the basis for a constitutional prohibition against any redistribution.[5]

Professor Amar himself shows just how far a creative textualist can go. He suggests that the Sixteenth, Seventeenth, and Nineteenth Amendments might together be read to provide a constitutional basis for the New Deal—that is, for the rejection of freedom of contract as a constitutional principle and for the expansion of federal regulatory authority.[6] Professor Amar explains that "increased national power and the increased permissibility of economic redistribution . . . are . . . central themes of the textual Progressive-era amendments."[7] He is careful to say that he is only raising the possibility of a textual justification for the New Deal's changed constitutional understandings, not purporting to provide such a justification.[8] Still, Professor Amar seems to be raising the possibility that, in textualist terms, it may be permissible to use an amendment authorizing a progressive income tax as a basis for a "textual" argument that redistribution is a permissible aim of government generally—and to use amendments that establish a national rule about women's suffrage and reduce state legislators' power by authorizing the direct election of Senators as a general warrant for increasing the regulatory power of the federal government. These may well be good arguments, but if this is textualism, it is difficult to say that textualism will be a source of much judicial restraint.

In fact, what restrains judges is not the text of a broadly worded document like the United States Constitution. What restrains judges is precedent, the same thing that has restrained American and British judges for centuries in common law cases. Of course precedents can be interpreted in different ways. But a judge who follows precedent in good faith will find that his or her room to maneuver is often clearly bounded. A judge who follows only the text, and nothing else, will be much less restrained. It is precedent that makes my hypothetical interpretation of the Equal Protection Clause obviously bad constitutional law. Precedent, not text, gives the First Amendment the shape it has today. The development of other central principles of constitutional law—the legitimacy of the administrative state; the prohibition

5 *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

6 *See* Amar, *supra* note 2, at 1146.

7 *Id.*

8 *See id.*

against race and gender discrimination; the expansion of federal legislative and executive power—all took place in the way that common law principles develop in the law of torts or contracts. They developed case by case. They did not develop by direct inference from the text.

Professor Amar is at his eloquent best in describing the role that the Bill of Rights plays in our political culture. "The American people—outside courtrooms, outside law offices—confront, and lay claim to, the Bill of Rights as a text."[9] He then quotes several of the majestic phrases of the Bill of Rights that have indeed entered the vocabulary of "ordinary citizens."[10] But the Bill of Rights that, as Professor Amar says, "live[s] in the hearts and minds of ordinary Americans"[11] is not just the text. Clear and present danger; reckless disregard of the truth; separation of church and state; the presumption of innocence; proof of guilt beyond a reasonable doubt; the *Miranda* warnings; the unlawfulness of race and gender discrimination—these legal concepts have also entered the popular culture, and they are not found in the text. They are found in the cases; they are the product of an evolution of popular understandings. However heroic the Framers were, it would be surprising, and disappointing, if our Constitution had not evolved in important ways in the many generations that have passed since the framing. But the Constitution has evolved, and it is not clear that textualism can ever give an adequate account of that central fact of our constitutional order.

9 *Id.* at 1144.
10 *See id.*
11 *Id.*

PANEL III

TEXTUALISM AND FEDERALISM

Moderator
Gregory E. Maggs

Commentaries

Principal Paper*

* At the Symposium, Professor Lessig presented his previously published article, Lawrence Lessig, *Translating Federalism: United States v Lopez*, 1995 SUP. CT. REV. 125. The commentators then remarked on that paper, and here, Professor Lessig provides a written response to their comments.