

University of Chicago Law School

Chicago Unbound

Journal Articles

Faculty Scholarship

2013

The Constitution of the Second Generation

Alison LaCroix

Follow this and additional works at: https://chicagounbound.uchicago.edu/journal_articles



Part of the [Law Commons](#)

Recommended Citation

Alison LaCroix, "The Constitution of the Second Generation," 2013 University of Illinois Law Review 1775 (2013).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

THE CONSTITUTION OF THE SECOND GENERATION

Alison L. LaCroix*

In his new book, Akhil Amar describes the “unwritten Constitution” as a set of values, customs, and beliefs that are crafted and revealed over time, and which inform the interpretation and application of the Constitution. Amar’s account centers on four key moments in United States history: the founding, Reconstruction, the New Deal, and the civil rights revolution of the 1960s, leaving relatively unexplored an essential period of existential, adolescent crisis: the early nineteenth century. Using a 1830 exchange between James Madison and Martin Van Buren as a case study, this Article discusses the significance of the period between 1815 and 1850 as an era of constitutional change.

In his new book, *America’s Unwritten Constitution*, Akhil Reed Amar offers a richly layered portrait of the unwritten Constitution as a set of values, customs, and beliefs that were latent in the constitutional text. These vital constitutional principles—both substantive and interpretive—required activation through the efforts of individuals facing particular decisions or crises at specific historical moments.

The book thus continues Amar’s project of offering a “new textualist”¹ or “new structuralist” approach to constitutional interpretation, but with a twist. As Amar puts it, “the written Constitution itself invites recourse to certain things outside the text—things that form America’s unwritten Constitution. When viewed properly, America’s unwritten Constitution supports and supplements the written Constitution without supplanting it.”² Amar thus argues that textualism encompasses more than simply the words of the Constitution itself. Indeed, his core claim is that a constitutional theory that relies on both a written and an unwritten Constitution is not a paradox, but rather a hermeneutically subtle, con-

* Professor of Law and Ludwig and Hilde Wolf Teaching Scholar, University of Chicago Law School. I thank participants in the symposium on Akhil Reed Amar’s “America’s Unwritten Constitution” at the University of Illinois College of Law for helpful comments and discussion. Thanks also to Patricia Herold for excellent research assistance.

1. See, e.g., Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 28 (2000) (“I mean to defend a spacious but not unbounded version of constitutional textualism.”).

2. AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY*, at x–xi (2012).

ceptually coherent approach to interpretation.³ The text contains directions as to how the text ought to—indeed, on Amar’s view, how it must—be interpreted. Moreover, the Constitution contains explicit points of entry for nonenumerated substantive principles. Amar identifies the Ninth Amendment as the chief “textual portal” through which extratextual practices and precedents are incorporated by reference into the constitutional framework.⁴

Amar argues that the unwritten Constitution has been crafted and revealed through a process of maturation that began almost immediately upon ratification, extending through the current moment and, presumably, into the future. On Amar’s account, this process of constitutional maturation centers on four key moments, or “case studies”:⁵ the founding, Reconstruction, the New Deal, and the civil rights revolution of the 1960s.

But in this *Bildungsroman* of the growth of a strongly rights-based, rights-protecting federal republic, Amar leaves out an essential period of existential, adolescent crisis: the early nineteenth century.⁶ Between 1815 and 1850, Americans faced a crisis of confidence—a moment of adolescent uncertainty, thinly masked by an equally adolescent sense of bravado. With the passing of the last of the founding-era presidents (John Adams and Thomas Jefferson, famously, on July 4, 1826⁷; James Monroe on July 4, 1831⁸; and James Madison in June 1836⁹), a new generation of politicians and state-builders came to view themselves as charged with completing the federal republic. This second generation of founders confronted new challenges their forbears had not had to worry about: the growth of industrial capitalism; a series of recessions, or “panics”; westward expansion; claims for political equality by women and African Americans; and the mounting sectional dispute over slavery. Indeed, for the second generation, the most pressing questions of the day

3. See *id.* at xi (“The written Constitution cannot work as intended without something outside of it—America’s unwritten Constitution—to fill in its gaps and to stabilize it. In turn, America’s unwritten Constitution could never properly ignore the written Constitution, which is itself an integral part of the American experience. Over the centuries, various extratextual practices and precedents that have done justice to the text have flourished while other extratextual practices and precedents that have done violence to the text have faded away.”). On hermeneutics and legal interpretation, see William W. Fisher III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 STAN. L. REV. 1065, 1079–80 (1997); James T. Kloppenberg, *The Theory and Practice of American Legal History*, 106 HARV. L. REV. 1332, 1350 (1993) (reviewing MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* (1992)).

4. See AMAR, *supra* note 2, at xi.

5. *Id.* at 5.

6. Amar does discuss *McCulloch v. Maryland*, 17 U.S. 316 (1819), at some length. But the analysis focuses on the decision as an act of constitutional interpretation largely divorced from its historical moment. See AMAR, *supra* note 2, at 22–31.

7. FRANK FREIDEL, *THE PRESIDENTS OF THE UNITED STATES OF AMERICA* 13 (1998).

8. *Id.* at 11.

9. *Id.* at 15.

resolved themselves into constitutional questions. Controversial issues as varied as federal funding of roads and canals, the status of native peoples, the need for a national bank, and the existence and expansion of slavery all implicated economic, moral, religious, and territorial beliefs. In the minds of members of the second generation, however, the essential thread connecting these debates was the Constitution.¹⁰

Constitutional text, language, and thought framed—indeed, constituted—public discussion in the early nineteenth century to a degree that has not heretofore been adequately explored in the scholarship. Because twenty-first-century Americans continue to inhabit the founders' constitutional universe (albeit with important additions such as the Reconstruction amendments), the early-nineteenth-century fixation on the Constitution appears natural to us. But it was not predetermined or necessary. On the contrary, this tendency of Americans from all segments of society to resolve matters of public debate into constitutional questions, and to invoke specific articles and clauses of the text, was a distinct development in popular and elite discourse during this period.

In this brief Article, I will discuss the significance of the early nineteenth century for constitutional history in general, and for Amar's theory of the unwritten Constitution in particular. I will then explore the period's relevance to two of the central themes of Amar's book: first, what Amar terms "generational veils of ignorance";¹¹ and second, intertemporal, or intergenerational, interpretation.¹² Examining a case study from 1830 demonstrates that the period between 1815 and 1850 can be understood retrospectively as an era of constitutional change. Even more significant, however, the 1830 exchange between James Madison and Martin Van Buren illustrates second-generation political and legal actors' self-consciousness about their own location in constitutional time. Van Buren and his contemporaries regarded themselves as bearing heavy responsibility for translating the document's words into practice, and they occasionally sought guidance from surviving forbears such as Madison. To borrow Amar's distinction between the acts of *interpreting* and *implementing* the Constitution,¹³ early-nineteenth-century legal and political actors viewed themselves as charged with a project of implemen-

10. See DANIEL WALKER HOWE, *THE POLITICAL CULTURE OF THE AMERICAN WHIGS* 23 (1979) ("The spirited debate between Whigs and Jacksonian Democrats had its own conventions, the most striking of which was probably 'constitutionalism.'").

11. AMAR, *supra* note 2, at 475.

12. *Id.* at 480 (describing "[t]he convenient manner in which amendments are layered one atop another in chronological sequence" as inviting commentators to engage in an "intergenerational project" of reading the text "in light of the grand narrative of American history").

13. See, e.g., *id.* at 209 (distinguishing between interpretation—"declar[ing] the Constitution's meaning"—and implementation—"taking the abstract meanings of the Constitution and making them work as actual rules of decision in the courtroom itself and in the real world beyond the courtroom"); *id.* at 212 (describing *Brown v. Board of Education*, 347 U.S. 483 (1954), as "an effort to *implement* rather than simply to *interpret* the Constitution").

tation: translating the words of the document into practice, even as the landscape of that practice shifted around them.

I. THE EARLY NINETEENTH CENTURY IN CONSTITUTIONAL TIME

The first half of the nineteenth century has been the subject of renowned narrative histories from political and cultural historians, who have offered a number of themes to give coherence to these decades: the “age of Jackson”; the “market revolution”; the “rise of American democracy”; the “communications revolution,” and the era of the “impending crisis.”¹⁴ We also know the period as the prelude to the cataclysm of the Civil War, in anticipation of which these decades are often referred to as the Antebellum Period, the beginning of the impending crisis, and the origins of the irrepressible conflict. Yet these decades are strangely absent from serious constitutional history. But for lawyers, politicians, and—perhaps most significantly—for ordinary men and women, the period was marked by two elements: first, the insecurity of a second generation left to oversee a still-unstable republic;¹⁵ and second, a conviction that the Constitution provided the best frame for understanding and resolving most issues of contemporary political, cultural, legal, and economic debate.¹⁶

Many Americans who came of age in the first four decades of the nineteenth century expressed the unease of the second generation.¹⁷ These individuals, most of whom were born during the Revolutionary War and died before or during the Civil War, saw themselves as living in the aftermath of the founding, a potentially lesser moment but also one that would require important decisions about the relationship between their fathers’ written text and the booming economy, politics, and culture

14. See, respectively, DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848* (2007); SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* (2006); CHARLES SELLERS, *THE MARKET REVOLUTION: JACKSONIAN AMERICA, 1815–1846* (1991); ALFRED D. CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* (1977); DAVID M. POTTER, *THE IMPENDING CRISIS: AMERICA BEFORE THE CIVIL WAR, 1848–1861* (1976); ARTHUR M. SCHLESINGER, JR., *THE AGE OF JACKSON* (1945); see also Daniel Feller, *The Market Revolution Ate My Homework*, 25 *REVS. AM. HIST.* 408 (1997).

15. See JOYCE APPLEBY, *INHERITING THE REVOLUTION: THE FIRST GENERATION OF AMERICANS* (2000) (describing the worldview of the cohort of Americans who were born during the Revolutionary War and came of age in the early nineteenth century).

16. See WILENTZ, *supra* note 14, at xxi (“For Americans of the early republic, politics, government, and constitutional order, not economics, were primary to interpreting the world and who ran it . . .”).

17. For other uses of the phrase “second generation” to refer to this group, see GERARD N. MAGLIOCCA, *ANDREW JACKSON AND THE CONSTITUTION: THE RISE AND FALL OF GENERATIONAL REGIMES 1–5* (2007) (developing a theory of “generational regimes” to explain changes in constitutional law throughout U.S. history); MERRILL D. PETERSON, *THE GREAT TRIUMVIRATE: WEBSTER, CLAY, AND CALHOUN*, at vii (1987) (describing the titular senators as the “second generation of American statesmanship”).

of the unruly young nation.¹⁸ They thus viewed their main work as constitutional implementation.

The members of the second generation were remarkable for their widespread belief that constitutional ideas lay at the heart of American national identity, and in their energetic, often scattered determination to apply those principles to their own swiftly changing, profoundly unsettled moment.¹⁹ Religious sentiments, economic imperatives, partisan interests, and technological changes all supplied potential organizing lenses for understanding their historical moment. Again and again, however, early-nineteenth-century Americans looked to the Constitution to provide a frame for their experience. As the young Abraham Lincoln told the Young Men's Lyceum in Springfield, Illinois, in 1838, the "perpetuation of our political institutions" required both "the attachment of the People" and the cultivation of "a reverence for the Constitution and laws."²⁰ Supreme Court Justice Joseph Story struck a similar note in 1826, arguing that his generation's task was to try to match the founders' achievements in government by fostering "national feeling" through culture and the arts.²¹ Faced with new political and legal debates, members of the second generation hoped they would prove the equals of the vanishing first generation.

As the territory, technology, and politics of the nation shifted, so did the constitutional landscape. The job of these lawyers and judges became an intertemporal project of fixing ground rules that honored the eighteenth-century republic of Generation 1, even though the veil of ignorance had already been lifted. They, the members of Generation 2, believed themselves to be charged with mapping the future path of a nineteenth-century democracy. The Constitution of the second generation was a crucial turning point in the development of American constitutional law, both written and unwritten. As such, this "interbellum" pe-

18. See Alison L. LaCroix, *The Lawyer's Library in the Early American Republic*, in *SUBVERSION AND SYMPATHY: GENDER, LAW, AND THE BRITISH NOVEL* (Martha C. Nussbaum & Alison L. LaCroix eds., 2013) (describing the ambivalence of members of the second generation toward their forbears' achievements).

19. See, e.g., Walter Gaston Shotwell, *DRIFTWOOD: BEING PAPERS ON OLD-TIME AMERICAN TOWNS AND SOME OLD PEOPLE* 81 (1927) (quoting Ohio Congressman John A. Bingham's description of a political debate in 1840 between Bingham and Edwin Stanton, and Bingham's statement that "[a]lmost everything was reduced to a Constitutional question, in those days"). On Bingham, see GERARD N. MAGLIOCCA, *AMERICAN FOUNDING SON: JOHN BINGHAM AND THE INVENTION OF THE FOURTEENTH AMENDMENT* (forthcoming, Sept. 2013).

20. Abraham Lincoln, *Address to the Young Men's Lyceum of Springfield, Illinois: The Perpetuation of Our Political Institutions*, reprinted in *THE AMERICAN REPUBLIC: PRIMARY SOURCES* 518 (Bruce Frohnen ed., 2002).

21. JOSEPH STORY, *Discourse Pronounced at Cambridge, Before the Phi Beta Kappa Society, on the Anniversary Celebration*, August 31, 1826, reprinted in *THE MISCELLANEOUS WRITINGS, LITERARY, CRITICAL, JURIDICAL, AND POLITICAL, OF JOSEPH STORY, LL. D., NOW FIRST COLLECTED* 3, 17 (1835).

riod deserves a place in the story of the development of America's unwritten Constitution.²²

Many prominent members of this generation were lawyers, politicians, judges, and writers. Some of them were all these things at the same time. They included Supreme Court Justice Joseph Story; U.S. Attorney General William Wirt; the "Great Triumvirate" of Senators Henry Clay, Daniel Webster, and John C. Calhoun; and the young Lincoln. These individuals, most of whom were born during the Revolutionary War and died before the end of the Civil War, saw themselves as living in the aftermath of the founding, a potentially lesser moment but also one that would require important decisions about the relationship between their parents' written text and the booming economy, politics, and culture of the unruly young republic. They thus initially viewed their main work as putting the theory of the Declaration of Independence and the Constitution into practice.²³ As the territory, technology, and politics of the nation shifted, however, so did the landscape of constitutional possibility. The job of these actors became an intertemporal project of fixing ground rules that honored the eighteenth-century republic of the first generation, even though the founding moment and its glamor had passed. The second-generation founders charged themselves with mapping the future path of a nineteenth-century democracy.

What emerged from these struggles was the Constitution of the second generation, and it was not merely a gap between the watershed events of the founding and Reconstruction. Rather, it was a crucial turning point in the development of American constitutionalism, in the broadest and most popular sense. The interbellum Constitution permeated public discourse. Constitutional provisions and ideas were the framework according to which Americans considered political and legal questions.²⁴ Moreover, in applying the Constitution to their particular legal and political concerns, the members of the second generation created foundational precedents that shaped the meaning of crucial concepts such as federalism, interstate commerce, judicial review, the separation of powers, personal property, and individual rights.

In 1826, Story—an early subject of Amar's work²⁵—described his generation's task as fostering the appropriate "national feeling" in

22. See Alison L. LaCroix, *The Interbellum Constitution and the Spending Power* (unpublished manuscript) (on file with author) (developing the idea of the interbellum constitutional period).

23. On the efforts of nineteenth-century Americans to give meaning to the Declaration of Independence, see PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* (1998); GARRY WILLS, *LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA* (1992).

24. Cf. Arthur Bestor, *The American Civil War as a Constitutional Crisis*, 69 AM. HIST. REV. 327 (1964) (making a related point about the Civil War).

25. See Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985).

American culture to match the founders' achievements in government.²⁶ The interbellum period embodies Amar's theme of intertemporality, as well as the related question of what the Constitution means, given ever-increasing layers of constitutional thought across the life of a nation and the lives of its citizens.

II. CONSTITUTIONAL THOUGHT ACROSS GENERATIONS

One of Amar's central concerns in *America's Unwritten Constitution* is creating the possibility for constitutional reform by recognizing the distinct timeline according to which constitutional law operates. As he notes, "Justice-seeking reformers can ultimately prevail in time, using time—in particular, using the key device of a long time-delay between the vote on a visionary amendment and the effective start date of such an amendment."²⁷ Referring to such a rule as a "sunrise" provision, Amar argues that such mechanisms allow constitutional actors to use the "dead hand of the past" productively.²⁸ To avoid the "infinite regress problem" of creating a constitutional democracy, Amar advocates the "fixing of certain ground rules by Generation 1 for the benefit of Generation 2."²⁹ Especially in the area of "fair decisional procedures"³⁰—the "who decides who decides"³¹ problem that lies at the heart of constitutional law—Amar endorses meta-rules based on time as a means of approximating a Rawlsian veil of ignorance.³²

As Amar notes, the founders in some cases embraced these temporal techniques, implanting them in the Constitution. In so doing, they created both precedents for later constitutional interpreters and substantive textual provisions that postponed difficult decisions in ways that allowed for the possibility of "overcom[ing] immediate entrenched interests and injustices" and thereby to "achieve a more disinterested and just future state of affairs."³³ The most obvious example of this type of "generational veil[]" of ignorance³⁴ was the founders' decision to postpone discussion of the slave trade until 1808, a distance of two decades.³⁵ Although one might take exception to Amar's rosy description of the slave-

26. STORY, *supra* note 21, at 17; *see also* LaCroix, *supra* note 18.

27. AMAR, *supra* note 2, at 474.

28. *Id.*; *see also* Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606 (2008).

29. AMAR, *supra* note 2, at 474.

30. *Id.*

31. *Id.* at 346, 474.

32. *Id.* at 475; *see also* Rosalind Dixon & Tom Ginsburg, *Deciding Not to Decide: Deferral in Constitutional Design*, 9 INT'L. J. CONST. L. 636 (2011); Rosalind Dixon, *Updating Constitutional Rules*, 2009 SUP. CT. REV. 319 (2009); Jacob E. Gersen & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 HARV. L. REV. 543 (2007).

33. AMAR, *supra* note 2, at 476.

34. *Id.* at 475.

35. *Id.* at 476.

trade decision, insofar as the decision in 1788 to postpone debate on the question did not require a ban in 1808, the observation that the founders consciously built temporal mechanisms into the text of the Constitution is an important one.

Americans of the early nineteenth century were also enmeshed in this intertemporal project, but their position as “inheritors of the Revolution”³⁶ gave them an even more acute awareness of the complexity of applying an immediately aging text to changing political, social, and economic circumstances. The intertemporal struggle obtains not only in Generation 1, when a democracy is attempting to “bootstrap itself off the ground.”³⁷ Indeed, the effort becomes even more important when Generation 2 is trying simultaneously to distinguish itself from Generation 1 while also preserving the accomplishments of Generation 1.

But the most complex version of the intertemporal interpretive problem occurs when some members of Generation 1 are still present on the political and legal scene, able to offer glosses on their earlier statements and actions, and occasionally amending them. In the early nineteenth century, the actual presence of some members of Generation 1 occasionally led to confusion between their historical and their contemporary values—and, indeed, to the realization that their beliefs might have changed over the decades since the founding.

A handful of the original founders survived and remained prominent into the 1820s and 1830s. James Madison was active in public life until his death in 1836, conducting extensive correspondence with younger statesmen from his home at Montpelier. In a series of letters with Senator, then Secretary of State Martin Van Buren in 1826 and 1830, Madison engaged in explicit intertemporal constitutional interpretation. The subject was his own previous acts and statements as president.³⁸

The catalyst for the exchange between Van Buren and Madison was the long-running debate concerning Congress’s power to fund or oversee internal improvements—public works projects to build roads and canals in the expanding interior of the nation.³⁹ In 1830, Andrew Jackson issued a controversial veto of a bill to appropriate funds to underwrite the con-

36. See APPLEBY, *supra* note 15.

37. AMAR, *supra* note 2, at 474.

38. In the decade before his death in 1836, Madison’s correspondence dwelled on the legacy of his career in the Philadelphia Convention, as well as that of his presidency. Upon the publication of Robert Yates’s *Secret Proceedings and Debates of the Convention Assembled in 1821*, Madison defended his early convention proposals, especially his proposal to give Congress the power to negative state legislation, against the charge that they manifested a consolidationist impulse. See ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 166–67 (2010); see also RALPH KETCHAM, *JAMES MADISON: A BIOGRAPHY* 661 (1990); Arnold A. Rogow, *The Federal Convention: Madison and Yates*, 60 AM. HIST. REV. 323, 323–35 (1955).

39. See LaCroix, *supra* note 22, at 3 (discussing the constitutional framework surrounding the internal improvements debates and the substance of the Madison-Van Buren letters in that context).

struction of the Maysville Road in Kentucky.⁴⁰ In the veto message, Jackson cited previous vetoes by Presidents Madison and Monroe of similar internal improvements projects that were entirely within a single state to support his claim that the Congress lacked the power to appropriate funds for the road.⁴¹

Jackson placed particular emphasis on Madison's 1817 veto of the Bonus Bill, which he characterized as distinguishing between the power to appropriate funds for internal improvements and the power to execute the projects themselves. "[T]he administration of Mr. Madison was characterized by an act which furnishes the strongest evidence of his opinion" of the extent of Congress's appropriations power, Jackson wrote.⁴² "I have not been able to consider these declarations [by Madison] in any other point of view, than as a concession that the right of appropriation is not limited by the power to carry into effect the measure for which the money is asked, as was formerly contended."⁴³ Despite what he viewed as Madison's acknowledgment of a comparatively broader power to appropriate funds than to execute internal improvements, Jackson deemed the Maysville Road bill an unconstitutional extension of congressional authority. "I am not able to view it in any other light than as a measure of purely local character," Jackson concluded.⁴⁴ Indeed, if the road could be construed as a national project, "no further distinction between the appropriate duties of the general and state government, need be attempted: for there can be no local interest that may not with equal propriety be denominated national."⁴⁵ Consequently, Jackson vetoed the bill.

Jackson issued his veto on May 27, 1830.⁴⁶ One week later, on June 3, Madison wrote to Secretary of State Van Buren, taking exception to the veto message's characterization of his prior presidential acts.⁴⁷ Madison and Van Buren had exchanged letters four years earlier on the subject of internal improvements, when Van Buren had solicited the elderly statesman's views.⁴⁸ In that earlier correspondence, Van Buren had gone

40. Andrew Jackson, *Veto Upon an Act Authorising a Subscription of Stock in the Maysville, Washington, Paris, and Lexington Turnpike Road Company* (May 27, 1830), reprinted in ANNUAL MESSAGES, VETO MESSAGES, PROTEST, &C. OF ANDREW JACKSON, PRESIDENT OF THE UNITED STATES 27 (2d ed. 1835).

41. *Id.* at 30.

42. *Id.* at 29–30.

43. *Id.* at 30.

44. *Id.* at 31.

45. *Id.*

46. *Id.* at 27.

47. Letter from James Madison to Martin Van Buren (June 3, 1830), in 9 THE WRITINGS OF JAMES MADISON 1819–1836, at 375 (Gaillard Hunt ed., 1910).

48. Letter from James Madison to Martin Van Buren (Sep. 20, 1826), in 9 THE WRITINGS OF JAMES MADISON, *supra* note 47, at 251; Letter from Martin Van Buren to James Madison (Aug. 30, 1826), available at <http://rotunda.upress.virginia.edu/founders/default.xqy?keys=FOEA-print-02-02-0725>.

so far as to invite Madison to draft a constitutional amendment fixing the boundaries of congressional power over the vexed domain of internal improvements.⁴⁹ Madison's June 3 letter returned to that topic with Van Buren, Jackson's principal lieutenant and also the rumored author of the 1830 veto message.⁵⁰ Madison's letter was brief. After thanking Van Buren for transmitting a copy of Jackson's veto message to him, Madison wrote:

In returning his thanks for this polite attention, he regrets the necessity of observing that the Message has not rightly conceived the intention of J. M. in his veto in 1817, on the Bill relating to Internal Improvements. It was an object of the veto to deny to Congress as well the appropriating power, as the executing and jurisdictional branches of it.⁵¹

Following this correction of Jackson's erroneous understanding of Madison's state of mind in 1817, Madison built his case by invoking broader public meaning at that earlier date:

And it is believed that this was the general understanding at the time, and has continued to be so, according to the references occasionally made to the document.⁵²

But then Madison finished on a note of humility:

Whether the language employed duly conveyed the meaning of which J. M. retains the consciousness, is a question on which he does not presume to judge for others.⁵³

He then ended his letter with a "tender[] to Mr. Van Buren renewed assurances of his high esteem & good wishes."⁵⁴

Van Buren replied quickly. On June 9, he wrote that he had shown Madison's June 3 letter to Jackson, "who requests me to express his regret that he has misconceived your intentions in regard to your veto on the Bill for Internal Improvements in 1817."⁵⁵ Moreover, Van Buren wrote, Jackson would endeavor to "correct the error in informal conversations."⁵⁶ And should Madison desire a "more formal correction," Jackson would comply.⁵⁷ Van Buren then "venture[d] to intrude once more upon [his] retirement" by requesting Madison's views on the ongoing struggle over internal improvements.⁵⁸

49. Letter from Martin Van Buren to James Madison (Aug. 30, 1826), *supra* note 48.

50. See Van Buren's 1850s autobiography (claiming that he had advised Jackson to veto the Maysville Road bill and then drafted the veto message). MARTIN VAN BUREN, *THE AUTOBIOGRAPHY OF MARTIN VAN BUREN* 324–330 (John C. Fitzpatrick ed., 1920).

51. Letter from James Madison to Martin Van Buren (June 3, 1830), *supra* note 47.

52. *Id.*

53. *Id.*

54. *Id.*

55. Letter from Martin Van Buren to James Madison (June 9, 1830), available at <http://rotunda.upress.virginia.edu/founders/default.xqy?keys=FOEA-print-02-02-02-2070>.

56. *Id.*

57. *Id.*

58. *Id.*

Madison obliged with a lengthy letter in which he discussed several of the most salient points of the debate surrounding internal improvements. He began, however, with another reference to the misinterpretation of his 1817 veto:

On the subject of the discrepancy between the construction put by the message of the President on the veto of 1817, and the intention of its author, the President will of course consult his own view of the case. For myself, I am aware that the document must speak for itself, and that that intention cannot be substituted for the established rules of interpretation.⁵⁹

One would be hard pressed to find a more striking example of intertemporal interpretation than this statement by a former president to a sitting president, on the subject of a recent veto message that cited a thirteen-year-old veto message by the former president—a former president who was also the drafter of the Constitution and a participant in the ratification debates. In contrast to a neat linear chronology of generations following each other one at a time, the Madison-Van Buren letters remind us of the messiness of constitutional interpretation over time. Even when a living representative of a previous generation—indeed, the previous generation that will come to be regarded as the decisive one for interpretive purposes—is available to explain his earlier statements, the fact that the explanation is unfolding in a later historical moment necessarily contaminates the earlier sample with the concerns and biases of the later period.

The exchange between Madison and Van Buren also illustrates the potential hazards of intertemporal interpretation. Later generations may have difficulty hearing their predecessors' words, let alone comprehending their meaning. Madison's July 5 letter acknowledges this potentially insurmountable barrier to translation.⁶⁰ Even at a distance of less than two decades, Madison's comments suggest that not only was the Madison of 1830 different from the Madison of 1817, the written record produced by the 1817 Madison had acquired an independent existence and meaning that had moved beyond the control of the 1830 Madison.⁶¹ Moreover, the 1830 Madison recognized these limitations on his ability to assert interpretive authority over his own statements. Madison's distinction between authorial "intention" and the "established rules of interpretation"

59. Letter from James Madison to Martin Van Buren (Jul. 5, 1830), in 9 THE WRITINGS OF JAMES MADISON, *supra* note 47, at 376.

60. *Id.*

61. Cf. DEREK PARFIT, REASONS AND PERSONS 149–86 (1984) (discussing discontinuities in personal identity across time); Alison L. LaCroix, *Temporal Imperialism*, 158 U. PA. L. REV. 1329, 1354–55 (2010) (describing the complexities of intertemporal constitutional adjudication); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996) (arguing that the common law approach of constitutional interpretation, which looks to evolving legal standards over time rather than to any particular authoritative source, provides a better explanation of American practices of constitutional interpretation than textualism or originalism).

implies a belief in objective modes (“rules”) of interpretation,⁶² and perhaps also a sense that the meaning of his veto message was simply the product of its audiences’ understanding. Despite Van Buren’s repeated entreaties for Madison to state a remedy for Jackson’s mischaracterization of the 1817 veto message,⁶³ Madison declined to offer what he surely knew would become an authoritative fiat from one of the last surviving members of the founding generation.

Conclusion.

In *America’s Unwritten Constitution*, Amar does not offer a detailed account of how the unwritten Constitution is transmitted over time. Yet in order to understand what is and what is not included in the unwritten Constitution, and what constitutes an epochal moment, we must have a sense of what the Constitution looks like in the periods between epochal moments such as the founding and Reconstruction.

The early nineteenth century offers an unparalleled site for exploring the transmission of the Constitution, both written and unwritten. Interbellum legal and political observers saw themselves as living in the aftermath of the founding. As the second generation struggled to define the scope of the Constitution, they were acutely and uncomfortably aware of the need to drape themselves in the founders’ mantle even as they confronted a rapidly changing political, economic, and legal landscape. In contrast to the founding, Reconstruction, and the New Deal, the early nineteenth century has received relatively little recent, sustained attention from legal historians. The period is ripe for a rigorous and fine-grained account of constitutional thought and practice, and the constitutive role of law and politics in shaping the decades between the Revolution and the Civil War. The interbellum period witnessed important initial efforts to put the theories of the Constitution into practice, even as westward expansion, the emergence of political parties, and economic crises put pressure on the original understandings that underpinned the words of the written text.

62. See *supra* note 59 and accompanying text.

63. The exchange appears to have ended with another request from Van Buren:

If you have any choice as to the course which may be pursued by the President, in regard to the misconstruction of your Veto to the Bill for the disposition of the Bonus had from the Bank of the United States[,] I wish you had intimated it. It would I know be most agreeable to the President to write that which would prove most acceptable to yourself.

Letter from Martin Van Buren to James Madison (Jul. 30, 1830), available at <http://rotunda.upress.virginia.edu/founders/default.xqy?keys=FOEA-print-02-02-2113>.