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"NO WORD IS AN ISLAND": TEXTUALISM AND
AESTHETICS IN AKHIL REED AMAR'S *THE BILL OF
RIGHTS**

Robert Spoo**

Akhil Reed Amar's *The Bill of Rights: Creation and Reconstruction* ("The Bill of Rights")¹ probes three defining moments of American constitutional history—two of them in the contested past and one in the restless present. The first two are the performative acts of framing, in 1789 and 1868, respectively, of the initial ten amendments and of the Fourteenth Amendment to the United States Constitution. For Amar, history is too multivalent, and the Framers' text too loftily open-textured, for simple answers to the vexed question of incorporation. The Bill of Rights is, in one of Amar's controlling metaphors, an "alloy" of majoritarian and individual rights, federalism and civil liberties, that admits of no facile or mechanical incorporation against the states.² The Fourteenth Amendment, in its turn, is a complex text woven in response to a "complicated reality."³ Indeed, Amar sees history and text as related to each other in richly homologous ways. This interrelation, which is perhaps the overarching concern of his book, demands the interpreter's most sensitive and nuanced ministrations. Historical insensitivity can lead to anachronism, a cardinal sin in Amar's hermeneutic theology.⁴ Textual recklessness can result in exegetical sole-

* The quotation in the title of this essay, "[n]o word is an island," is taken from Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 499 (1989).

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

2. See AMAR, *supra* note 1, at xiv (referring to "[c]ertain alloyed provisions of the original Bill—part citizen right, part state right—[that] may need to undergo refinement and filtration before their citizen-right elements can be absorbed by the Fourteenth Amendment").

3. *Id.* at 180.

4. See, e.g., *id.* at 401 (incorporating into the index entry for "Fairman, Charles"

cism, a related, or perhaps correlated, blunder. The interpreter of the Bill of Rights thus takes on a challenge and a responsibility: to fashion an adequate response to the problem of the Framers' "alloy."

The performative act of interpretation in the present, whether by judge, scholar, or ordinary citizen, is a third defining moment of constitutional history. This essay examines Amar's contribution to this ever-unfolding moment: his interpretive methodology and practice in *The Bill of Rights*. In particular, I focus on his use of aesthetic criteria and strategies as supplements to constitutional argument. As a textualist with presentist commitments to We the People's Constitution, Amar is attentive to the plain—or what Justice Story called the "fair"⁵—meaning of the document's words. Yet, as a cunning intratextualist and structuralist, Amar discovers ambitious verbal and institutional relationships within the eight corners of the Constitution and the Bill of Rights that challenge even as they enrich the plain meaning of the text. As an intertextualist and historian, he recognizes that text is rarely self-sufficient, that it often stands in need of resourceful supplementation. Ultimately, Amar's restless eclecticism makes him something of a "hypertextualist" in the sense used by Digital-Age enthusiasts: He draws upon multiple interpretive media—or what Philip Bobbitt calls "archetypes"⁶—for each of his acts of exegesis. History, text, structure and, less often and more ambivalently, doctrine, combine to forge and temper a strategy of "refined incorporation" which Amar holds to be the interpreter's most satisfying response to the alloy of the Bill of Rights.

This essay examines Amar's complexly "alloyed" project of using text and history to interpret text and history. Part I probes his own carefully chosen metaphors for this project, from macrostructural figures of Creation and Reconstruction, to microstructural images for incorporation drawn from the language

the sub-entry, "anachronistic views of").

5. PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 25 (1982) (quoting Justice Joseph Story's reference to "the fair meaning of the words of the [Constitution's] text" in 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 407, at 391 n.1 (1st ed. 1833) [hereinafter COMMENTARIES]).

6. *Id.* at 7.

of metallurgy. Part II focuses in detail on Amar's textualist theory and practice, paying special attention to his strategy of intratextualism. The category of the aesthetic looms large in Amar's project, and one of the goals of this essay is to isolate and weigh the value of aesthetic and literary criteria for constitutional argumentation. Part III, accordingly, explores similarities between Amar's exegetical strategies and those of the literary-critical school known as the New Criticism. Amar's attentiveness to holistic meanings, intratextual echoes, and semantic nuances makes him something of a constitutional New Critic and renders the Constitution under his scrutiny a "verbal icon" of the type celebrated by that interpretive school.⁷ Although it would be too much to say that Amar raises aesthetic response to the level of an archetype of constitutional grammar—thus adding a seventh mode to Bobbitt's typology—the language of aesthetic pleasure and coherence plays an important role in Amar's intratextualism. Aesthetic and historical argument interact richly in *The Bill of Rights*. The nature and validity of that interaction are the chief focus of this essay.

I. MACROSTRUCTURES OF MEANING: CREATION AND RECONSTRUCTION

Interpretive purpose pervades *The Bill of Rights* from the most unadorned expository sentence to the loftiest rhetorical figure. Polemical structures of meaning emerge early and insistently in the book—as soon, in fact, as the title of Part One, "Creation," the first of many indications that the 1789 Bill of Rights is to be regarded as an organic thing, the living product of a collaboration. The Bill was, Amar says, "a creature of its time."⁸ That word "creature" points in at least two directions, reminding us, on the one hand, that this document that seems to accompany us so easily into the late twentieth century was given its shape, or "created," in an unfamiliar past and, on the other, that as a living "creature" the text has the potential to change as we change. We are thus forewarned and reassured in

7. See generally WILLIAM K. WIMSATT & MONROE C. BEARDSLEY, *THE VERBAL ICON: STUDIES IN THE MEANING OF POETRY* (1954); see also discussion *infra* Part III.B.

8. AMAR, *supra* note 1, at 3.

the same moment: Amar will require us to show a healthy respect for the alien qualities of the past lest we forget that it is an historical document that we are expounding and pitch headlong into anachronism. At the same time, we can be confident that the expounded text will continue to answer to our present concerns, that our efforts at historical-mindedness will not plunge us into antiquarianism.⁹ In the trope of "Creation," Amar the textualist offers a glimpse of his ambitiously hybrid methods and goals: Exegesis will call upon history to make a plain-meaning text speak the more plainly and richly to present purposes. The hint of paradox that lurks in this promise will unfold itself more fully later on.

On the practical level of exegesis, "Creation" requires putting "first things first."¹⁰ We must remove our accustomed modern "spectacles,"¹¹ which cause us to see the Bill of Rights almost exclusively in terms of individual civil liberties, and re-focus on the Bill's original majoritarian function as a bulwark against a powerful and potentially self-dealing central government. "Reconstruction" is the second step in the corrective process. Like "Creation," this term faces in two directions. On the one hand, it refers to certain transforming historical events: the national effort to restore the ex-Confederate states to civil government and the legislative saga of framing and ratifying the Fourteenth Amendment. On the other, it points steadily to the interpretive present: the job of taking these freshly re-historicized rights and remodeling them in the individualizing spirit of "privileges and immunities." This task of translation requires "not incorporating clauses mechanically but reconstructing rights."¹² Only in this way can the textualist "Reconstruct the Creation vision."¹³

9. See generally FRIEDRICH NIETZSCHE, THE USE AND ABUSE OF HISTORY, in 5 THE COMPLETE WORKS OF FRIEDRICH NIETZSCHE (Oscar Levy ed. & Adrian Collins trans., 1909) (1874) (distinguishing among antiquarian, monumental, and critical conceptions of history).

10. "First Things First" is the title of Part I, Chapter One. AMAR, *supra* note 1, at 3.

11. *Id.* at 7.

12. *Id.* at 254.

13. *Id.* at 59.

A. *Birth and Rebirth: The Lincoln Leitmotiv*

Echoing the macrostructure of Creation and Reconstruction are Amar's persistent metaphors of birth and rebirth, which he uses to reinforce and vary the first dyad. He refers early on, for example, to "the world that birthed the Bill,"¹⁴ and later to the men—James Madison, Thomas Jefferson, Patrick Henry—"whose combined travails helped birth the Bill of Rights."¹⁵ Congressman John Bingham, Amar says, was "the father of the Bill's rebirth in section 1 of the Fourteenth Amendment,"¹⁶ and it is only by the collective efforts of the "men and women" who fought against the slave power that "our Bill of Rights was re-born."¹⁷

These obstetric images subtly remind us that, in addition to its arch-heroes James Madison and John Bingham, *The Bill of Rights* pays tribute implicitly and pervasively, though rarely by name, to Abraham Lincoln, who serves throughout as a kind of tutelary spirit of structure. Lincoln, too, pressed the paradox of male childbearing in his Gettysburg Address: "Fourscore and seven years ago our fathers brought forth on this continent a new nation, conceived in liberty, and dedicated to the proposition that all men are created equal."¹⁸ The slight shock of the obstetric image prepares us for appreciating the strangeness of the process that Lincoln describes: the founding of a nation on the airy basis of an abstract proposition, a mere idea of equality. As Garry Wills notes, "[t]he act of bringing forth a new nation conceived in liberty is always an *intellectual* act for Lincoln."¹⁹ Moreover, the veiled pun on "nation," with its Latinate ties to "natal" and "nativity," allows Lincoln to nudge forward

14. *Id.* at 3.

15. *Id.* at 158.

16. *Id.*

17. *Id.* at 294.

18. Abraham Lincoln, Address at Gettysburg, Pennsylvania (Nov. 19, 1863), in *LETTERS AND ADDRESSES OF ABRAHAM LINCOLN* 289, 289 (1903). Amar self-consciously echoes the Gettysburg Address at various points in *The Bill of Rights*. See, e.g., AMAR, *supra* note 1, at 110 ("The jury, as a local body, beautifully fit the localism of the Revolutionary era; but some fourscore years later the Civil War brought the surrender of the banner of extreme localism to the freedom flag of Union.").

19. GARRY WILLS, *LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA* 85 (1992).

his birth metaphor on the witty authority of etymology, thus paving the way for the resounding promise of a “new birth of freedom” at the conclusion.²⁰

The pervasive ghostly presence of the Gettysburg Address in *The Bill of Rights* quietly lends structure and authority to Amar’s own master narrative. Reduced to its simplest form, that narrative declares: The birth of majoritarian rights in the Bill was followed some eighty years later by their miraculous rebirth as individual liberties from the same textual source. The miracle, of course, is that a single text could bear such different offspring at such antithetical moments in our nation’s history. The two sets of rights are thus fraternal twins in their uncanny mix, or alloy, of sameness and difference. To give point to this paradox, Amar subtly borrows from the anguished theologizing of Lincoln’s Second Inaugural Address, transposing its logic from the military and moral realm to the historical and legal one. Where Lincoln asks his listeners to suppose that the slave interest is an offense for which God sent the war as punishment and expiation,²¹ Amar points to the original Bill’s “quiet complicity with the original sin of slavery”²² and notes that, in affirming the freedom and citizenship of all, the Reconstruction Framers “renounced the Slave Power and all its works.”²³ Both narratives are profoundly redemptive. The American nation fell prey early on to the original utilitarian sin of enthralling the few to the many; a stiff-necked people persisted in this error beyond God’s appointed time; social upheaval and war were given to cleanse the sin and make a new start. As a textualist, of course, Amar anchors this story in the words of the Bill itself; indeed, he is not far at times from suggesting that the original Bill’s words bore the taint of majoritarian iniquity²⁴ just so long as the slave interest continued—this is one of the subtler nuances of “alloyed” amend-

20. Abraham Lincoln, Address at Gettysburg, Pennsylvania (Nov. 19, 1863), in *LETTERS AND ADDRESSES OF ABRAHAM LINCOLN*, *supra* note 18, at 289, 290.

21. See Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), in *LETTERS AND ADDRESSES OF ABRAHAM LINCOLN*, *supra* note 18, at 316, 318.

22. AMAR, *supra* note 1, at 293.

23. *Id.* at 294.

24. For a discussion of the moral complicity of the Bill of Rights in the Constitution’s perpetuation of the slave power, see *infra* note 33 and accompanying text.

ments—and that those words required the Fourteenth Amendment to “refine” and cleanse them.

Amar can offer this textualist theology without risking infidelity to history. Rather, it was the anti-incorporationist scholar Charles Fairman who showed himself to be “anachronistic” in ignoring the import of John Bingham’s constitutional faith and the religious rhetoric with which that Congressman endeavored to inspire his colleagues in the House.²⁵ Amar adds that “Hugo Black, not Charles Fairman, proved the more faithful historian, for he understood—because he shared—the almost mystical attachment to the Bill of Rights exemplified by John Bingham.”²⁶ Here, reliable historiography consists not in detached skepticism but in participatory sympathy. The textualist Black, choosing the faith of total incorporation over the Laodicean hairsplitting of selectivity and the Pharisaical aridity of fundamentalism,²⁷ could enter into the mind and spirit of the Reconstruction Framers because he personally felt the urgency of their project. Thus, textualism, despite its presentist tendencies, can meet history on its own terms through an intersubjective hermeneutics²⁸ of the kind Amar practices in fitting his language with the religious iconography of Bingham and Lincoln. The textualist can gain access to an alien past by

25. See AMAR, *supra* note 1, at 191. In Part Two of *The Bill of Rights*, Amar devotes considerable space to refuting the influential anti-incorporationist arguments in Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949). See, e.g., AMAR, *supra* note 1, at 197-206 (contesting Fairman’s theory that, since the ratifiers of the Fourteenth Amendment were virtually silent on the question of incorporation, they could not have intended the Amendment to incorporate the Bill of Rights).

26. AMAR, *supra* note 1, at 191.

27. I refer to William Brennan’s “selective incorporation” model and Felix Frankfurter’s “fundamental fairness” doctrine. See *id.* at xiv.

28. By “intersubjective hermeneutics,” I mean an approach to the search for historical truth that centers on notions of personal contact with the “mind” of the past. Various described as idealistic, hermeneutic, or existential historiography, and exemplified by Jules Michelet, Wilhelm Dilthey, Benedetto Croce, R.G. Collingwood, and others, this approach is ultimately Romantic in tendency. See, e.g., R.G. COLLINGWOOD, *THE IDEA OF HISTORY* 219 (1946) (“If it is by historical thinking that we re-think and so rediscover the thought of Hammurabi or Solon, it is in the same way that we discover the thought of a friend who writes us a letter, or a stranger who crosses the street . . .”); see also HAYDEN V. WHITE, *Interpretation in History, in TROPICS OF DISCOURSE: ESSAYS IN CULTURAL CRITICISM* 51, 79 n.30 (1978) (discussing “history as palingenesis,” a resurrecting of the mind and personality of the past, as practiced by Michelet and others).

conforming his language sympathetically to the rhetorical forms of that past. A time machine built of language is the vehicle of choice for the text-oriented interpreter.

B. *Controlling Metaphors: Alloys, Crucibles, and Filters*

It is impossible to read *The Bill of Rights* and not be struck by Amar's persistent use of metallurgic images to figure textualist methodology. Ores, alloys, crucibles, and filters appear so frequently in Amar's theory and practice that these images take on an explanatory life of their own and begin to rival the redemptive story of Creation and Reconstruction as a master narrative of methodology. Of course, Amar's expressive metallurgy and his Lincolnesque theology are not wholly unrelated. One feature common to alloys and crucibles is the element of fire, and the retributive and purgatorial fires of the Civil War often seem to be playing about the edges of Amar's metaphors. Lincoln, himself, set the pattern for this range of imagery, most famously in his description of the war as "[t]he fiery trial through which we pass."²⁹ Something of Lincoln's sense of fated and traumatic history seems to be echoed at times in Amar's images of fire-forged and fire-tempered metals.

"Certain alloyed provisions of the original Bill—part citizen right, part state right—may need to undergo refinement and filtration," Amar says, "before their citizen-right elements can be absorbed by the Fourteenth Amendment."³⁰ At first blush it seems odd, even infelicitous, to figure the original Bill as a compound of alloys, a derivative substance. Something earthier and pre-metallurgic would seem more fitting in the case of our national "decatalogue,"³¹ and indeed Amar occasionally does vary the alloy metaphor, as in his reference to the "mixed ore in which [citizen rights] are embedded in the 1789 Bill."³² Yet, upon closer inspection, the alloy figure grows in aptness with respect to both its primary referent—the challenging blend of citizen rights and state rights originally fused into the Bill and

29. Abraham Lincoln, Annual Message to Congress (Dec. 1, 1862), in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 666, 688 (Roy P. Basler ed., 1946).

30. AMAR, *supra* note 1, at xiv.

31. *Id.* at 9.

32. *Id.* at 222.

rendered progressively confused by our preoccupation in this century with individual rights—and its other connotations. Certainly any document as thoroughly a product of partisan concession and compromise as was the original Bill must be regarded as a kind of political alloy or amalgam. One of those compromises, I have suggested, is responsible for the faint pejorative sense of impurity or inferiority that “alloy” carries in Amar’s usage: In failing to address the evil of slavery that was furtively installed in Articles I and IV of the Constitution,³³ the Bill perpetuated the alloyed impurity and moral indecisiveness of the precursor document. The sins of the parent text were visited upon its offspring.

Textualism is never far from history in *The Bill of Rights*, and Amar’s alloy metaphor straddles both forms of constitutional argument. Looked at from a textual point of view, the alloyed Bill poses a problem of translation: How can we best give voice to what is “utterable” in an amendment at a given moment in history, to what can be heard and accepted within prevailing norms of constitutional originality and validity?³⁴ Furthermore, what will we find to be utterable in that moment: structural, majoritarian values, or individual, minority truths? If the particular truth we seek is not utterable, how may we legitimately translate the intractable provision in order to convey that truth and make it enforceable in the courts of law and conscience?

33. See U.S. CONST. art. I, § 2, cl. 3 (providing that each slave be counted as three-fifths of a person for purposes of House representation); *id.* art. I, § 9, cl. 1 (prohibiting Congress from interfering with slave importation until 1808); *id.* art. IV, § 2, cl. 3 (providing for the return of fugitive slaves); see also MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 19-20 (1986) (discussing the Constitution’s slavery provisions in the light of the nation’s conflicted efforts “simultaneously to protect liberty and slavery”).

34. I have taken the term “utterability” and the concept of translation from Lawrence Lessig. See Lawrence Lessig, *Understanding Federalism’s Text*, 66 GEO. WASH. L. REV. 1218, 1223 (1998) (“Sometimes [textualist] implications, in context, are unutterable. In these cases—where the plain text seems unutterable—utterability constrains the Court to find a different, and sometimes a more faithful, reading.”) [hereinafter Lessig, *Understanding*]; see also Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 193 (arguing, in the context of federalism and the growth of the commerce power, that “to be faithful to the constitutional structure, the Court must be willing to be unfaithful to the constitutional text” by translating the Framers’ vision of limited federal power into the context of today) [hereinafter Lessig, *Translating*].

Viewed from the perspective of history, the alloyed text poses the same question in a different idiom: How may we characterize an amendment in such a way as to avoid the pitfalls of anachronism? If our obligation as historians is to historical truth, is it not precisely the alloyed quality of the text—its uneven mix of collectivist protections and private immunities, its Janus-faced anxiety about the tyranny of government and the will of an overweening majority—to which we must attend? From the standpoint of purist historiography, our translations of text must do more than merely avoid the appearance of extralegal political considerations;³⁵ they must respect the past's heterogeneous, at times incoherent survival into the present. It is possible to betray that heterogeneity by making too much sense of it. The *traduttore*, as the old chestnut reminds us, can quickly become a *traditore*. The imperatives of presentism can undermine fidelity to the past.

The conscientious historian of the type just described dominates Part One of *The Bill of Rights*, and James Madison, the consummate alloyed man,³⁶ is the fitting symbol of that conscience. For Madison was a Federalist who recognized the danger posed by a strong central government to popular majorities; yet he also drafted a constitutional amendment that would place a check on the majoritarian aggressions of states, much as the Fourteenth Amendment would later do.³⁷ In his prescient inconsistencies,³⁸ Madison was a dynamic blend of residual, dominant, and emergent forces of history; indeed, he can be seen as the very personification of alloyed, heterogeneous

35. Lessig calls this the "Frankfurter constraint"—the requirement that a reading offer a rule that can be applied in context without "appearing political." Lessig, *Understanding*, *supra* note 34, at 1224 (quoting Lessig, *Translating*, *supra* note 34, at 174).

36. In referring to Madison as the "alloyed man," I mean to make vivid the fact that he embodied conflicting forces in history. This makes him an especially appropriate personification of the historical process itself, which Amar figures as complicated and heterogeneous throughout *The Bill of Rights*, particularly in Part One.

37. See AMAR, *supra* note 1, at 143-44; see also *id.* at 237 (describing Madison's dual "concern" with the agency problem of government and the factional problem of tyrannous majorities).

38. See *id.* at 77 (describing Madison as "ahead of his time"); see also *id.* at 159-60 (stressing that Madison was "a man ahead of his time"). To be ahead of his time in Madison's case was not to be somehow outside or beyond history, but to be radically responsive to its complex interweavings of residual, dominant, and emergent forces.

history, a strange interweaving of the utterable and the unutterable (his failed Fourteenth Amendment having been deemed unutterable by a majority of Congress).

Part Two of Amar's book is dominated by Congressman John Bingham, who, in contrast to Madison, represents not alloyed history but a kind of triumph over the complicated past in the interests of zealous translation. Bingham actualized in the Reconstruction Era what had remained merely a potential of the Creation Era—the broad recognition of civil liberties—although “the conventional narrative uses Madison as an anachronistic trope in lieu of Bingham.”³⁹ Bingham was the expansive incorporationist and the true creator of a “Bill of Rights,” who oversaw the process by which individual privileges would come to revise, or translate, the majoritarian accent of the first ten amendments. Whereas the dominant exegetical presence of Part One is the fastidious historiographer who shuns anachronism (“first things first”), a different though related figure, that of the prudential textualist,⁴⁰ comes to the fore in Part Two. This is not to say that historical argument is unimportant in Part Two; to the contrary, arguments from history probably play a quantitatively greater role there than in Part One. But the qualitative accent of Part Two seems to me to be on text in translation, and the tireless, unalloyed Bingham is the presiding spirit of that project.

When I say that the “prudential textualist” comes to dominate the second half of the book, I have in mind, for example, Amar's pragmatic-sounding remark that “I have told a tale that, at the end of the day, ends up supporting most of today's

39. *Id.* at 291.

40. By “prudential textualist” I mean a textualist who is prepared to make use of prudentialist arguments when a text fails to yield a clear or complete meaning. See BOBBITT, *supra* note 5, at 61 (When there is “no text which states the priority to give one [text] over others, there will be no textual argument that can resolve the balance. It becomes then a matter of prudence, a calculation of the necessity of the act against its costs.”). Prudential arguments advance “particular doctrines according to the practical wisdom of using the courts in a particular way.” *Id.* at 7. I do not mean to suggest that Amar ever strays far from textual-historical moorings, but rather that, in Part Two, a certain interpretive imperative—that of demonstrating almost total incorporation—gives a prudential accent to his analyses. Since prudentialism is a valid form of constitutional argumentation, see *id.* at 59-73, Amar's textual polemics never become “ungrammatical.”

precedent about the Bill of Rights.”⁴¹ This is only superficially a doctrinal statement. Amar’s point is that doctrine, taking its own circuitous and often benighted way, has managed somehow to wind up at the same destination as careful textual-historical analysis, no, or little, thanks to judges: “[C]ourts today have ended up in pretty much the right place, even if they have not always offered the best textual and historical reasons.”⁴² These are the confident words of the textualist who, having vindicated Bingham and argued for the truth of near-total incorporation, has carried the day against the professional contrarians.

How different tonally is the warning of the cautious historian concerning the seductions of mechanical incorporation: “The reality is, alas, more complicated.”⁴³ The sober, almost melancholy acknowledgment of the alloyed quality of history and text sounds the Madisonian note discussed above. That sighed “alas,” however, glances at the Republican impatience of Bingham, a restless mood that grows, and grows victorious, throughout the balance of the book.

I do not wish to force the argument here, nor to categorize Amar’s strategies too rigidly according to archetypes. I speak of perceived tendencies only, and it is my perception that history plays a special foundational role in Part One, preparing the way for the prudential textual-historical arguments of Part Two. Historical complexity is faced squarely in Part One as a prologue to translating that complexity in the interests of minority rights in Part Two. Or, to put the matter somewhat differently, and perhaps gnomically, Amar must formulate the general epistemic problem of history as it is manifested in text (the alloyed Bill) before he can use text (refined incorporation) to address the specific pragmatic problem of countermajoritarian history.

The central textualist enterprise of Part Two is thus a deeply principled one: the elaboration of a “refined model of incorporation” that tests a given provision of the Bill of Rights by asking “whether it is a personal privilege—that is, a private right—of individual citizens, rather than a right of states or the public at

41. AMAR, *supra* note 1, at 307.

42. *Id.*

43. *Id.* at 180.

large.”⁴⁴ Guided by the historical and textual implications of the Fourteenth Amendment’s Privileges or Immunities Clause, refined incorporation seeks to “synthesize the strengths” of “Hugo Black’s total incorporation model, William Brennan’s selective incorporation approach, and Felix Frankfurter’s anti-incorporationist emphasis on fundamental fairness.”⁴⁵

Amar characterizes this synthesis as an “alloy of the three seemingly incompatible elements” or theories of incorporation that “will prove far more attractive and durable than each unalloyed component.”⁴⁶ The alloy metaphor thus surfaces again, but this time with a difference. For there is no hint here of the pejorative sense of “alloy,” the sense of metallic weakness or impurity. Here the synthesizing textualist takes three metals, each of which is brittle and inferior in its own right, and melts them down to forge a superior compound substance.⁴⁷ In this endeavor, the textualist has the fires of history on his side. “Clause by clause, amendment by amendment, the Bill of Rights was refined and strengthened in the crucible of the 1860s. Indeed, the very phrase *bill of rights* as a description of the first ten (or nine, or eight) amendments was forged anew in these years.”⁴⁸ Abolitionism, war, assassination, Radical Republicanism, Reconstruction: These very real movements and events prepared the crucible for the arduous process of incorporation. The textualist, at his own more rarefied furnace, melts and mixes the hermeneutic metals that will permit late-twentieth-century scholars and jurists to perceive more clearly the meaning of that historical forging process of the 1860s.⁴⁹

44. *Id.* at 221.

45. *Id.* at 214.

46. *Id.* at 140.

47. One reason why the total, selective, and fundamentalist models of incorporation are inferior metals is that each in its own way is abstract and conceptual, lacking the tangible evidentiary basis that exists for the textualist approach (recorded language) and the historical approach (recorded events).

48. AMAR, *supra* note 1, at 284.

49. Amar’s efforts at refined incorporation complement not only the process of Reconstruction history generally, but also the specific efforts of Republican Reconstructionists. He argues, for example, with regard to Second Amendment incorporation: “Once we remember that, strictly speaking, 1860s Republicans sought not to incorporate clauses but to apply (refined) rights against states, it seems rather natural textually that Reconstructionists . . . invoked the operative rights clause of the Second Amendment while utterly ignoring its preambulatory ode to the militia.” *Id.* at 259. Thus, the goal of incorporating individual privileges (arms-bearing) and of filter-

Bingham's Privileges or Immunities Clause, precisely because its language neither matches that of the original Bill nor even refers directly to the Bill, is the proper equipment for absorbing citizens' rights and filtering out states' rights. Where verbal duplication would have led to judicial perplexity or paralysis, asymmetry allows for differential incorporation and opens up spaces for constructive choice.⁵⁰ In its turn, Amar's apparatus of refined incorporation seeks to repeat the differential function of Bingham's language at the level of scholarly interpretation. Thus, both scholarship and the judiciary can benefit from the handy and flexible mechanism of refined incorporation, in contrast to the cumbrous machinery of substantive due process. In various ways, then, Amar's project shows history and textualism to be homologous and collaborative, the one a source of ontological fact, the other an epistemic tool for recognizing and weighing that fact and making it a legal reality.

II. TEXTUALISM IN *THE BILL OF RIGHTS*

Textualism is easier to sling about as a label than to employ meaningfully in order to describe specific acts of constitutional interpretation. The term probably has as many definitions as it has definers. My present goal is not, in any case, to fix Amar in a formulated phrase, as J. Alfred Prufrock might say, but rather to see certain aspects of his textual practice in *The Bill of Rights* steadily and whole. Inevitably, this means paying scant attention to some aspects of that practice and altogether ignoring instances of his textualism in other books and articles.

A. *Plain Meanings and Recondite Meanings*

In approaching Amar's textualism, we might begin with something pre-textual and nonverbal such as a characteristic gesture—his habit of producing a small booklet version of the

ing out collective rights (militia-enrollment) is one shared by Amar and Senator Jacob Howard both—a further convergence of textualism and history.

50. See *id.* at 180 (noting that “[t]he wording of the Fourteenth Amendment is remarkably sensitive to [the] complicated reality [of incorporation],” and reminding us that the answer to such questions “will often be anything but mechanical, requiring considerable judgment and hard choices”).

Constitution from a jacket pocket. Hugo Black, a noted textualist precursor, was prone to the same gesture.⁵¹ This expressive act attests to much more than a distrust of memory, to which Black in fact confessed,⁵² or the quick-draw propensities of a man who would be right at ten paces in any constitutional dispute. Rather, the gesture says, in part: Behold, here is “a text with four proverbial corners. It actually uses words like ‘this Constitution’ to describe itself as a document It is an act, a doing, an ordainment and establishment, a constituting, a constitution.”⁵³ Moreover, a constitution is a written act, and “[w]ritten constitutionalism,” as Jed Rubenfeld has remarked, “is revolutionary.”⁵⁴ At a minimum, Amar’s gesture seems to say that “[this] text itself is an obvious starting point of legal analysis.”⁵⁵

Were it not small and portable, the United States Constitution could not be whipped out of a pocket. Its language, too, is portable in the sense that it is memorable and “lapidary.”⁵⁶ But if we cannot always tuck the text away in our memories—and a culture that has the Internet and CD-ROM will surely be tempted to forget about memory—we can fold a copy of the text into a family Bible or photograph album, bind it into the backs of dictionaries and history books, nail it to the walls of schoolrooms and government buildings, or carry it in our pockets. All of this, for Amar, means that this document ordained by “We the People” has profoundly and unavoidably to do with “popular sovereignty and self-government over time.”⁵⁷

51. See BOBBITT, *supra* note 5, at 33 (describing an incident where Justice Black “produc[ed] from his coat pocket a small copy of the Constitution” to answer a reporter’s questions).

52. See *id.*

53. Akhil Reed Amar, *A Few Thoughts on Constitutionalism, Textualism, and Populism*, 65 *FORDHAM L. REV.* 1657, 1657 (1997). As Amar made these remarks, he brandished his “handy-dandy pocket copy” of the Constitution. *Id.*

54. Jed Rubenfeld, *The Moment and the Millennium*, 66 *GEO. WASH. L. REV.* 1085, 1105 (1998). Rubenfeld compares the writtleness of our Constitution to “the speechmodeled ideal of self-government exemplified by the ancient Greek polis or the New England town meeting.” *Id.*; cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (noting that “[t]he powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written”).

55. AMAR, *supra* note 1, at 296.

56. Amar, *supra* note 53, at 1658; cf. AMAR, *supra* note 1, at 195 (“Recall that the Bill [of Rights] was in fact worded so that, like Scripture, it might be easily memorized and internalized by ordinary Americans.”).

57. Amar, *supra* note 53, at 1658; cf. AMAR, *supra* note 1, at 27 (noting that

The brevity and availability of the document ensure that we the people will always be given notice of our most basic rights.

This idea of notice presupposes, in addition to writtenness and physical accessibility, two fundamental textual conditions: plain meaning and relevance to present concerns. Yet both of these conditions are widely and vigorously debated by scholars and jurists. The two concepts are mutually related in that any text that is likely to remain relevant to present-day concerns will probably be more or less intelligible to the common reader, and its intelligibility will turn on its capacity to accommodate contemporary issues and meanings, lexical and otherwise. Philip Bobbitt defines "textual argument" as the type of argument "that is drawn from a consideration of the present sense of the words of the provision," and he distinguishes textual from historical argument by noting that the latter "requires the consideration of evidence extrinsic to the text."⁵⁸ Justice Joseph Story famously objected to Thomas Jefferson's preference for the Framers' documented intent as a source for fixing constitutional meaning by arguing that "there can be no security to the people in any constitution of government if they are not to judge of it by the fair meaning of the words of the text."⁵⁹ Story packed much of the textualist position into that brief riposte: the centrality of the people as interpreters, the necessity of notice, the importance of present relevance and of plain, or "fair," meaning. Plain meaning is indispensable to popular sovereignty; the people "cannot be presumed," says Story, "to admit in [constitutions] any recondite meaning."⁶⁰

Yet if popular constitutional government presupposes plain meanings, the activities of judges and scholars exist in large part because of recondite meanings. Quite plainly, constitutional meanings are sometimes recondite, or at least seem so. Just as plain meanings thrive on broad consensus as to present-day

"[t]he Preamble's dramatic opening words . . . trumpeted the Constitution's underlying theory of popular sovereignty").

58. BOBBITT, *supra* note 5, at 7.

59. *Id.* at 25 (quoting Justice Story in COMMENTARIES, *supra* note 5, § 407, at 391 n.1); *cf. Marbury*, 5 U.S. (1 Cranch) at 175 (resting interpretation of the Supreme Court's original and appellate jurisdiction on "the plain import of the words," "their obvious meaning").

60. BOBBITT, *supra* note 5, at 26 (quoting COMMENTARIES, *supra* note 5, § 451, at 437).

lexical definitions,⁶¹ recondite meanings are often the consequence of the passage of time. Meanings and intentions grow obscure as their origins recede into the inaccessible or contested past. If the phrase "high Crimes and Misdemeanors"⁶² is not intuitively perspicuous to our late-twentieth-century understandings, this is probably because such offenses and their requisite altitude in the context of public office are creatures of the era of Blackstone and Lord Mansfield. We must perform some kind of historical excavation to be sure of the meaning of such a phrase, and if we have to excavate, the one thing we can be fairly sure of is that we will never be entirely sure.

Rubinfeld argues that textualism, even when it seems most concerned with the past, keeps its gaze fixed upon the present because it is ultimately concerned with "the constitutional text as a vehicle for the voice of the people."⁶³ The textualist's originalism, says Rubinfeld, is not "Framers'-intent originalism," for it looks to the text as it was understood by "the *ratifying* public."⁶⁴ Yet this form of textualism escapes bondage to the *vox populi* of the past by holding that the public of the present day is free to amend the text at will. Thus, suggests Rubinfeld, the notion of ongoing tacit ratification by the people justifies the textualist in maintaining her presentist commitments.⁶⁵ Jeffrey Rosen also recognizes two sharply distinct kinds of textualist, one who asks "what the text means to us today, without any reference to its historical context," and

61. See *id.* at 26 ("To the textualist, an eighteenth-century dictionary is as illegitimate as a twentieth-century Brookings pamphlet. . . . But a consensus is usually available as to the common use of a particular term in a particular context.")

62. U.S. CONST. art. II, § 4.

63. Rubinfeld, *supra* note 54, at 1103.

64. *Id.* at 1102-03.

65. See *id.*; cf. BOBBITT, *supra* note 5, at 26 ("[T]extual arguments rest on a sort of ongoing social contract, whose terms are given their contemporary meanings continually reaffirmed by the refusal of the People to amend the instrument."); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 8 (1980) ("[T]he interpretivist [or textualist] takes his values from the Constitution, which means, since the Constitution itself was submitted for and received popular ratification, that they ultimately come from the people.").

another who asks “what the text would have meant to the people who framed and ratified it.”⁶⁶ Textualists on Rosen’s account are either sanguine know-nothings or grounded historians.

It is hard to recognize the Akhil Amar, or at least the whole Amar, of *The Bill of Rights* in any of these restrictive definitions. As a constitutional exegete, he is too eclectic, too bent on interpretive freedom, too alert to the multiple meanings and potential paradoxes of open-textured language raised to the level of principled generality, to be fairly confined to one or another of these schools of reading. Indeed, his methods are so inclusive as to seem at times to court inconsistency.

We should, however, be wary of drawing such a conclusion lest the inconsistency we perceive turn out to be an illusion projected by our own insistence on categories. On the question of plain meaning versus recondite meaning, for example, Amar has been criticized by Rosen for suggesting that the majority of present-day Americans would agree that “privileges or immunities” include most of the Bill of Rights.⁶⁷ Detached from its historical context, Rosen thinks, the phrase might mean precious little even to scholars. Indeed, if the Clause so clearly contemplates the sorts of rights enumerated in the Bill, why does Amar spend the better part of *The Bill of Rights* arguing from text, history, and structure that this is the case?

The answer is that the case for which he argues is not so simple. Like Rosen, Amar distinguishes between “the two main strands of textualism.” He notes that, “[a] plain-meaning textualist might look to today’s dictionaries to make sense of a contested term like ‘commerce’ or ‘cruel’ or ‘privileges’ or ‘process,’ whereas an original intent textualist might look to eighteenth-century dictionaries.”⁶⁸ Although both strands can be found in *The Bill of Rights*, sometimes woven together, sometimes lying apart, we miss the total interpretive picture if we keep our gaze fixed on one strand or the other. Amar in fact practices a “third distinct approach” that he calls “intra-

66. Jeffrey Rosen, *Translating the Privileges or Immunities Clause*, 66 GEO. WASH. L. REV. 1241, 1244 (1998).

67. See *id.* at 1244 & n.15.

68. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 788-89 (1999).

textualism." This approach "tries to use the Constitution as its own dictionary of sorts."⁶⁹

B. *Intratextualism as Therapy*

To say that the Constitution, or any document, can act "as its own dictionary" is, from a certain perspective, to speak here-
sy or nonsense. For if documents defined themselves, profes-
sional definers would become an endangered species, and schol-
ars, whose job is popularly understood to involve lugging about
heavy tomes for the purpose of explaining things, would find
themselves out of a job. This view holds that complex docu-
ments cannot be judges in their own cause. They must be inter-
preted on the basis of extrinsic evidence, that is, by historical
events or by relevant contemporaneous documents. These are
the kinds of dogmatic assumptions that the intratextualist sets
at defiance, or at least tries to complicate.

Amar conceives of intratextualism as a therapy for what
John Hart Ely called "clause-bound" interpretation.⁷⁰ Ely dis-
tinguished between narrow and broad "interpretivism,"⁷¹ defin-
ing the latter as the recognition that some content extrinsic to
a particular constitutional provision is necessary for a full un-
derstanding of that provision, and adding that "the theory one
employs to supply that content should be derived from the
general themes of the entire constitutional document and not
from some source entirely beyond its four corners."⁷² To draw
an analogy from a very different discipline, we might say that
fixation upon specific clauses, a practice encouraged by the
doctrinal approach to exegesis, is to constitutional interpretation
what neurosis is to mental health: a contraction of the free and
full play of faculties in the service of a misguided kind of prob-
lem-solving.⁷³ The therapy for the neurosis of clause-bondage is

69. *Id.* at 789.

70. See ELY, *supra* note 65, at 12.

71. "Interpretivism" is also known as "textualism."

72. ELY, *supra* note 65, at 12.

73. One form of what Freud called the repetition compulsion, for example, occurs when a patient returns again and again in her dreams to a traumatic event, revisiting the painful moment in an effort to gain mastery over it. See SIGMUND FREUD, INTRODUCTION LECTURES ON PSYCHO-ANALYSIS 340 (James Strachey ed. & trans., 1966); cf. SIGMUND FREUD, BEYOND THE PLEASURE PRINCIPLE (1920), reprinted in THE FREUD

broad interpretivism, or what Amar calls intratextualism.⁷⁴ Intratextual interpretation is thus rather suggestively like intrapsychic integration, the goal of analyst and analysand working together to overcome repression. "And if they can open it at all, what part of it are they forbidden to read or to obey?"⁷⁵ This is Justice Marshall's therapy for clause-bound Article-III judges, but the words might have been used by Doctor Freud to exhort his patients to read and inwardly digest the meanings of their trauma-bound unconscious.

"In deploying this technique," says Amar, "the interpreter tries to read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase."⁷⁶ This modest how-to account of intratextualism addresses technique, but not the theory's deeper purposes and justifications. In treating the Constitution as a kind of echo chamber, intratextualism seeks to maximize the document's semiotic potential. More than this, by liberating itself from clause-bondage and focusing on "at least two clauses" together with "the link between them,"⁷⁷ intratextualism forces itself to explain what that link is. The technique is therefore about what is implicit in the document and, by extension, in our constitutional ethos. Lacking the authoritative guidance of a discrete patch of text, the fetish of the typical textualist, the intratextualist is compelled to think about the Constitution and its ultimate meanings, for the ultimate meanings of most things—theories, texts, individual lives—are those that go unarticulated in express terms.

READER 594, 611 (Peter Gay ed., 1989) (asserting that the compulsion to repeat, which is an act "in opposition to the pleasure principle," can be observed when "children repeat unpleasurable experiences for the . . . reason that they can master a powerful impression far more thoroughly by being active than they could by merely experiencing it passively").

74. Amar notes that, if Ely's "general methodological prescription is not quite intratextualism, as I have defined it, it is rather close." Amar, *supra* note 68, at 779. In particular, Amar agrees with Ely's claim that "there are indeed larger patterns and structures implicit in the document as a whole, and that careful examination of the entire text is the proper starting point for analysis." *Id.*

75. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179 (1803). For an analysis of *Marbury* as a somewhat incomplete intratextual performance, see Amar, *supra* note 68, at 763-66.

76. Amar, *supra* note 68, at 748.

77. *Id.* at 788.

Moreover, this recognition of implicit meanings within non-contiguous text, which renders intratextualism more a concordance than a dictionary,⁷⁸ involves the dichotomy of surface and depth, or what Amar at one point refers to as “a surface marker of a deeper analytic insight waiting to be found upon close inspection.”⁷⁹ Thus, for example, he discovers in the word “people,” as it reverberates throughout the Constitution from the Preamble to the Tenth Amendment, “a deep pattern, embroidering the fundamental constitutional principle of popular sovereignty.”⁸⁰ The advantages of reading discontinuous elements of a text as symptomatic of a deeper coherency are obvious: The technique offers the satisfaction of deriving the whole from the part, the totality from the fragment, the urn from the mere shard. It makes for the possibility of what Ronald Dworkin calls “integrity” in legal interpretation, the placing of the institutional history, in this case the Constitution and the precedents that flow from it, in the “best” possible light.⁸¹ Intratextualism can therefore be satisfying both aesthetically and in political-moral terms.

These advantages of intratextualism, however, are also its greatest potential weaknesses. For the argument from surface to depth, from symptom to pattern, is fraught with the dangers of subjectivity and arbitrariness. To return to the Freudian analogy for a moment, the reliability of psychoanalysis is easily challenged at the level of clinical interpretation of neurotic symptoms, for the analyst typically rejects the facial evidence of the symptom by reading it as a form of resistance, that is, as something quite different from or even antithetical to the repressed trauma which it masks. In contrast to psychoanalysis, of course, intratextualism benefits from the controls provided by a more stable, rule-sensitive interpretive community (legal scholars and lawyers) and by the comparative consensus that results from accumulated precedent and other approved legal

78. See *id.* at 792-94.

79. *Id.* at 798. Amar's use of the term “marker” echoes semiotic theory, but in a pre-publication draft of his article this phrase read “a surface *symptom* of a deeper analytic insight waiting to be found upon close inspection”—a glance at psychoanalytic theory. Akhil Reed Amar, *Intratextualism* 74 (Oct. 15, 1998) (unpublished manuscript, on file with author).

80. Amar, *supra* note 68, at 793.

81. See RONALD DWORKIN, *LAW'S EMPIRE* 225-46 (1986).

authorities. Amar would add, and his interpretive practice surely shows, that the conscientious intratextualist points to non-contiguous textual symptoms only as a starting point for research and analysis. This process often leads beyond the constitutional text to various forms of corroborative *intertextuality*, a technique to be discussed more fully below.⁸²

The interpretive risks of intratextualism are undeniable, however, and they increase in proportion as the resources for inferring underlying patterns are multiplied by the intratextual technique. That is to say, creative intratextualism substantially augments the "class of legal reasons" that may be derived from the Constitution. As the number of reasons or rules expands, the number of conclusions to be drawn from the Constitution or its parts increases also. The consequence is that intratextualism is more likely to invite rational indeterminacy,⁸³ in contrast to more staid forms of textualism which, binding analysis to specific clauses, control the number of proffered reasons and so limit the number of conclusions that may be drawn. Quite simply, as the interpreter becomes less clause-bound, temptations to overread may grow more numerous.

In this respect, intratextualism shares advantages and disadvantages with its near cousin, the structural approach elaborated by Charles Black. Both intratextualism and structuralism encourage semiotic freedom and creative risk-taking. Where Amar points to implications tucked away in noncontiguous bits of text, Black draws inferences from the structures and relationships inhering in our constitutional system: the relationships between the federal and state governments, between citizens and governments, and among the three coordinate branches.⁸⁴ Both techniques are grounded, "unlike much doctrinalism, . . . in the actual text of the Constitution," says Bobbitt.⁸⁵ Indeed, the very word "structure" can refer to both

82. See Amar, *supra* note 68, at 771 (noting that "intratextualism often merely provides an interpretive lead or clue, the full meaning of which will only become apparent when other interpretive tools are also brought to bear on the problem").

83. See Brian Leiter, *Legal Indeterminacy*, in 1 LEGAL THEORY 481, 481 (1995) (noting that "the law on some point is *rationaly* indeterminate if the Class [of legal reasons] (on some conception) is insufficient to justify only one outcome in the case").

84. See generally CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (Ox Bow Press 1983) (1969).

85. BOBBITT, *supra* note 5, at 80.

textual organization and governmental interrelationships. We can speak, for example, of the "structure" of federalism or of "structures" of meaning within the text of the Constitution. In addressing one of these matters, we may soon find ourselves touching upon the other.⁸⁶ Thus, Amar, discussing the connection between parliamentary and individual forms of free speech, can remark that "the extension of this right [of free speech] to ordinary citizens in the First Amendment is indeed simply a textual recognition of the structural truth of American popular sovereignty."⁸⁷ Here, the two kinds of argument perform such similar functions in identifying "larger constitutional patterns at work"⁸⁸ that they seem almost interchangeable.

Structuralism is not without its doubters. Black himself pointed to the likely objection that this "new line of reasoning will lead too far, or that its general formulas afford no ground for prediction of results."⁸⁹ Like intratextualism, structuralism is vulnerable to the charge of indeterminacy, both in its methods and in its conclusions.⁹⁰ Yet in the hands of conscientious

86. Cf. BLACK, *supra* note 84, at 31 ("There is . . . a close and perpetual interworking between the textual and the relational and structural modes of reasoning, for the structure and relations concerned are themselves created by the text, and inference drawn from them must surely be controlled by the text.")

87. AMAR, *supra* note 1, at 224.

88. Amar, *supra* note 68, at 790. *But see id.* (noting that "the most typical forms of structural argument focus not on the *words* of the Constitution, but rather on the *institutional* arrangements implied or summoned into existence by the document"). In the same essay, Amar distinguishes between a "brand of holistic textualism [that] squeezes meaning from the Constitution's organization chart" and Blackian structuralism which "would point to institutional patterns rather than the organization of constitutional text." *Id.* at 797 n.197. However, the similarity in methods and results between these two approaches, even as Amar describes them here, seems to me suggestive of their proximity.

89. BLACK, *supra* note 84, at 48; cf. BOBBITT, *supra* note 5, at 84 ("Structural arguments are sometimes accused of being indeterminate because while we can all agree on the presence of various structures, we fall to bickering when called upon to decide whether a particular result is necessarily inferred from their relationships."). Bobbitt's real worry about the structural approach was that it might prove to be a technique that could be successfully employed only "by a very few," *id.* at 85, and that inalienable personal rights might get lost in the elastic relation between citizen and state. *See id.* at 85-86.

90. Black believed the answer to this charge was that "[n]othing but a possible gain in predictability could come from selection of a ground which forces one to talk about, and only about, realistic factors of national political involvement." BLACK, *supra* note 84, at 49. The search for the "real" grounds of decision hints at structuralism's profound ties, in terms of motivation at least, to Legal Realism and

and skillful practitioners, both approaches can generate more “satisfying” results than many doctrinal arguments.⁹¹ To get a better feel for the kinds of satisfaction that intratextualism affords, we must look closely at some examples from *The Bill of Rights*.

C. *Squeezing Meaning from the Text: Amar in Action*

I have already suggested that Akhil Amar’s brand of textualism seeks to maximize meaning. Indeed, on occasion, he speaks of ways in which textualist approaches can “squeeze more meaning from the document that inscribes our highest and most popular law.”⁹² This image of the determined exegete applying digital pressure to a reluctant text both celebrates textualism as a tool and hints at the serious purpose for which Amar plies that tool. For when we recall that no less a figure than Thomas Jefferson sneered at textualist efforts as “trying what meaning may be squeezed out of the text, or invented against it,”⁹³ we can appreciate the slightly defiant pride with which Amar declares himself a squeezer of meanings.

The textual wringing that Amar describes is part of a larger project that he calls “holistic textualism.”⁹⁴ “Instead of being studied holistically,” he complains, “the Bill [of Rights] has been broken up into discrete blocks of text, with each segment examined in isolation.”⁹⁵ The interpreter’s goal should be “to write in a truly comprehensive way about the Bill of Rights as a whole,” to offer an “integrated overview.”⁹⁶ Squeezing meaning thus stands to holism as a means to an end, a therapeutic technique for overcoming clause-bondage. The text of the Constitution is not equivalent to the sum of its clauses, and ana-

that school’s impatience with the paper rules proffered by judges. Amar’s intratextualism also bears this relation to Legal Realism, I believe, particularly in its hostility to the frequent superficiality and wrong-headedness of doctrine. *See infra* note 133 and accompanying text.

91. *See* BOBBITT, *supra* note 5, at 85.

92. Amar, *supra* note 68, at 826-27.

93. BOBBITT, *supra* note 5, at 25 (quoting Justice Story’s attribution of this view to Jefferson in COMMENTARIES, *supra* note 5, § 407, at 390 n.1.).

94. Amar, *supra* note 68, at 796-98.

95. AMAR, *supra* note 1, at xi.

96. *Id.* at xii.

lyzing it piecemeal in the received fashion will always leave a residue of meaning unaccounted for—an irreducible gestalt. Yet it is important to see that holism has two distinct faces in *The Bill of Rights*: It is both a goal *of* interpretation, as we have seen, and a goal *for* interpretation. That is, the act of interpreting should itself be holistic, combining various kinds of argument in a flexible, eclectic totality.⁹⁷

Amar's interpretive practice incorporates both dimensions of holism. The following analysis of his discussion of the Creation-Era Second Amendment is necessarily somewhat schematic and selective, but it should serve to make visible certain important features of his holistic textualism. Amar loses no time in stating his conclusion: The "core concerns" of both the First Amendment and the Second Amendment are "populism and federalism."⁹⁸ This opening gambit introduces structural concerns with democratic self-government, and textual questions such as the proximity of provisions, which Amar quickly harmonizes by pointing to the intratextual echo of the Preamble's phrase "We the People" in the main clause of the Second Amendment—"the right of the people to keep and bear Arms."⁹⁹ Popular sovereignty thus emerges as a pattern underlying noncontiguous instances of "the people" and their implicit relation to the populist guarantees of the First Amendment. This *intratextual* move, bridging structural and textual insights, is quickly reinforced by an *intertextual* reference to a version of the "militia" amendment favored by Pennsylvania Anti-Federalists.¹⁰⁰ Here, *intertextual difference* (rather than sameness or similarity)¹⁰¹ makes the point about the collectivist nature of the original Second Amendment, for the unsuccessful Pennsylvania version

97. See Amar, *supra* note 68, at 776 (claiming that "intratextual argument works best when it coheres with other types of constitutional argument and is part of a larger constitutional vision").

98. AMAR, *supra* note 1, at 46.

99. U.S. CONST. amend. II; see AMAR, *supra* note 1, at 47.

100. See AMAR, *supra* note 1, at 47.

101. Amar notes elsewhere that intratextualism can find significance in both sameness (or similarity) and difference between clauses in a document. See Amar, *supra* note 68, at 761, 772; see also Amar, *supra* note *, at 456-57 (using an intratextual analysis of the Judiciary Act of 1789 to show that the Act's differential use of the words "power," "jurisdiction," and "cognizance" casts doubt on *Marbury's* conclusion that the Act unconstitutionally conferred original *mandamus* jurisdiction on the U.S. Supreme Court). I am extending the same logic here to intertextuality.

included "killing game" as one of the purposes of the right to bear arms.¹⁰² Since this early invitation to safeguard individual rights was not picked up by the Framers, we have some evidence, Amar suggests, for concluding that the Second Amendment contemplated only (or chiefly) collective rights at its adoption.¹⁰³

From structural, intratextual, and intertextual arguments, Amar moves outside of texts altogether into history, pointing to the connection between the revolutionary right to abolish tyrannous government and the popular appeal to arms.¹⁰⁴ There follows an historical account of the nineteenth-century distinction between political rights and civil rights,¹⁰⁵ supplemented by a lengthy footnote enumerating moments in American history when suffrage has been linked in some way to military arms-bearing: further evidence that the "militia" amendment was deeply political and collectivist in its origins.¹⁰⁶ This brief historical excursus is anchored by references to Locke's *Second Treatise of Government* and the Lockean language of the Declaration of Independence.¹⁰⁷ Amar cités these texts, I take it, to buttress his historical argument, not to introduce a further intertextual argument.

Historical and intertextual arguments, however, are sometimes hard to tell apart. After all, both step outside of the text in question to seek support from extrinsic materials, and historical data are never simply "given" but always come to us by means of a text of some sort.¹⁰⁸ What seems to distinguish intertextual from historical uses of texts is that, in the former case, the supporting text is usually of a certain significant type,¹⁰⁹ and it must have been capable of affecting the princi-

102. See AMAR, *supra* note 1, at 47.

103. See *id.*

104. See *id.*

105. See *id.* at 48-50.

106. See *id.* at 48-49 n.*.

107. See *id.* at 47.

108. "[H]istory is *not* a text, not a narrative, master or otherwise, but . . . as an absent cause, it is inaccessible to us except in textual form" FREDRIC JAMESON, *THE POLITICAL UNCONSCIOUS: NARRATIVE AS A SOCIALLY SYMBOLIC ACT* 35 (1981).

109. See AMAR, *supra* note 1, at 296 (referencing "such earlier landmarks of liberty as the English Bill of Rights, the Declaration of Independence, and various state constitutional declarations of rights").

pal text in such a way as to cause the latter to “build upon” or “deviate” from that prior text (“*earlier* landmarks”).¹¹⁰ To qualify as an intertext,¹¹¹ then, a text should have a certain pedigree,¹¹² and it must bear a potentially causative¹¹³ relation to the language of the principal text.

Amar next addresses the federalism implications of the Second Amendment, probing the terms “militia” and “the people” to determine whether the right to keep and bear arms was fundamentally a right of state governments or of citizens.¹¹⁴ After a flurry of quotations from *The Federalist* and Article I of the Constitution, offered primarily as historical support in the sense described above, Amar quotes intertextually from remarks by Elbridge Gerry in the First Congress to clarify the populist, as distinct from a states’-rights, meaning of “the people” in the

110. *Id.*

111. I use the term “intertext” merely as a convenient way of referring to the prior text.

112. Elsewhere, Amar writes of “*intertextual* links to other documents, such as the English Bill of Rights, state constitutions, the Declaration of Independence, and the Articles of Confederation.” Amar, *supra* note 68, at 799. The phrasing suggests that this list may be nonexhaustive but also that intertexts should be documents of sufficient constitutional weight to have had an impact on the Framers. It is with some uncertainty, therefore, that in my discussion below I refer to Elbridge Gerry’s remarks in the First Congress as an intertext, just as earlier I suggested that an amendment proposed by the Pennsylvania Anti-Federalists could be an intertext. Yet such remarks were a kind of prior “text” (since voiced in a central speaking spot and placed on record) and were of sufficient weight to play a role in the deliberations of the Framers of the Second Amendment.

113. The precise nature of this causative role is unclear, however. To qualify as an intertext, must a prior text actually have “influenced” the Framers, impacting upon their “intentions,” or is it sufficient that it merely *could* have had such an impact? Is influence upon individuals necessary at all? Might a document function as an intertext if it simply offers evidence of contemporaneous usage? If so, could the candidate text have been written two years *after* the Bill of Rights?

These questions touch on the vexed problem of historical causation: whether two events stand to each other in a relation of causation or mere parallelism. Amar is in various ways (though not exclusively) an original-intent textualist, but his methodology seems flexible enough to make use of (some) parallel as well as causal intertexts. Yet I take it that his flexibility would not stretch so far as to allow him to abandon all traditional criteria of influence and causation, as some post-structuralist and postmodern writers have seemed willing to do. See, e.g., MICHEL FOUCAULT, *THE ORDER OF THINGS* at xiii (1973) (discussing his archaeological or “epistemic” approach to knowledge and noting that he considers “the traditional explanations—spirit of the time, technological or social changes, influences of various kinds” to be unsatisfactory and so has “left the problem of causes to one side”).

114. See AMAR, *supra* note 1, at 51.

Second Amendment's main clause.¹¹⁵ Amar reinforces this meaning intratextually by pointing to the Tenth Amendment's clear distinction between "the States" and "the people."¹¹⁶ He also brings contemporaneous lexical evidence to bear upon "militia," as he later does with "army,"¹¹⁷ to show that two hundred years ago "militia," standing alone without adjective, meant a communal muster of "the people," not a band of paid, semiprofessional volunteers.¹¹⁸ This argument from contemporaneous usage, frequently associated with the opinion-writing of Justice Scalia,¹¹⁹ is perhaps the paradigmatic textualist strategy, what Amar calls "original intent" textualism.¹²⁰ Contemporaneous dictionaries or lexicons, because they satisfy neither generic nor causal criteria, and because they are not really "texts," would not seem to qualify as intertexts, although they can often be as persuasive as intertexts and do offer suggestive parallelism. Indeed, because they report consensus of usage rather than simply contain single uses of words, dictionaries might be thought to carry more interpretive weight than intertexts.¹²¹

Having argued for the populist tenor of the Second Amendment's main clause, and having parried a states'-rights reading of "well regulated" by means of historical and intertextual (state constitutional) arguments,¹²² Amar turns to the rich intratextual collaboration between the Amendment and Clauses 12, 15, and 16 of Article I, which collectively allocate control of local militias between the central government and the states, and sharply distinguish "Armies" from "the Militia."¹²³ Amar follows up this intratextual argument with a colorful

115. *See id.*

116. *See id.*

117. *See id.* at 53.

118. *See id.* at 51-52.

119. *See, e.g.,* Harmelin v. Michigan, 501 U.S. 957, 976 (1991) (using an 1828 edition of Webster's American Dictionary to argue that the Framers of the Eighth Amendment did not intend "cruel and unusual punishments" to refer to disproportionate punishments).

120. Amar, *supra* note 68, at 789.

121. *Cf. id.* at 792 (discussing the comparative strengths and weaknesses of using a standard dictionary, as opposed to the Constitution itself, as a "database of word usage").

122. *See* AMAR, *supra* note 1, at 52-53.

123. *See id.* at 53-54.

depiction of the civic virtues of the militia as contrasted with the ragtag mercenary character of standing armies, using historical argument to flesh out his larger structural point about the role of the militia in protecting "liberty through localism."¹²⁴ As with religious establishment, the Bill of Rights leaves conscription and militia control to state and local levels, checking, or narrowly confining, the power of the central government to interfere with those traditional prerogatives.¹²⁵

In the course of laying down all these textual and historical coordinates, Amar has subtly defined the Second Amendment's militia as a populist institution that can be neither reduced to individual rights nor generalized to states' rights. It is an intermediate association, a vehicle through which individuals participate in government.¹²⁶ Amar now proceeds to his finale—an argument against federal power to institute a national army draft—by pointing to the phrase "a well-regulated militia . . . [being] 'necessary to the security of a free State,'" and by balancing that phrase intratextually against the Constitution's Necessary and Proper Clause to suggest that the pointed echo of "necessary" in the Bill of Rights "estops" Congress from ever claiming that what is "necessary" is an army of conscripts.¹²⁷ Historical argument follows, with an account of various federal draft bills introduced during the War of 1812 and their defeat at the hands of representatives of the New England states who vigorously opposed federal interference with the militia.¹²⁸ Amar concludes his historical polemic by remarking, significantly, that the defeat of these early draft bills "should be as central a precedent for our Second Amendment as the 1800 triumph over the Sedition Act is for our First."¹²⁹

The significance of this remark for an analysis of Amar's interpretive practice lies in its startling normative suggestion that early-nineteenth-century legislative activity should serve as a "precedent" in our constitutional jurisprudence. Pivoting on this proposal, Amar introduces, by way of exasperated epilogue,

124. *Id.* at 55-56.

125. *See id.* at 56.

126. *See id.* at xii.

127. *Id.* at 57 (quoting U.S. CONST. amend. II).

128. *See id.* at 57-58.

129. *Id.* at 58.

a doctrinal argument focusing on the Supreme Court's upholding of a federal draft in the *Selective Draft Law Cases* of 1918.¹³⁰ Forced to follow the structural and textual tour de force of the preceding pages, doctrine makes an unsurprisingly poor showing here, and Amar drives the point home by noting that the *Selective Draft Law Cases* exhibit scant sympathy with "the worldview that gave rise" to the Second Amendment.¹³¹ With this thrust, Amar levels one of the gravest criticisms that, in his view, can be made of a constitutional argument—that it is anachronistic. And this Court decision is anachronistic in two temporal directions: It makes no effort to understand the world of 1800, and it fails to articulate the vast historical changes since 1800 that might well justify a national draft in 1918. In remarking that "[a] case can be right for the wrong reasons,"¹³² Amar offers a glimpse of his distant kinship with the Legal Realists, who often complained that judges proffered abstract rules and rationales in place of the real reasons (frequently having to do with contemporary economic forces) that shaped their decisions.¹³³

Amar's treatment of the *Selective Draft Law Cases* is paradigmatic of his use of doctrine in *The Bill of Rights*. Typically, judicial precedent arrives late in his arguments and puts on a blundering, misguided, or simply irrelevant performance at that point. Amar is forthright about the subordinate role of doctrine in his book, noting with acid understatement that "judges are not exactly the heroes and heroines of my tale."¹³⁴ This should not be surprising in a work that foregrounds textual and historical argument, often as a corrective for the obfuscations of judicial opinions that have paid precious little attention to text and history.

130. 245 U.S. 366 (1918); see AMAR, *supra* note 1, at 58-59.

131. AMAR, *supra* note 1, at 59.

132. *Id.*

133. See, e.g., KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 59 (Oceana Publications 1960) (1930) ("It is society and not the courts which gives rise to, which shapes in the first instance the emerging institution; which kicks the courts into action."); Herman Oliphant, *A Return to Stare Decisis* (pt. 2), 14 A.B.A. J. 159, 159 (1928) (discussing courts' "intuition of fitness of solution to problem" as manifested in decisions concerning promises not to compete, together with the "[c]ontemporary economic reality [that] made these holdings . . . eminently sound"); see also *supra* note 90.

134. AMAR, *supra* note 1, at 305.

As Amar himself points out, however, precedent plays a more central and often a more positive role in Part Two of *The Bill of Rights*, where cases like *Barron v. Mayor of Baltimore*,¹³⁵ *Corfield v. Coryell*,¹³⁶ and even *Dred Scott v. Sandford*¹³⁷ offer language that helps to illuminate—at times intertextually or historically—the Reconstructors' intentions in framing the Fourteenth Amendment.¹³⁸ In Amar's account of the reconstructed Second Amendment, for example, doctrine combines with sustained historical argument and intertextual invocations of Blackstone, the Freedman's Bureau Act, and other sources, to demonstrate the Fourteenth Amendment's subtle "privatization" of the Creation-Era's collectivist right to bear arms.¹³⁹ Curiously, it is not a judicial opinion but the National Rifle Association ("NRA") that appears in the role of anachronistic latecomer here, for the NRA has made the individual right to own arms its rallying cry, while offering Creation-Era collectivist rationales for its position.¹⁴⁰ In effect, the NRA ignores the historical truth that "between 1775 and 1866 the poster boy of arms morphed from the Concord minuteman to the Carolina freedman."¹⁴¹

To sum up, Akhil Amar's holistic textualism seeks to extract the maximum amount of constitutional significance from the Bill of Rights by means of a diverse and comprehensive exegesis. Of Philip Bobbitt's five types of argument, Amar employs three with regularity—the textual, the historical, and the structural—while using doctrinal arguments more selectively and often for the purpose of pointing a moral about judicial inattentiveness to history and text. Freely mixing these types, Amar vividly illustrates the concept of the "archetype," a term that may be preferable to "type," Bobbitt observes, "since many arguments take on aspects of more than one type."¹⁴² I have already suggested that Amar might be thought of as a "hyper-

135. 32 U.S. (7 Pet.) 243 (1833).

136. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230) (Washington, Circuit J.).

137. 60 U.S. (19 How.) 393 (1857).

138. See AMAR, *supra* note 1, at 128-29, 140-45, 170-72, 176-78.

139. See *id.* at 260-64 (citing *Dred Scott*, *Barron*, and *Nunn v. Georgia*, 1 Ga. 243 (1846), for various propositions).

140. See *id.* at 266.

141. *Id.*

142. BOBBITT, *supra* note 5, at 7.

textualist," a term currently used to indicate the multi-media capabilities of CD-ROM text presentations. A hypertext typically contains one or more versions of some classic text (*Moby Dick* or *The Odyssey*, for example) and permits the user to access a wealth of historical, biographical, intertextual, or other annotative material by clicking on portions of the document. Providing a searchable text that serves as its own concordance and thus offers unlimited opportunities for intratextual exploration, the hypertext maximizes meaning by keying intrinsic and extrinsic research materials to relevant parts of the text. Amar's methodology is analogous in many ways.¹⁴³

Textual arguments, in intratextual and intertextual forms, predominate in *The Bill of Rights*. In that respect, Suzanna Sherry is surely correct in calling Amar a "committed textualist."¹⁴⁴ His eclectic use of argument types, however, renders suspect Sherry's further claim that "his dedication to textualism as the only valid interpretive method deprives him of the ability to stand back and ask whether his results make sense."¹⁴⁵ Amar is far less theory-driven and much more flexibly pragmatic than Sherry allows. Through the Ray-Bans of a committed doctrinalist, however, Amar might well appear to be methodologically monochromatic.

Finally, as Amar's analysis shifts from Creation to Reconstruction, intertextual arguments begin to outnumber intratextual ones. This trend would appear to be inevitable in light of the central task of Part Two: demonstrating how the Privileges or Immunities Clause of the Fourteenth Amendment subtly incorporates the Bill of Rights against the states. For although the Constitution's Habeas and Comity Clauses¹⁴⁶ allow Amar to make certain important intratextual¹⁴⁷ argu-

143. Cf. Amar, *supra* note 68, at 788 ("In effect, intratextualists read a two-dimensional parchment in a three-dimensional way, carefully folding the parchment to bring scattered clauses alongside each other.").

144. Suzanna Sherry, *Textualism and Judgment*, 66 GEO. WASH. L. REV. 1148, 1149 (1998).

145. *Id.* at 1152.

146. See U.S. CONST. art. I, § 9, cl. 2; *id.* art. IV, § 2, cl. 1.

147. Significantly, perhaps, Jeffrey Rosen refers to the relationship between the Privileges or Immunities Clause and the Comity Clause as "intertextual," not intratextual, suggesting that he regards the Constitution and the Fourteenth Amendment as quite separate texts. See Rosen, *supra* note 66, at 1246.

ments about the kinds of rights contemplated by the Privileges or Immunities Clause, these arguments are limited in scope and require supplementation by doctrinal evidence.¹⁴⁸ The Reconstructors' use of "words like *privileges* and *immunities* that are only roughly synonymous with, rather than identical to, the words of the first eight amendments"¹⁴⁹ creates difficulties for the intratextualist's project. Synonymy's displacement of verbal identity alters the acoustics of the intratextual echo chamber. Unable to call attention to precise repetitions reverberating between portions of the constitutional text, the interpreter must devise strategies of translation. Amar's technique of refined incorporation makes ample use of intertextual, historical, and doctrinal sources to translate or mediate between the Creation Framers' list of specific rights and the Reconstructors' generalized "privileges or immunities."

Indeed, even if there existed a greater number of echoes between the Bill and the Fourteenth Amendment, the two acts of framing, separated by seventy-five years of American history, might well render the relationship between those echoes intertextual rather than intratextual. However organic we may believe the total constitutional instrument to be, history has introduced various kinds and degrees of discontinuity into the whole, recasting the document as a series of texts that we must continually synthesize in that ultimate constitutional moment, the interpretive present.¹⁵⁰ This, after all, is what refined incorporation is all about.

148. See AMAR, *supra* note 1, at 174-78 (reading the Comity Clause and Justice Bushrod Washington's ode to fundamental rights in *Corfield v. Coryell* as intertexts for understanding Section 1 of the Fourteenth Amendment).

149. *Id.* at 174.

150. My argument here runs the risk, of course, of reintroducing the clause-bound approach to the Constitution at the level of historical justification. It is clear that Amar considers the Constitution and the original Bill to be an organic whole: "How could we forget that our Constitution is a single document, and not a jumble of disconnected phrases—that it is a Constitution we are expounding?" *Id.* at 125. My point is merely that history inevitably raises the specter of discontinuity even though it may not create utter disconnection within our project of democratic self-government, which Rubenfeld characterizes as "living under temporally extended, self-given commitments." Rubenfeld, *supra* note 54, at 1106. Temporally extended projects are, by definition, exposed to the ravages of time.

III. CONSTITUTIONAL AESTHETICS

A. *Textualist Poetics: Amar's Interpretive Practice*

No one who has encountered the language of literary criticism can read *The Bill of Rights* and not be struck by Amar's frequent appeals to aesthetic values, to the felicities of the constitutional text and the drama of its framing. It is "poetic," he says, that the original First Amendment addressed the structural matter of Congressional representation, for in this way the Amendment responded to perhaps the chief concern of the Anti-Federalists.¹⁵¹ Similarly, the "populist roots" of our First Amendment—Madison's third—were vindicated when the election of 1800 tossed out the Federalists who had passed the self-dealing Alien and Sedition Acts—an event that "borders on the poetic," says Amar.¹⁵²

But Amar's use of aesthetic rhetoric goes beyond mere casual characterizations of events and texts. Indeed, no account of his methodology and practice can ignore this rhetoric, for his intratextual analyses presuppose a kind of organic self-awareness in the Constitution's language that is most often associated with the intensity of poetry. The exalted generality of the Bill of Rights, like the language of great literature, is "charged with meaning to the utmost possible degree."¹⁵³ The Bill's dignified limpidity makes it the People's Poem, lofty but learnable and ennobling. In leading us to see how that Poem instructs, Amar does not want us to lose sight of how it can delight as well.

He urges, for example, that

the First Amendment's words that these freedoms and rights [of expression, assembly, and petition] "shall" not be "abridg[ed]" by "law" *perfectly harmonize with their echoes*

151. AMAR, *supra* note 1, at 9.

152. *Id.* at 23.

153. EZRA POUND, ABC OF READING 22 (1934). William O. Douglas spoke of the Constitution's language as being charged not with meaning but with power: "Words are sparingly used; and often a single phrase contains a vast arsenal of power. . . . [The Commerce Clause] is the fount and origin of vast power. It has exerted as great an impact on the American economy as any power, apart from the War Power." WILLIAM O. DOUGLAS, WE THE JUDGES 192 (1956).

in the key sentence of section 1 [of the Fourteenth Amendment]. That *harmony* is no accident; the key sentence was drafted to *resonate* with the nonabridgment clause of the First Amendment.¹⁵⁴

He also speaks of “the rhetorical resonance between the phrase ‘No State shall’ [in Section 1 of the Fourteenth Amendment] and the idea of a federally enforceable ‘bill of rights’ against state governments [in Article I, Section 10].”¹⁵⁵ Madison, we are told, had “intuited” this “resonance” in his own proposed amendment “that ‘No State shall’ abridge various rights of religion, expression, and jury trial.”¹⁵⁶ Similarly, John Jay’s remarks in 1778 deprecating the taking of civilian property for military use “resonate with the special fears of an overweening and unaccountable federal military audible in the Second and Third Amendments.”¹⁵⁷ Indeed, once we are attuned to the harmonies and resonances that Amar wishes us to hear, we begin to suspect that when he says that a certain phrase or provision “sounds in structure” (or in federalism),¹⁵⁸ he is alerting us to tonal values and aural pleasures, not just adapting the old lawyer’s tag about an action sounding in damages.¹⁵⁹

Similarly, Amar draws our attention to “the obvious harmony” between an early amendment put forward by Madison and the wording of our Fourth Amendment, a resonance that “fits snugly” with a “more satisfying account” of the Fourth Amend-

154. AMAR, *supra* note 1, at 232 (emphasis added) (footnote omitted).

155. *Id.* at 164.

156. *Id.*

157. *Id.* at 80.

158. *Id.* at 20.

159. Cf. BLACK, *supra* note 84, at 11 (expressing a preference for a legal ground “sounding in the structure of federal union”); *id.* at 69 (referring to “reasons sounding deeper in political symbolism”). Black’s use of “sounding” strikes me as more logical and legal and less aural in its connotations than Amar’s. It is perhaps worth pointing out, with respect to Amar’s aesthetic language, that he has been influenced by Black’s style as well as by his ideas. After quoting extensively from the legislative history of the Thirty-ninth Congress, for example, Amar quips, “As a lover of mercy . . . I shall resist the temptation to present all the evidence that anti-incorporationists have overlooked or distorted.” AMAR, *supra* note 1, at 186. Compare Black’s droll confession to his Baton Rouge audience that “[i]f I were not a lover of mercy, I could have prepared myself to spend all three of these lectures discoursing on the variant theories of the various justices in *New York v. Miln* and the *Passenger Cases* alone.” BLACK, *supra* note 84, at 20.

ment.¹⁶⁰ He stresses the harmonies between the populist language of that text and the role of the civil jury in redressing unreasonable searches.¹⁶¹ The Fifth Amendment's Takings Clause, Amar notes a few pages later, "did harmonize with the original Bill of Rights' underlying vision of federalism."¹⁶² "The jury," he reminds us in language typical of the poetry or music critic, "was the dominant motif of Amendments V-VIII."¹⁶³ And, coming at the end of the original Bill, "the Ninth and Tenth Amendments elegantly integrate popular sovereignty with federalism."¹⁶⁴ These examples and those in the foregoing paragraph show that intratextual, intertextual, structural, and historical arguments all become candidates for aesthetic characterization in *The Bill of Rights*.

As Amar proceeds from the Creation Era to the Reconstruction Era, and as intratextual insights begin to make way for intertextual and historical arguments, aesthetic metaphors become rarer as ways of characterizing the constitutional text, and metallurgic figures take center stage. Harmonies, resonances, echoes, and motifs ebb away; the shore is strewn with ores, filters, and crucibles, and we hear the din of mining, refining, forging, molding, and recasting. As Amar's narrative moves from the Revolutionary Period to the Industrial Age, technology displaces art as the controlling metaphor for his methodology. As I have suggested in other connections, this rhetorical transition is necessitated by the very different task that confronts the textualist interpreter of the Fourteenth Amendment, an Amendment dislocated from the earlier constitutional text by the modifications of language and the transformations of history. The exegete who was able to savor the chamber music of the original Bill of Rights must now labor to translate the dissonant chords of the Civil War amendments to make them harmonize with the rest. Refined incorporation requires hard work and an interpretive technology; aesthetic sensitivity to resonances will no longer suffice.

160. AMAR, *supra* note 1, at 73.

161. *See id.*

162. *Id.* at 79.

163. *Id.* at 110.

164. *Id.* at 123.

B. *The Constitutionalist as New Critic*

"[I]ntratextualism," Amar says, "has a certain undeniable aesthetic attraction, appealing to ideals of symmetry and harmony. When done well, intratextualism is elegant. The use of linguistic links to trace thematic threads is a common feature of aesthetically pleasing interpretation of great works of literature, for example."¹⁶⁵ Elsewhere, he speaks in praise of "snug interpretation, a particularly well-fitting, aesthetically pleasing, illuminating interpretation."¹⁶⁶ Again, I perceive a parallel—and I suspect a debt—to Charles Black, who said of his own structural method that "I am expressing here an aesthetic and moral preference, though aesthetic and moral choices may have their effect, ultimately, in practice as well."¹⁶⁷ Black carefully qualifies his aesthetic enthusiasm, making sure his audience does not take him for a dilettante, by pointing to the role that aesthetic values may play, "ultimately," in "practice." This pragmatic appeal to moderation strikes me as very close to Amar's attitude towards constitutional interpretation: The Constitution may delight as well as instruct, but it "is not and should not become a mere objet d'art."¹⁶⁸

While Black, Bobbitt, and others have helped him to recognize a role for the aesthetic in constitutional exegesis, Amar has also been influenced, I believe, by the theory and practice of the New Criticism, a loosely confederated school of literary critics that gained prominence in the American academy in the 1940s and 1950s, and remained a powerful pedagogic force well into the 1970s and beyond. The New Critics revolutionized literary teaching and scholarship and scandalized their academic elders by holding that literary texts themselves—especially complex poems of the lyric genre—should be the primary focus of study, not biographical or historical contexts that merely provided external frameworks for thinking about these texts. For the New Critic, the language of literature had a special claim on the student's attention, for it offered an intensity and

165. Amar, *supra* note 68, at 799.

166. Amar, *supra* note 53, at 1659.

167. BLACK, *supra* note 84, at 28.

168. Amar, *supra* note 68, at 799.

richness and a deeply unified structure of meanings that surpassed the comparatively utilitarian discursiveness of most other forms of writing.

Cleanth Brooks, perhaps the most celebrated of the New Critics, spoke of "the 'beauty' of the poem considered as a whole" and "the effect of [its] total pattern."¹⁶⁹ The emphasis on wholeness and unity was characteristic: "[This] principle of unity which informs [the structure of a poem] seems to be one of balancing and harmonizing connotations, attitudes, and meanings."¹⁷⁰ "It is a positive unity, not a negative; it represents not a residue but an achieved harmony."¹⁷¹ A poem is like "a ballet or musical composition" for it is "a pattern of resolutions and balances and harmonizations developed through a temporal scheme."¹⁷² One of the goals of the critic is "to see that the parts of a poem are related to each other organically, and related to the total theme indirectly."¹⁷³ Robert Penn Warren wrote that the poet "proves his vision by submitting it to the fires of irony—to the drama of his structure—in the hope that the fires will refine it."¹⁷⁴ The complex text commends itself to our scrutiny as a "verbal icon"¹⁷⁵—a *cynosure* of our quasi-religious ardors, a focal point for critical thought, a repository of densely packed meanings.

The New Critical values are well inventoried by Brooks and Warren in the preceding paragraph: wholeness, totality of pattern, resolution, balance, harmonization, organicism, and structure. If we turn back for a moment to the values that Amar in his intratextual moments associates with the constitutional text, we encounter a very similar list: holistic textualism, wholeness, integrated overview, harmony, resonance, echo, motif, structure

169. Cleanth Brooks, *The Heresy of Paraphrase*, in *THE WELL WROUGHT URN* (1947), reprinted in *CRITICAL THEORY SINCE PLATO* 1033, 1033 (Hazard Adams ed., 1st ed. 1971) [hereinafter *CRITICAL THEORY*].

170. *Id.*, reprinted in *CRITICAL THEORY*, *supra* note 169, at 1034.

171. *Id.*, reprinted in *CRITICAL THEORY*, *supra* note 169, at 1034.

172. *Id.*, reprinted in *CRITICAL THEORY*, *supra* note 169, at 1037.

173. Cleanth Brooks, *Irony as a Principle of Structure*, in *LITERARY OPINION IN AMERICA* (M.D. Zobel ed., 1951), reprinted in *CRITICAL THEORY*, *supra* note 169, at 1041, 1042.

174. Robert Penn Warren, *Pure and Impure Poetry*, in *SELECTED ESSAYS* (1958), reprinted in *CRITICAL THEORY*, *supra* note 169, at 981, 992.

175. See *supra* note 7 and accompanying text.

(in textual and institutional senses). Moreover, Amar subscribes to a view of authorial intention entirely in keeping with that of the New Critics, who attacked what they called the "intentional fallacy." Intentional fallacy is the notion that poetic language can and should be traced to identifiable authorial intentions despite the reality that "the design or intention of the author is neither available nor desirable as a standard for judging the success of a work of literary art."¹⁷⁶ Writing of the Constitution, Amar similarly asserts that the "deep pattern[s]" revealed by intratextual analysis "may not have been specifically intended" by the Framers, though these patterns are "far from random."¹⁷⁷ "A great play," he says in a quintessentially New Critical moment, "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."¹⁷⁸ If we must point to a source for these profound patterns that defy all manner of explanation, Amar says, we should attribute them to "the genius of the document."¹⁷⁹ The constitutional verbal icon, the Framers' well-wrought urn, exists independently of specific provenances and intentions; the document that offers up truths about our national identity need not divulge its more mundane secrets.

Yet, for all of Amar's affinities with the New Critics, he does not share their valorizing of linguistic irony, dissonance, tension, and paradox.¹⁸⁰ These values, considered by Brooks and

176. W.K. Wimsatt & Monroe C. Beardsley, *The Intentional Fallacy*, in *THE VERBAL ICON* (1954), reprinted in *CRITICAL THEORY*, *supra* note 169, at 1015, 1015.

177. Amar, *supra* note 68, at 793.

178. *Id.* at 793-94.

179. *Id.* at 794.

180. Nor does he share their reluctance to make use of historical argument. Jeffrey Rosen has compared one kind of constitutional textualist to "New Critics" who "ask what the text means to us today, without any reference to its historical context." Rosen, *supra* note 66, at 1244. This is the received view of New Criticism, and it is more a caricature than an accurate depiction. The New Critics did not reject historical context wholesale, and they regularly consulted the historical meanings of words. Yet it is true that, having rescued the study of poetry from dry-as-dust historiography, they trained their spotlight on the text and kept historical analysis in the wings. See generally FRANK LENTRICCHIA, *AFTER THE NEW CRITICISM* (1980). In this respect, Amar, who makes ample use of historical argument, departs dramatically from his New Critical forbears—a further illustration of the eclectic nature of his textualism.

Warren to be the hallmarks of complex texts, do not find their way into Amar's intratextual theory and practice. Amar provides some distinctions that may shed light on this divergence:

A great historian or deconstructionist might approach a great text in search of irony, polyphony, and even contradiction. . . . A great literary critic or classicist might read a text so as to reveal its artistic beauty. . . . A great lawyer or judge reading the Constitution *as law* will look for something slightly different: consistency rather than inconsistency, workability and ease of exposition to ordinary Americans rather than sheer beauty in the eyes of aesthetes.¹⁸¹

Amar reveals several things indirectly in this important passage. First, he implicitly dissociates himself from Critical Legal Studies, or what he refers to as a "deconstructionist" approach. Yet the reasons he gives face in two directions. Although forms of "irony, polyphony, and . . . contradiction" can indeed be found in post-structuralist-tinged CLS accounts of the radical indeterminacy of legal rules,¹⁸² these qualities are actually more characteristic of New Critical celebrations of the ironic textures of complex works.¹⁸³ Amar is really dissociating himself from negative or suspicious hermeneutics in general, a category that might be seen as including both New Criticism in its irony-exalting moments and deconstruction, which in its American avatar has been influenced by the New Critics. Ultimately, there is little room in Amar's project for irony, contradiction, and indeterminacy, because his purpose is to build consensus about how the Constitution coheres and how it hangs together as an instrument of popular sovereignty. When he does encounter dissonance in the text—as in the verbal nonidentity of the Privileges or Immunities Clause with the Bill of Rights—he works to overcome the obstacle through strategies of translation and textual refinement. Amar's is a constructive, not a deconstructive, vision.

181. Amar, *supra* note 68, at 794.

182. Amar cites Duncan Kennedy in the portion of the text omitted from my quotation. *See id.*

183. *See supra* note 174 and accompanying text.

IV. CONCLUSION

Amar the textualist, if he is to be found anywhere in his own list of interpretive types, is probably closest (ironically perhaps) to the "lawyer or judge" who seeks in the Constitution "consistency . . . workability and ease of exposition to ordinary Americans."¹⁸⁴ In a related context, he has confessed to being "a constitutionalist, a textualist, and a populist."¹⁸⁵ The emphasis here is on pragmatism, accessibility, and consistency, on the relationship between the constitutional text and the people, not on the cognac-and-smoking-jacket pleasures of the aesthetic voluptuary.

Ultimately, the siren song of art is incompatible with the dimension of constitutional interpretation that involves legal advocacy. Advocacy is a deeply purposive act; its goals are utilitarian and external. The tendency of art, on the other hand, is internal and purposeless; "poetry makes nothing happen."¹⁸⁶ At most, aesthetic experience, the perception of beauty, harmonizes the human faculties, mediates between appetitive drives and intellectual purposes, and reconciles our animal and rational natures.¹⁸⁷ Art stands aside from the bustle and clamor of the human comedy; it is, as Immanuel Kant explained, purposiveness without purpose,¹⁸⁸ self-sufficient and unperturbed. It delivers us from "the slavery of the will."¹⁸⁹ This, of course, is a Romantic view of aesthetics, and it is one deeply shared by the New Critics. Legal argument, however much it may be assisted by aesthetic sensibility, cannot depend upon art for its essence. The lawyer or legal scholar seeks to persuade; she wills change in the workaday world. Constitutional arguments, whether they proceed from text, history, structure, doctrine, prudential purpose, or democratic ethos, are *argu-*

184. Amar, *supra* note 68, at 794.

185. Amar, *supra* note 53, at 1657.

186. W.H. Auden, *In Memory of W.B. Yeats*, in *SELECTED POEMS* 80, 82 (Edward Mendelson ed., 1979). Clearly, this attitude towards the function of art differs from that of social realists of the 1930s and Berkeley poets of the 1960s.

187. See FRIEDRICH VON SCHILLER, *LETTERS ON THE AESTHETIC EDUCATION OF MAN* (1795), reprinted in *CRITICAL THEORY*, *supra* note 169, at 418, 418-31.

188. See IMMANUEL KANT, *Analytic of the Beautiful*, in *CRITIQUE OF JUDGMENT* (1790), reprinted in *CRITICAL THEORY*, *supra* note 169, at 379, 390.

189. ARTHUR SCHOPENHAUER, *THE WORLD AS WILL AND IDEA* (1819), reprinted in *CRITICAL THEORY*, *supra* note 169, at 476, 478.

ments. They are purposiveness incarnate. Aesthetic argument, in Philip Bobbitt's sense, would be a contradiction in terms. Aesthetic values can be a tributary to other argument types, but they cannot themselves become part of what he calls "our legal grammar."¹⁹⁰ They are in that respect exempted from constitutional fate.

Amar's intratextual use of aesthetic terminology, however, is far from empty rhetoric. "[A]rtistic beauty"—the desideratum of the "critic or classicist" in Amar's taxonomy of interpreters—is not irrelevant to his project, even if that project resists the seductions of "sheer beauty."¹⁹¹ Art's constitutional fate is to remain the handmaiden of textual interpretation. Its role is subservient, but not servile. For Amar, the Constitution is the People's Poem; its formal beauties testify to the deep patterns of popular sovereignty that emerge over time, both in our collective commitment to the temporally extended project of republican government and in the private, timebound labors of the committed textualist.

190. BOBBITT, *supra* note 5, at 6.

191. Amar, *supra* note 68, at 794.