Textualism and Judgment

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Akhil Amar has written a provocative defense of textualism as a method of constitutional interpretation. In the book from which his essay is drawn, Professor Amar uses his textualist method to interpret the Bill of Rights and the Fourteenth Amendment, often reaching conclusions strikingly at odds with conventional interpretations. In my comments on Professor Amar's textualist exegesis, I first examine what he means by "textualism." I then focus on his textualist reading of one particular constitutional provision, the Ninth Amendment, which I believe leads to a historically inaccurate and impoverished interpretation. Finally, I ask how a scholar as careful and as thoughtful as Professor Amar could be so badly misled in his interpretation.

Professor Amar's work on textualism is something of a moving target. Although he strongly endorses textualism as the most appropriate method of constitutional interpretation, it is not always clear what he means by the term. Sometimes he appears to use the conventional meaning, focusing primarily on the words of the Constitution. At other times, however, Professor Amar seems to broaden the approach to include what most people would label "originalism": He looks beyond the words themselves to their historical setting. For example, he talks about "the broader struggles" of the generations that drafted the various parts of the Constitution, and about the "paradigm case[s]" that sparked particular provisions.[1]

Finally, Professor Amar hints at the end of his essay that he might be open to an even broader approach to constitutional interpretation. By suggesting that the same text might "mean different things in different contexts,"[2] he allows for the possibility that the meaning of the Constitution is not fixed either by its text or by its historical context, but instead might change with time. That open-ended approach to constitutional interpretation, embodied in the idea of a "living constitution,"[3] is often called legal pragmatism. Legal pragmatism allows interpreters to consider not only the text and the original meaning intended by the Founders, but also subsequent events and our developing aspirations. A pragmatist approach asks who we were, who we are, and who we want to be, and integrates those notions into a text that pragmatists view as fluid rather than fixed.

To the extent that Professor Amar would endorse all of these different forms of what he calls textualism, he is not really defending any unique or novel approach to constitutional interpretation. Indeed, the use of multiple

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1 Akhil Reed Amar, *Textualism and the Bill of Rights*, 66 GEO. WASH. L. REV. 1143, 1147 (1998).

2 *Id.*

3 This phrase is famously attributed to Justice Brennan. Although he subscribed to the idea, he apparently did not use the phrase itself. *See* Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 98 U. ILL. L. REV. 173, 173-74 n.2 (1998).

interpretive methods—which is at the heart of pragmatist constitutional interpretation—began with Chief Justice John Marshall's interpretation of the Necessary and Proper Clause in *McCulloch v. Maryland*,[4] and has more recently been eloquently defended by Professor Philip Bobbitt.[5] Nor would most textualists find Professor Amar's shifting approach congenial. Justice Scalia, for example, focuses on text to the exclusion of other interpretive devices, and would almost certainly condemn Professor Amar's use of the equivalent of legislative history, much less his willingness to consider the possibility that the meaning of the text might change with time.

But it is hardly fair to criticize Professor Amar for what might be offhand remarks at the end of a book of several hundred pages. His view of textualism is not entirely clear from the essay that appears in these pages, but it is quite clear from the substantive portions of the book. When he actually interprets the Bill of Rights, he uses a strong form of textualism, focusing almost exclusively on the words themselves and their interrelationships. If we go by what he does, rather than by what he says, Professor Amar is a committed textualist. I turn, then, to his textualist approach to constitutional interpretation.

Where does Professor Amar's textualism lead him? It should make us a bit suspicious that it leads him to disagree with what he calls "mainstream scholars" on almost every controversial constitutional question. Indeed, in some areas—especially criminal procedure—he stands virtually alone against a broad consensus. Can conventional wisdom have been so wrong for so long? Perhaps it was, and perhaps it takes Professor Amar's strong textualism to expose the errors. But as my colleague Daniel Farber has suggested, law is an incrementalist discipline, and we ought to mistrust a thesis that blinds us with its novelty and brilliance.[6]

We need not rest on a generalized mistrust of novelty, however. Looking at Professor Amar's interpretation of one particular clause—the Ninth Amendment—demonstrates that in this case his conclusion is unpersuasive in light of the evidence. I focus on the Ninth Amendment because I know something about it; I suspect, however, that experts in other areas could provide similar critiques of Professor Amar's other interpretations. I use the Ninth Amendment primarily as an illustration of how wrong a textualist analysis can be.

The Ninth Amendment, ratified along with the rest of the Bill of Rights in 1791, provides: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."[7] Most scholars interpret this clause to protect unenumerated individual rights. That is, they interpret the Ninth Amendment as a directive not to read the Bill of Rights as an exhaustive list of individual rights.

Professor Amar, however, disagrees. He argues that the Ninth Amendment, like much of the rest of the Bill of Rights, is not about *individual* rights

4 17 U.S. (4 Wheat.) 316 (1819).

5 *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991).

6 *See* Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917 (1986).

7 U.S. CONST. amend. IX.

but about federalism and collective rights.[8] It is designed, he suggests, to prevent Congress from going beyond its enumerated powers. He purports to rely primarily on the text—and on a bit of history—to reach this conclusion, focusing mainly on his reading of the phrase "the people."

Unfortunately, there is a wealth of historical evidence that this reading is contrary to the original meaning of the clause.[9] What follows is a summary of that evidence, largely drawn from my previous work on judicial enforcement of unwritten natural rights.[10]

First, it is clear that the founding generation, unlike us twentieth-century positivists, believed in unwritten natural rights. Certain individual rights existed and deserved judicial protection even if they were not contained in a written constitution. The best evidence of this belief—aside from the writings of the founding generation and the philosophers on whom they relied—is that both before and after the ratification of the Constitution and the Bill of Rights, American courts enforced unwritten natural rights. In a series of state cases that stretch well into the mid nineteenth century, and federal cases to about 1820, judges acknowledged that written constitutions were not exhaustive lists of rights. In some cases judges merely bolstered their interpretation of written provisions by referring to the inalienable natural rights of man, but in many cases judges actually enforced individual rights that were found nowhere in the relevant state or federal constitutions.

Moreover, the history of the Ninth Amendment itself indicates that it was designed to recognize and protect these natural unenumerated rights. During debates over the ratification of the original Constitution, Anti-Federalists criticized the document because it lacked a bill of rights. Federalists responded that a bill of rights might be dangerous, as it might be construed as exhaustive. For example, James Iredell told the North Carolina ratifying convention:

> [I]t would be not only useless, but dangerous, to enumerate a number of rights which are not intended to be given up; because it would be implying, in the strongest manner, that every right not included in the exception might be impaired by the government without usurpation; and it would be impossible to enumerate every one. Let any one make what collection or enumeration of rights he

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8 *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 120-24 (1998).

9 Whether we in the late twentieth century ought to be bound by the meaning ascribed to the clause in the late eighteenth century is a question that I leave aside. I mean to show only that Professor Amar has offered an implausible historical reading of the text; he does not discuss what it ought to mean today beyond its original meaning.

10 *See* Suzanna Sherry, *Foreword: State Constitutional Law: Doing the Right Thing*, 25 RUTGERS L.J. 935 (1994); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987); Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171 (1992); Suzanna Sherry, *The Ninth Amendment: Righting an Unwritten Constitution*, 64 CHI.-KENT L. REV. 1001 (1988). A good collection of works on the Ninth Amendment and natural rights may be found in THE RIGHTS RETAINED BY THE PEOPLE (Randy Barnett ed., 2 vols. 1989, 1993). *See also* John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967 (1993).

> pleases, I will immediately mention twenty or thirty more rights not contained in it.[11]

The founding generation thus feared that listing some rights would extinguish others because the act of writing would undermine the unwritten natural rights.

The Ninth Amendment was James Madison's solution to that problem. In introducing to the House of Representatives the provision that became the Ninth Amendment, Madison noted that Iredell's fear was "one of the most plausible arguments [he had] ever heard urged against the admission of a bill of rights into this system."[12] To guard against the possibility of construing a bill of rights as eliminating any unwritten rights, he proposed the Ninth Amendment. Although there is almost no other legislative history surrounding the adoption of the Ninth Amendment, Madison's own statements strongly suggest that the Ninth Amendment was designed to protect individual rights, not state prerogatives.

One last piece of evidence confirms that the Ninth Amendment is not a federalism provision. After the Bill of Rights was ratified in 1791, language similar to the Ninth Amendment began appearing in *state* constitutions. Throughout the nineteenth century, states drafting new constitutions included language mirroring the Ninth Amendment's protection of unenumerated rights. It is obvious that state constitutions do not need a provision safeguarding federalism; the language thus must be interpreted in some other way.

The evidence that the Ninth Amendment protects individual rights seems compelling. Indeed, only a handful of serious scholars disagree with that conclusion. How, then, did Professor Amar end up on the wrong side of the debate? In particular, how did a scholar who is so thoughtful and careful, and who knows so much history, make such an obvious mistake? The mistake is especially puzzling in Professor Amar's case, because some of his earlier work on the founding period is truly brilliant: he authored two of the best articles ever written on the historical origins of the jurisdictional provisions of Article III.[13]

So what went wrong? I think that what went wrong is, in a way, not Professor Amar's fault. The problem is, instead, a problem inherent in textualism. Textualism, like other foundationalist theories such as originalism, purports to be a grand theory of constitutional interpretation, answering all questions with the same single-minded and narrowly constrained technique. The inevitable result is a diminution of what one might call judgment. Judgment is what judges use to decide cases when the answer is *not* tightly con-

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11 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 167 (Jonathan Elliot ed., 2d ed. 1891) [hereinafter ELLIOT'S DEBATES] (statement of James Iredell). Both James Wilson and James Madison made similar arguments. *See* 2 *id.* at 436 (statement of James Wilson); 3 *id.* at 626 (statement of James Madison).

12 1 ANNALS OF CONG. 456 (Joseph Gales ed., 1789).

13 *See* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985); Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990).

strained by some interpretive theory. It is an aspect of what others have called prudence, or pragmatism.[14] But if one has a theory of constitutional interpretation that is supposed to produce clear answers in a relatively mechanical way, there is little room for the exercise of judgment, and judgment thus tends to atrophy.

Without a flourishing sense of judgment, there is no way to evaluate the results produced by any particular theory. Professor Amar's close attention to text can therefore lead him to brilliant insights, as in the federal jurisdiction area, or it can lead him to dead ends, as with the Ninth Amendment. Unfortunately, he seems unable to distinguish between the two, because 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. Textualists—and other foundationalists—are simply not permitted to ask whether a result makes sense: if it is dictated by the theory, then it is the right answer.

But any viable theory of constitutional interpretation must be tempered by judgment. We have to be able to look at our preliminary conclusions and say: "Yes, this is where our theory takes us, but does it fit with other things: with our history, our aspirations, our developing sense of justice?" This pragmatist "play of intelligence"[15] is a necessary part of any effort at constitutional interpretation. There is nothing wrong with a close attention to text as a starting point for constitutional interpretation. If it is also the ending point, however, one can occasionally end up with brilliant insights, but more often one ends up with nonsense.

14 On prudence, see Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567 (1985). On pragmatism, see PRAGMATISM IN LAW AND SOCIETY (Michael Brint & William Weaver eds., 1991).

15 Daniel A. Farber, *Missing the "Play of Intelligence,"* 36 WM. & MARY L. REV. 147 (1994).