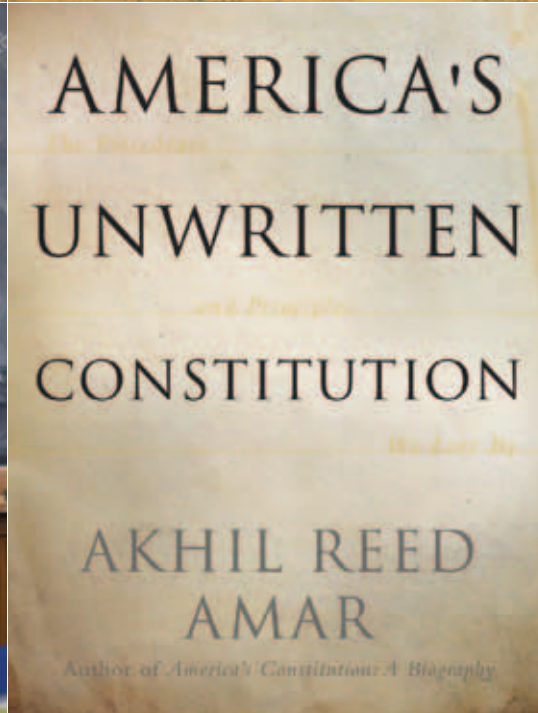
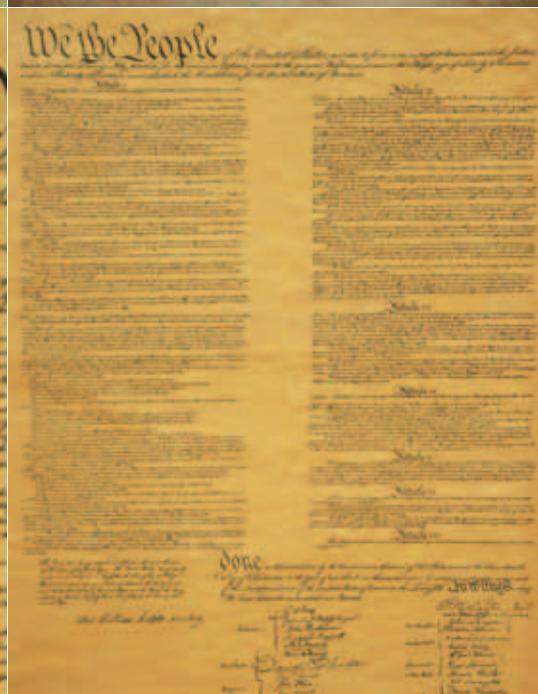


An excerpt from *America's Unwritten Constitution* by Sterling Professor of Law Akhil Reed Amar '84

As the legal world continues the debate over constitutional interpretation, Sterling Professor of Law Akhil Reed Amar '84 has recently published *America's Unwritten Constitution*, a 640-page book devoted to looking beyond the text of the written Constitution. Where his 2006 book *America's Constitution: A Biography* served as a close examination of what the U.S. Constitution says (and why), this newest book takes up the discussion of American rules and rights not explicitly enumerated in America's framing document. America's "unwritten Constitution," Amar argues, "supports and supplements the written Constitution without supplanting it" and is the key to answering many of the constitutional puzzles that face our nation. The paradox we are faced with now is how to journey beyond the text of the Constitution while remaining faithful to it. ¶ The text that follows is excerpted from the introduction of *America's Unwritten Constitution* and gives a peek into Amar's latest contribution to the discussion of constitutional interpretation.



# Examining America's Unwritten Constitution



The eight thousand words of America's written constitution only begin to map out the basic ground rules that actually govern our land. For example, the idea that racial segregation is inherently unequal does not explicitly appear in the terse text. The First Amendment prevents "Congress" from abridging various freedoms, but does not expressly protect these freedoms from abridgment by the president or state governments. None of the Constitution's early amendments explicitly limits state governments. While everyone today refers to these early amendments as "the Bill of Rights," this phrase, too, is unwritten. The phrases "separation of powers," "checks and balances," and "the rule of law" are also absent from the written Constitution, but all these things are part of America's working constitutional system—part of America's *unwritten* Constitution.

Consider also the axiom that all voters must count equally—one person, one vote—in state elections and in elections to the U.S. House of Representatives. No clause of the written Constitution expressly proclaims this axiom. At the Founding, this axiom was not widely honored in practice; nor did it sweep the land at any time over the next 175 years. And yet today, this unwritten rule—a rule supported by every Supreme Court justice, by both major parties, by opinion leaders of all stripes, and by an overwhelming majority of ordinary citizens—forms the bedrock of the American system of government.

Of course, much (though not all) of America's "unwritten Constitution" does involve written materials, such as venerable Supreme Court opinions, landmark congressional statutes, and iconic presidential proclamations. These materials, while surely written texts, are nonetheless distinct from the written Constitution and are thus properly described by lawyers and judges as parts of America's *unwritten Constitution*.

America's unwritten Constitution encompasses not only rules specifying the substantive content of the nation's supreme law but also rules clarifying the methods for determining the meaning of this supreme law. The written Constitution does not come with a complete set of instructions about how it should be construed. To some extent, these instructions are thus unwritten.

Without an unwritten Constitution of some sort, we cannot even properly identify the official written Constitution. In the late 1780s, several different versions of the text circulated among the citizenry, each calling itself the "Constitution." Each featured slightly different punctuation, capitalization, and wording. Which specific written version was and is the legal Constitution? To find the answer, we must necessarily go beyond these dueling texts themselves and consider things outside the texts. (When we do, we shall discover that the hand-signed parchment now on display in the National Archives is not and never was the official legal version of the Constitution, though this celebrated parchment does, happily, closely approximate the official text.) With a proper analytic framework in place, we shall also be poised to resolve a debate that has recently erupted about whether the Constitution contains a consciously Christian reference to Jesus in the phrase "the Year of our Lord"—a phrase that appeared in many but not all of self-described written Constitutions making the rounds in the 1780s.

What, exactly, is the unwritten Constitution and how can we find it? How can Americans be faithful to a written Constitution even as we venture beyond it? What is the proper relationship between the document and the doctrine—

that is, between the written Constitution and the vast set of judicial rulings purporting to apply the Constitution? In particular, how should we think about various landmark cases—from *Brown v. Board of Education* and *Gideon v. Wainwright* to *Reynolds v. Sims* and *Roe v. Wade*—that critics over the years have assailed as lacking proper foundations in the written Constitution?

This book tackles these and related questions. In brief, I argue that the written Constitution itself invites recourse to certain things outside the text—things that form America's unwritten Constitution.

When viewed properly, America's unwritten Constitution supports and supplements the written Constitution without supplanting it.

Consider the Constitution's Ninth Amendment, which affirms the reality of various rights that are not textually "enumerat[ed]"—rights that are concededly not listed in the document itself. To take this amendment seriously, Americans must go beneath and beyond the Constitution's textually enumerated rights. For instance, even though the text fails to specify a criminal defendant's entitlement to introduce reliable physical evidence of his innocence, surely this textual omission should not doom a defendant's claim of right.

The Ninth Amendment is not the only textual portal welcoming us to journey beyond the Constitution's text, and the trail of unenumerated rights is only one of several routes worth traveling in search of America's unwritten Constitution. In [*America's Unwritten Constitution*], we shall revisit many of our Constitution's most important topics, from federalism, congressional practice, executive power, and judicial review to race relations, women's rights, popular constitutionalism, criminal procedure, voting rights, and the amendment process.

With case studies drawn from these and other areas, we shall see how America's two Constitutions, written and unwritten, cohere to form a single constitutional system. The written Constitution cannot work as intended without something outside of it—America's unwritten Constitution—to fill in its gaps and to stabilize it. In turn, America's unwritten Constitution could never properly ignore the written Constitution, which is itself an integral part of the American experience. Over the centuries, various extra-textual practices and precedents that have done justice to the text have flourished while other extra-textual practices and precedents that have done violence to the text have faded away.

No Supreme Court opinion has ever openly proclaimed that its members may properly disregard or overturn the written Constitution. According to the Court, judicial precedents may in appropriate situations be judicially overruled; various statutes may be invalidated by courts or repealed by Congress; unwritten customs may ebb away; unenumerated rights may



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occasionally be pruned back. But the written Constitution itself operates on a higher legal plane, and a clear constitutional command may not as a rule be trumped by a mere case, statute, or custom.

Other elements of our unwritten Constitution—well-established legislative and executive practices and deeply embedded American political norms—similarly evince fidelity to the written Constitution. Congress members, presidents, cabinet officers, state legislators, and governors all pledge allegiance to the terse text. Ordinary citizens celebrate this document—at times to the point of idolatry, revering it without reading it.

Indeed, the very concept of a written Constitution forms part of our national language and lies at the heart of our national birth-story. At the precise historical moment that British colonists in the New World declared their independence from the British crown, they also freed themselves from traditional British ideas of constitutionalism. Between 1776 and 1789, Americans adopted a series of written "constitutions," first at the state level and then continentally. Each of these documents audaciously sought to compress basic legal ground rules into a single text that would outrank the vast mass of ordinary law. Most of these "constitutions" also aimed to speak in a special way to and for ordinary citizens. In 1787-88, the process of ordaining the last and most momentous of these written instruments, a continent-wide "Constitution for the United States of America," directly involved far more voters than had any previous constitutional event in world history.

Prior to these revolutionary American innovations, the standard British understanding of a "constitution" was quite different. It remains so today. The "British Constitution" has never consisted of a single foundational document. Nor has it ever been reducible to a clearly defined set of specially enacted legal texts. Rather, for centuries the "British Constitution" has referred to the traditions, practices, understandings, principles, and institutions that collectively structure the basic British system of government and way of life. In short, Britain has long lived under an entirely "unwritten Constitution." Ever since 1776, America has rejected this British model.

But America's revolutionary break with the British model was only partial, not total. In several ways, the terse text has always pointed beyond itself, inviting readers to fill in its gaps

by consulting extra-textual sources such as judicial opinions, executive practices, legislative enactments, and American traditions. America's written Constitution thus bids us to heed her unwritten Constitution, which in turn refers us back, in various ways, to its written counterpart. Like the Chinese symbols yin and yang, America's written Constitution and America's unwritten Constitution form two halves of one whole, with each half gesturing toward the other.

Equipped with this comprehensive understanding of the American constitutional system, we can begin to bridge the deep divide in our current constitutional culture. Today, some judges, politicians, pundits, and scholars plant their flag on the high ground of constitutional text and original intent, while others proudly unfurl the banner of a "Living Constitution." Too often, each side shouts past the other, and both sides overlook various ways in which the text itself, when properly approached, invites recourse to certain non-textual—unwritten—principles and practices. We are all textualists; we are all living constitutionalists.

Any satisfying account of America's unwritten Constitution must focus on method as well as substance. Before we can confidently say *what* government officialdom may and may not properly do under various unwritten constitutional rules, we must figure out *how* to find these unwritten rules. Fortunately, there are a handful of interpretative tools—constitutional compasses and lenses—that can be used to locate and bring into sharp focus the unwritten substantive do's and don'ts. The written Constitution does not enumerate these methodological tools. Thus, these interpretive instruments are themselves components of America's unwritten Constitution.

Ultimately, this book explains not merely what America's Constitution, written and unwritten, says on a wide variety of topics, but even more critically how to make proper constitutional arguments—how to think constitutional law and how to do constitutional law. Some of these ways of thinking and doing are well understood today; others are not. Thus this book offers a new vision of the nature of constitutional interpretation—a new vision, that is, of the tools and techniques for going beyond the written Constitution while remaining faithful to it. *Y*