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.

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

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 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 “enumerated”—rights that are concededly not listed in the document itself. To take this amendment seriously, Americans must go beyond 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 look 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 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 unwritten Constitution, written and unwritten, coheres 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.

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