

Architecture

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Architectural images shape America's basic constitutional vocabulary. Lawyers and layfolk alike refer to those who ordained and established the Constitution as "Founders" and "Framers"—builders who laid the foundations and framed the timbers of the grand constitutional edifice we inhabit. And we call the most important remodeling of this edifice "the Reconstruction."¹

Architectural metaphor is no newcomer to constitutional conversation. At the outset of the Philadelphia Convention of 1787, the two leading draftsmen—dare I say architects?—of what would become the Constitution voiced their visions in remarkably similar terms. First came James Wilson, "contend[ing] strenuously for drawing the most numerous branch of the Legislature immediately from the people. He was for raising the federal pyramid to a considerable altitude, and for that reason wished to give it as broad a basis as possible."² Then came James Madison: "He thought too that the great fabric to be raised would be more stable and durable if it should rest on the solid foundation of the people themselves, than if it should stand merely on the pillars of the Legislature."³ Writing later as Publius, Alexander Hamilton summoned up a similar image in explaining the need for popular ratification of the proposed Constitution: "[T]he foundations of our national government [must lie] deeper than in the mere sanction of delegated authority. The fabric of American empire ought to rest on the solid basis of the consent of the people."⁴ And here are the words of John Marshall in *Marbury v. Madison*: "That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected."⁵

Now, I am not an architect, nor do I play one on TV. But I suggest that if we examine the Constitution's text as an architect might, we will notice key features of the document—its size and shape, its style and layout, its exterior facades and interior

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1. For prominent architectural allusion in a distinguished contribution to the Harris Lecture Series itself, see Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 *Ind. L.J.* 233 (1990).

2. 1 *The Records of the Federal Convention of 1787*, at 49 (Max Farrand, rev. ed. 1937) [hereinafter *Farrand*] (May 31). Modern readers may see the architectural image more vividly if they substitute the more modern word "base" for Wilson's more archaic "basis." See 1 *Oxford English Dictionary* 985 (2d ed. 1989).

3. *Id.* at 50 (May 31). The word "fabric" here and in later quotations refers to a building, not a textile. To the Founding generation "rearing a fabric" meant erecting a building, not growing cotton. See 5 *Oxford English Dictionary* 638 (2d ed. 1989).

4. *The Federalist No. 22*, at 152 (emphasis altered) (A. Hamilton) (Clinton Rossiter ed. 1961). Hereinafter all citations are to this edition.

5. 5 *U.S.* (1 Cranch) 137, 176 (1803).

motifs—whose significance is lost on most lawyers and judges today. Consider what follows an experiment in architecture.

I. SIZE AND FUNCTION

When human beings initially approach a building or other architectural work, we instinctively size it up, feeling its magnitude or modesty. Thus, the first architectural thing to observe about the United States Constitution is its remarkable compactness. From Preamble to the Twenty-seventh Amendment, it does its work in less than 8,000 words. When President Washington took office in 1789, the document was even smaller, comprising a mere 4,500 words. The entire Bill of Rights uses fewer than 500 words, and the three transformative Reconstruction Amendments use only slightly more than that.

By way of comparison, the average state constitution today sprawls out over some 30,000 words.⁶ Indeed, the federal Constitution is smaller than every single one of the fifty state constitutions now in force.⁷ The Vermont, New Hampshire, and Indiana Constitutions are at least in the neighborhood, at around 10,000 words apiece.⁸ By contrast, Alabama's Constitution occupies a neighborhood (a city?) by itself at over 300,000 words—roughly forty times the size of the federal document.⁹

What are we to make of the federal Constitution's modest architectural dimensions? For the Constitution is far from a modest document in its ambition: to lay the framework for a mighty nation to rival and ultimately surpass the Old Powers of Europe and the great empires of antiquity. James Wilson's allusion to the towering pyramids of Egypt is revealing; the framers dreamt big. They envisioned a geographically vast republic, peopled with countless millions, extending far into the future, and revolutionizing the world. And they literally built big in the national capital.

In 1787, the distance between the northern district of Massachusetts (now known as Maine) and the southern edge of Georgia was daunting by world historical standards. Never before in human history had so vast a region, encompassing so many different climates (to say nothing of sects) been governed democratically. Historically, extended empires meant emperors; continental kingdoms required kings. But the Framers reveled in their grand plan to prove that self-governing societies could stretch far beyond small city-states like Athens, Sparta, and pre-imperial Rome. In the *Federalist* Number 9, Publius reminded his readers that individual states like Virginia (which then encompassed what we now call West Virginia as well as Kentucky) were already seeking to expand self-government beyond the compact republics of antiquity, where all citizens could meet face to face in the city square.¹⁰ The concept of representation, according to the *Federalist* Numbers 10 and 63, enabled far-ranging

6. See the state data summarized in Christopher W. Hammons, *State Constitutional Reform: Is it Necessary?*, 64 *Alb. L. Rev.* 1327, 1350. The arithmetic mean is around 34,000 words; the median around 24,000.

7. *Id.*

8. *Id.*

9. *Id.*

10. *The Federalist* No. 9, at 73-74 (A. Hamilton).

democracies to hold together.¹¹

And America would prove all this to the world.

For evidence of this immodest vision, we need look no further than the first paragraph of the first *Federalist*. America's new Constitution, Publius trumpeted, would determine "the fate of an empire in many respects the most interesting in the world. It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example" to prove to all "mankind" the workability of popular self-government.¹² Consider also the stunningly immodest language of the *Federalist* Number 14 (complete with architectural allusion at the end):

Hearken not to the unnatural voice which tells you that the people of America . . . can no longer be fellow-citizens of one great, respectable, and flourishing empire. Hearken not to the voice which petulantly tells you that the form of government recommended for your adoption is a novelty in the political world; that it has never yet had a place in the theories of the wildest projectors; that it rashly attempts what it is impossible to accomplish. . . . [W]hy is the experiment of an extended republic to be rejected merely because it may comprise what is new? Is it not the glory of the people of America that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience? To this manly spirit, posterity will be indebted for the possession, and the world for the example, of the numerous innovations displayed on the American theater in favor of private rights and public happiness. . . . Happily for America, happily we trust for the whole human race, [the American Revolutionaries] pursued a new and more noble course. They accomplished a revolution which has no parallel in the annals of human society. They reared the fabrics of governments which have no model on the face of the globe. They formed the design of a great Confederacy, which it is incumbent on their successors to improve and perpetuate. . . . If they erred most in the structure of the Union, this is the work . . . which has been new modeled by the act of your convention and it is this act on which you are now to deliberate and to decide.¹³

This immodest vision of what America had already accomplished and could yet accomplish was hardly unique to Publius. Just pull out a dollar bill and ponder the great pyramid that appears on the back, wreathed by the proud words "Novus Ordo Seclorum"—the New Order of the Ages that America would usher in. All this appeared on the Great Seal of the United States as adopted in 1782, five years before

11. See *id.* No. 10, at 81-84 (J. Madison); *id.* No. 63 at 386-87 (J. Madison).

12. *Id.* No. 1, at 33 (A. Hamilton).

13. *Id.* No. 14, at 103-05 (J. Madison). This passage is especially noteworthy because it completes the first major section of *The Federalist*. Its last words—"you are now to deliberate and to decide"—echo and gesture back towards the first sentence of Number 1 ("you are called upon to deliberate").

James Wilson spoke of pyramids in Philadelphia or Publius began publishing in New York. The pyramid on the Great Seal is unfinished; a top has yet to be erected. So too, as immense as the nation already was in 1787, the Founders saw it as unfinished and expected it to grow even bigger. The vast Northwest Territory, stretching all the way to what is now Indiana, was already part of the Union; and *The Federalist* clearly hints at future westward growth, strongly anticipating the early nineteenth-century ideas of the Monroe Doctrine and Manifest Destiny.¹⁴ The Constitution itself leaves the door wide open for this westward expansion in the broad language of Article IV discussing federal territories and new states.¹⁵ And in *McCulloch* we see John Marshall dreaming big, defining America as a “vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific.”¹⁶

All this is nothing if not immodest, even epic. The Founders’ master plan—to spread self-government across a continent, raise up a great republic for countless generations to come, and ultimately induce an unrepublican Old World to follow America’s New World republican example—seems almost fantastical, but for the fact that so much of it has already come to pass. In 1787, genuine self-government existed almost nowhere on the planet, and America comprised only a tiny fraction of the world’s population, military might, and economic power. As late as 1900, it was hardly clear that, only a century later, freedom and democracy would sweep the globe as they have done and are now doing.

Thus we cannot explain the modest size of our Constitution’s text in terms of the modesty of its vision. And a quick look beyond the Great Seal to the actual buildings that the Founders erected confirms their taste for the grandiose. The Capitol building exists on a scale vastly larger than anything comparable in America—for example, it is more than fifty times the size of Pennsylvania’s initial state house (now known as Independence Hall). According to the official House website:

Today, the Capitol covers a ground area of 175,170 square feet, or about 4 acres, and has a floor area of approximately 16-1/2 acres. Its length, from north to south, is 751 feet 4 inches; its greatest width, including approaches, is 350 feet. Its height above the base line on the east front to the top of the Statue of Freedom is 288 feet; from the basement floor to the top of the dome is an ascent of 365 steps. The building contains approximately 540 rooms and has 658 windows (108 in the dome alone) and approximately 850 doorways.¹⁷

14. On westward growth, see, e.g. *The Federalist* No. 7, at 60-61 (A. Hamilton); id. No. 38, at 239 (J. Madison). On the more general foreshadowing of the Monroe Doctrine in *The Federalist*, see generally Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. Chi. L. Rev. 483, 483-90 (1991).

15. See U.S. Const. art. IV, sect. 3 (“New States may be admitted by the Congress into this Union. . . The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . .”).

16. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 408 (1819).

17. See http://www.aoc.gov/cc/capitol/capitol_overview.htm By contrast, Independence Hall occupies a footprint that is approximately 107 feet by 45 feet, and comprises two floors of rooms—approximately 10,000 square feet in all. Its spire (including weathervane) rises to 169 feet. Conversation with Independence Hall architect, January 16, 2002.

To be sure, the original plan for the Capitol was somewhat less grandiose, but this plan nonetheless envisioned a building far larger and more splendid than any governmental building, or any other building for that matter, in early America. President Washington admired the original plan for the Capitol not only for its “simplicity and convenience” but also, tellingly, for its “grandeur.”¹⁸

Of course, some of our capital’s most celebrated buildings were built on a more modest scale. The first thing that strikes many modern visitors to the White House is that it is smaller than they expected. The Lincoln Memorial likewise lacks the towering scale of the Capitol building or the 555 foot high Washington Monument.

If we ponder places like the White House and the Lincoln Memorial, we can begin to solve the puzzle of why so big a constitutional vision is housed in so small a text. The White House is designed to embody a republican idea: America has no Emperor or King, so the residence of our leader should not look like Windsor Castle or the Palace of Versailles. It should be a place that does not overawe citizens by its sheer magnitude. For all its beauty and power, the Lincoln Memorial should likewise be democratically inviting and accessible, not intimidating. If the Capitol building exists on an altogether different scale, we must remember that it is not the private residence of, or a public monument to, one man. Rather, it is the place where a host of lawmakers from across a vast continent come to deliberate together, an official agora (especially on the House side) designed to be the People’s place—a kind of governmental Grand Central Station. Indeed, a smaller Capitol might have necessitated a smaller—and thus *more* elite and *less* representative—set of delegates,¹⁹ and might have meant less room in the public galleries for ordinary citizens to come and watch their representatives in action. The awesome scale of the Capitol facilitates a large House of Representatives whose members can come from and mingle with the middling classes.²⁰

Now take this musing about building size and look again at the federal Constitution. The document was designed, to borrow a phrase, for the People. Ordinary people were asked to ratify the text and thereby make it law (a point to which I shall repeatedly return). The text governs ordinary citizens and speaks in their name. Like the Lincoln Memorial, it must be open and inviting. It needed to be compact enough so that ordinary citizens in 1787 could read it from start to finish to decide whether they were indeed willing to give it their consent. It is designed so that later generations of ordinary citizens can continue to read and re-read it to learn about their government, their rights, and their duties, and can ponder possible constitutional amendments that might be proposed.

Recall once again the architectural images summoned up by Wilson, Madison, Hamilton and Marshall. All of these founders spoke not only of erecting a mighty edifice, but also of basing that edifice on the foundation of the people.²¹ Thus the Constitution had to be written compactly so as to be understandable by ordinary folk.

18. See http://www.aoc.gov/cc/capitol/wt_dwg.htm

19. For a general discussion of the debate about numerical size and representation at the Founding, see Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 8-17 (1998).

20. According the House website, see *supra* note , the Capitol building is visited by 3-5 million persons a year.

21. See *supra* TAN ____ .

This, in fact, is what John Marshall said in one of the most quoted and least understood passages in all of constitutional law. “A constitution,” wrote Marshall, cannot properly “partake of the prolixity of a legal code.”²² Why not? Because such a code “would probably never be understood *by the public*.”²³ As an inherently populist document—establishing a government “of the people,” “from” them, “by” them, “on” them, and “for” them—the Constitution by its very “nature, therefore, requires that only its great outlines should be marked. . . . [W]e must never forget it is a *constitution* we are expounding.”²⁴

By directing our attention to textual scale, architecture helps us see how the Constitution’s small size aims to implement its big idea: popular sovereignty. Text size also has profound implications for some of the Constitution’s other major themes, such as federalism, separation of powers, and rights.

As a matter of federalism, the contrast between the federal Constitution and some state constitutions suggests that state constitutions may be somewhat less populist than conventionally thought. Because state constitutions are generally easy to amend, and are in fact frequently amended, by the citizens themselves via initiative and referendum, these constitutions might seem unambiguously more populist than the federal text. But the added verbiage in state charters makes them harder for ordinary citizens to read and understand. Along this axis, the federal Constitution would seem more accessible to the general public and thus, more populist.

But even though the federal Constitution was designed to be an open and inviting textual edifice, how many citizens today in fact take advantage of the invitation? Millions of Americans visit Washington DC each year and tour its great buildings. How many visit the Constitution itself and tour its remarkable precincts? Most layfolk—and even, I suspect, most lawyers—have never spent the mere half hour that it would take to read the document from start to finish. How many Americans could quote from memory any two of the ten amendments that make up America’s vaunted Bill of Rights?

Our inattention to the exact text of the Bill is especially ironic given that it is written so as to facilitate popular memorization, encompassing easily remembered and internalized maxims of government, pithily put.²⁵ According to the opening chapter of the bestselling book in Revolutionary America after the Bible, schoolboys in ancient Rome “were obliged to learn the twelve tables by heart.”²⁶ And speaking of the Bible, it was of course common at the time of the Founding—and in some places still remains common—for children to memorize passages of Scripture. Likewise, many Founders expected that a didactic Bill of Rights “will be the first lesson of the young citizens.”²⁷ Both ordinary citizens and lawmakers could be expected to keep the document close to their hearts—quite literally, as Thomas Paine explained in describing the Pennsylvania Constitution of 1776:

22. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819)

23. *Id.* (emphasis added).

24. *Id.* at 404-05, 407. For a similar reading of these passages, see Joseph Goldstein, *The Intelligible Constitution* 1-3 (1992).

25. See Amar, *supra* note _____, at 131-32 and sources cited therein.

26. 1 William Blackstone, *Commentaries* *6.

27. Letter from A Delegate Who Has Caught Cold, reprinted in 5 *The Complete Anti-federalist* 268, 273 (Herbert J. Storing, ed., 1981).

It was the political bible of the state. Scarcely a family was without it. Every member of the government had a copy; and nothing was more common, when any debate arose on the principle of a bill, or on the extent of any species of authority, than for the members to take the printed constitution out of their pocket, and read the chapter with which [such] debate was connected.²⁸

This is not to say that educated Americans today don't have a general sense of their constitutional rights. But that general sense, and much of the specific vocabulary, comes more from the Supreme Court than from the Constitution itself. Following the Court, layfolk often speak of the "separation of church and state" even though those words don't quite appear in the First Amendment; and the *Miranda* mantra has displaced the actual wording of the Fifth and Sixth Amendments. Lawyers speak unselfconsciously about "substantive due process" or "strict scrutiny" as if the Constitution really used these words.

A quick look at constitutional text and history suggests that the Framers envisioned rather less reliance on the Supreme Court, and rather more constitutional conversation within the legislature and among the citizens. No phrase appears more in the Bill of Rights than the words, "the people"—words that of course also have pride of place in the Preamble. (The recurrent use of these words is, from an architextural point of view, one of the document's dominant motifs.) The document nowhere gives the Supreme Court a monopoly on constitutional interpretation or proclaims it to be "the ultimate interpreter of the Constitution"—a phrase that also is absent from *Marbury v. Madison* and that never appeared in *U.S. Reports* until the second half of the twentieth century.²⁹

Today's Supreme Court takes up vastly more constitutional space than the one established in 1789. In the almost eighty years between the Founding and the Reconstruction, the Supreme Court invalidated acts of Congress on only two occasions, *Marbury*³⁰ in 1803 and *Dred Scott*³¹ in 1857. By the mid 1920s, this number had risen to about fifty—less than one case a year.³² As of 1930, the Court had never invalidated any government practice in the name of freedom of expression; and the first time the Court struck down an act of Congress on First Amendment grounds was in 1965.³³ Overall, the Warren Court invalidated acts of Congress in about twenty

28. Thomas Paine, *Rights of Man* 182 (Heritage Press 1961)(1791)..

29. This phrase first appeared in an opinion of the Court in *Baker v. Carr*, 369 U.S. 186, 211 (1962). Cf. *Cooper v. Aaron*, 358 U.S. 1, 18 (1957) (proclaiming, in a context involving state defiance of the Court's mandate rather than congressional or presidential disagreement with the Court's judgment, that "the federal judiciary is supreme in the exposition of the law of the Constitution"); *Youngstown v. Sawyer*, 343 U.S. 579, 595 (1952) (Frankfurter, J., concurring) (describing "judicial process as the ultimate authority in interpreting the Constitution").

30. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803).

31. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

32. For details, see Charles Warren, *Congress, the Constitution, and the Supreme Court* 134-35 (1925).

33. See *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

cases over a sixteen year span—slightly more than one case a year.³⁴ By contrast, the Rehnquist Court in the last seven terms alone struck down congressional laws (most of them constitutionally sound laws, in my view) in almost 30 cases³⁵—far more than in any prior period. From 1995 to 2001, the Court used the First Amendment doctrine to strike down state and federal policies (many of them quite constitutionally defensible and some of them even admirable, I should add) in more than twenty separate lawsuits.³⁶

34. See *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Toth v. Quarles*, 350 U.S. 11 (1955); *Reid v. Covert*, 354 U.S. 1 (1957); *Trop v. Dulles*, 356 U.S. 86 (1958); *Kinsella v. United States*, 361 U.S. 234 (1960); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963); *Schneider v. Rusk*, 377 U.S. 163 (1964); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *United States v. Brown*, 381 U.S. 437 (1965); *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70 (1965); *United States v. Romano*, 382 U.S. 136 (1965); *Afroyim v. Rusk*, 387 U.S. 253 (1967); *United States v. Robel*, 389 U.S. 258 (1967); *Marchetti v. United States*, 390 U.S. 39 (1968); *Haynes v. United States*, 390 U.S. 85 (1968); *United States v. Jackson*, 390 U.S. 570 (1968); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Leary v. United States*, 395 U.S. 6 (1969); *O'Callahan v. Parker*, 395 U.S. 258 (1969);

35. See *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454 (1995); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *United States v. Lopez*, 514 U.S. 549 (1995); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *United States v. IBM Corp.*, 517 U.S. 843 (1996); *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604 (1996); *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996); *Babbitt v. Youpee*, 519 U.S. 234 (1997); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Reno v. ACLU*, 521 U.S. 844 (1997); *Printz v. United States*, 521 U.S. 898 (1997); *Feltner v. Columbia Pictures Television, Inc.* 523 U.S. 340 (1998); *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998); *Clinton v. City of New York*, 524 U.S. 417 (1998); *Eastern Enter. v. Apfel*, 524 U.S. 498 (1998); *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Alden v. Maine*, 527 U.S. 706 (1999); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000); *Dickerson v. United States*, 530 U.S. 428 (2000); *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 121 S. Ct. 955 (2001); *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001); *Bartnicki v. Vopper*, 532 U.S. 514 (2001); *United States v. Hatter*, 121 S. Ct. 1782 (2001); *United States v. United Foods*, 533 U.S. 405 (2001)).

36. See *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454 (1995); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995); *Rosenberger v. Rector*, 515 U.S. 819 (1995); *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996); *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727 (1996); *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999); *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999); *United States v. Playboy Entm't Group*, 529 U.S. 803 (2000); *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001); *Bartnicki v. Vopper*, 532 U.S. 514 (2001);

The Supreme Court's rise over the years can also be seen in actual bricks-and-mortar architecture. The Court did not even have its own building until the 1930s. When the nation's capital was relocated to Washington, DC in 1800, the Court met in a small room in the Capitol building. After the Capitol was burned in the War of 1812, the Court was eventually moved into a courtroom in a basement under the Senate chamber, where it sat for four decades. In 1860, the Senate moved into a newer room, and the Court moved upstairs into the old Senate chamber, where it met for the next seventy-five years.

Now all this wasn't quite right, symbolically. As I shall later elaborate, the architecture of constitutional text envisions three separate and coequal departments—legislative, executive and judicial. Thus, it is apt that today's Supreme Court sits not under the Senate or anywhere else in the Capitol building, but rather in its own edifice, level with the Capitol and the White House—three separate and equal (though different) buildings for three separate and equal (though different) branches.

But I wonder whether the Court building today goes too far in the direction of judicial aggrandizement. The problem is not so much the building itself—though some might ask why nine Justices need such an imposing marble temple to do their work.³⁷ The real problem lies not with the architect, but with the Justices. They are failing to administer the building in a manner most consistent with the Constitution's basic ideas of popular sovereignty and republican equality. When you or I, as members of the general public and sovereign people, seek to go to this building to watch our public servants in action by attending an oral argument—a public proceeding in open court—we (the people!) are treated rather curiously. According to Court rules, you are not even permitted, while sitting in Court, to take out a pencil or pen and write a note to yourself about what you have just heard. No notes allowed!³⁸ If this isn't technical prior restraint, it is uncomfortably close—especially when we remember that the history of prior restraint is tightly intertwined with judicial use (and abuse) of the power to punish contempt of court.³⁹ Shouldn't the Justices treat the people who pay for this Court with more respect?

By way of comparison, a phone survey conducted in early 2002 reveals that none of the thirteen United States Courts of Appeals bans notetaking by members of the general public; nor does the highest court of any state, or of the District of Columbia. The Supreme Court of Canada likewise allows notetaking by ordinary visitors.⁴⁰

Good News Club v. Milford Cent. School, 533 U.S. 98 (2001); United States v. United Foods, 533 U.S. 405 (2001); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001)..

37. According to the Court's official website, the building measures 385 feet by 304 feet. <http://www.supremecourtus.gov/about/courtbuilding.pdf>.

38. http://www.supremecourtus.gov/visiting/guide_argument.pdf. The House and Senate galleries are subject to similar rules, but imitation does not equal justification. Moreover, much of the Congress's business is done in committee hearings where notetaking is generally permitted, and before television cameras, see *infra* TAN _____. Also, the *Congressional Record*, published daily and freely available on the internet, offers a verbatim transcript of public proceedings on the floor.

39. See Amar, *supra* note----, at 23-24.

40. Phone survey conducted by Richard Albert, February, 2002 (data on file with author).

And for those of us across this vast continent who cannot easily pop over to Washington, DC, at the drop of a hat, it seems unfortunate that the Justices do not allow us to monitor what happens in open court via new technologies like radio, television, and the internet. Granted, allowing cameras in the Court might raise some problems. Lawyers might posture and play to the camera so as to drum up business from the folks back home; the commercial nightly news might broadcast short clips out of context, thereby discouraging candid oral argument; and the Justices might lose some privacy as their faces become more publicly recognizable. But televising Court proceedings uncut and commercial-free on C-SPAN—much as C-SPAN now helps beam congressional proceedings into family rooms across America—would minimize these problems. (CPAC, the Canadian counterpart of C-SPAN, regularly televises oral argument in the Canadian Supreme Court.) Even if TV should be barred, why shouldn't National Public Radio be allowed to cover oral arguments, live (again, uncut and commercial-free)? Why shouldn't the Court itself post a free transcript of the oral argument on its official website immediately—within minutes—so that any interested citizen in America can in real time see who said what in open Court?⁴¹ Given that the Court building itself cannot accommodate more than a few hundred persons—or to be more blunt, given that the building itself devotes too little space for the citizen gallery and too much space to other, less democratic functions—why shouldn't the public have electronic access to what is, after all, a public event conducted by public servants with public money? And so again I ask, shouldn't the Justices treat the people who pay for this Court with more respect?

Another question: does the Court's treatment of the people in its building mirror its treatment of the People (with a capital We) in its caselaw? A short document must perforce leave a great deal to be worked out and specified later, and the Founders envisioned a system in which all branches of government and the people themselves would be part of an extended constitutional conversation interpreting and implementing the document's grand design. Different branches of government might have different views, and the people themselves—at the ballot box, in the jury box and elsewhere—would often play a decisive role in the unfolding democratic drama.

But the Court increasingly has come to assert a monopoly of interpretive power and has often treated the Constitution itself in cavalier ways. Perhaps the most famous case of the modern era, *Roe v. Wade*,⁴² never even quotes the words of the Constitution that it claims are violated by anti-abortion laws. And when we look at these words, they speak of “due process of law,” not “due substance of law” or, as the Court would have it, “substantive due process.” Instead of expounding the People's Constitution, today's caselaw often eclipses it, substituting the Court's own words for the Constitution's and proclaiming the Justices' general right—their duty, even—to ignore the Constitution in many situations when the Constitution has the effrontery to conflict with the Court's precedents.⁴³ The Court's law as expressed in doctrine is increasingly displacing the

In Rhode Island, notetakers must seek permission from the court clerk, who typically grants such permission pro forma.

41. Typically, the oral argument transcript is posted on the official court website about seven to ten days after the event.

42. 410 U.S. 113 (1973).

43. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 864 (1992).

People's law as expressed in the Constitution itself. We, the People are being displaced by them, the Justices.⁴⁴ It was precisely to forestall this displacement that the Founders crafted a short document that every citizen could read, understand, and in various ways (as a voter, as a juror) help interpret—a document founded on popular sovereignty rather than judicial supremacy, a document beginning with the majestic words, “We, the People. . . .”

II. THE GREAT PORTAL

Which brings us to the Preamble. Just as we typically take note of a grand entranceway to some great building as we enter it, so too when we visit the Constitution architexturally, we should immediately pause and ponder the majestic textual arch ushering us inward. “We, the People of the United States . . . do ordain and establish this Constitution for the United States of America.”

Note that I have omitted the words in the middle of this sentence to reduce it to its grammatical essence of subject, verb and object. I shall come to the omitted words soon enough, but for now please consider just how remarkable a sentence this is, stripped to the essentials. Here is the monumental idea fronting the monumental document: popular sovereignty. All ye who enter, pay heed. This text comes from the People.

It is fashionable today to miss this point or mock it by emphasizing all the Founding-era exclusions—of slaves, of women, of free blacks and unpropertied men. Much of this criticism is valid, and I shall eventually return to the issue of democratic exclusion. But what this criticism misses is that at the time the Preamble's words are written, the Constitution can indeed lay claim to being the most populist document the world has yet seen. Ancient democracies had likewise excluded slaves and women; and no ancient democracy had ever democratically voted on its basic constitution itself. The celebrated (and partly monarchical) English Constitution had never been reduced to writing and voted on; and ordinary Americans had never been asked to ratify the Declaration of Independence, or the state constitutions of 1776, or the Articles of Confederation.⁴⁵ As Americans debated the Constitution in 1787 and 1788, they understood—and so must we today—the stunning fact that never before in the history of planet earth had so many ordinary persons been directly involved in registering their explicit consent to the supreme law under which they and their posterity would be governed.

In dramatic contrast to ancient Republics founded by one lawgiver—Athens's Solon, or Sparta's Lycurgus—America's Constitution was drafted by a representative assembly and then put to a vote by popularly elected convention in each state. Leading founders were acutely aware and immensely proud of America's innovation. James Wilson could scarcely contain himself:

44. For a more general discussion of the gaps between the document and the doctrine purporting to construe it, see Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 Harv. L. Rev. 26 (2000).

45. Massachusetts in 1780 and New Hampshire in 1784 did secure popular ratification of their proposed state constitutions; the federal Constitution built on and continentally extended these two precedents.

A people free and enlightened, establishing and ratifying a system of government, which they have previously considered, examined, and approved! This is a spectacle, which we are assembled to celebrate; and it is the most dignified one that has yet appeared on our globe.

...

... A whole people exercising its first and greatest power—performing an act of sovereignty, original and unlimited!

The scene before us is unexampled as well as magnificent. The greatest part of governments have been the deformed offspring of force and fear. With these we deign not comparison. But there have been others which have formed bold pretensions to higher regard. You have heard of Sparta, of Athens, and of Rome; you have heard of their admired constitutions, and of their high-prized freedom. . . . But did they, in all their pomp and pride of liberty, ever furnish, to the astonished world, an exhibition similar to that which we now contemplate? Were these constitutions framed by those, who were appointed for that purpose, by the people? After they were framed, were they submitted to the consideration of the people? Had the people an opportunity of expressing their sentiments concerning them? Were they to stand or fall by the people's approving or rejecting vote?⁴⁶

The Preamble does not merely affirm popular sovereignty; it embodies and enacts it. It performs it. We, the People, in fact *do* something—we ordain and establish, we make, we found, we erect, we constitute. Our Constitution is a deed and not just a text, and it is the Preamble (as further specified by Article VII, to which I shall return) that does the deed.

And the Preamble does all this on a continental scale. It unites previously separate and “sovereign” states that had been bound together in a “league,” a “firm [but mere] treaty of friendship” into something altogether different, into a continental nation. In a phrase, it “form[s] a more perfect Union.”⁴⁷

In announcing this as its literally primary purpose, the Preamble clearly puts diehard believers in absolute state sovereignty on notice. Abandon that hope, ye who enter here. The phrase “perfect Union” in fact echoes language from the Union of England and Scotland in 1707, as Publius reminds his readers in *The Federalist* Number 5.⁴⁸ As with that union creating a United Kingdom, the Preamble proposes to unite the

46. Oration Delivered on the Fourth of July, 1788 in 2 *The Works of James Wilson* 773, 773-74 (Robert Green McCloskey ed., 1967). A similar, if more rhetorically restrained, meditation appears in *The Federalist* No. 38, at 231 (J. Madison). For important recent scholarship calling attention to this aspect of America's innovation, see Jed Rubenfeld, *Freedom and Time* 13, 163-68 (2001).

47. For more elaboration and documentation of this reading, see Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *Yale L. J.* 1425, 1442-62 (1987) [hereinafter Amar, *Of Sovereignty*]; Akhil Reed Amar, *The Consent of the Governed: Amending the Constitution Outside Article V*, 94 *Colum. L. Rev.* 457, 462-69 & n. 37 (1994) [hereinafter Amar, *Consent*]; Akhil Reed Amar, *Abraham Lincoln and the American Union*, *Ill. L. Rev.* 1109 (2001) [hereinafter Amar, *Lincoln*].

48. *The Federalist* No. 5, at 50 (J. Jay) (quoting letter of July 1, 1706, from Queen Anne to Scotch Parliament).

several states into a legal order that will not permit unilateral secession later on.⁴⁹

The rest of the Preamble's language likewise suggests a much stronger national system than had existed under the Articles of Confederation. The opening words of the Articles had affirmed a "confederacy" in which "[e]ach state retains its sovereignty, freedom and independence."⁵⁰ Nothing of the sort appears in the opening words of the Constitution. Whereas the Articles spoke of the "states" promoting "their common defense, the security of their liberties, and their mutual and general welfare,"⁵¹ the Preamble rephrases these words in a more nationalistic way, and presents them as part of a grand portico of nationalistic purpose: "to form a perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." This graceful colonnade speaks not merely of relations between states, but of direct national aims within each state—justice and domestic tranquility—and of a direct relationship between a national people and our national Constitution.

Antifederalists hurled themselves against this gate, but ultimately lost the debate. "Who authorized [the Philadelphia convention] to speak the language of , *We, the people*, instead of, *We, the states*?" asked Patrick Henry.⁵² "States," he continued, "are the characteristics and the soul of a confederation. If states be not the agents of this compact, it must be one great, consolidated, national government of the people of all the states."⁵³ In a more architectural vein, states' rightist Sam Adams confessed: "As I enter the Building, I stumble at the threshold. I meet with a National Government instead of a Federal Union of Sovereign States."⁵⁴ Likewise, Pennsylvania Antifederalist Robert Whitehill complained that the Preamble "shows that the old foundation of the union is destroyed, the principle of confederation is excluded, and a new and unwieldy system of consolidated empire is set upon the ruins of the present compact between the states."⁵⁵

As an affirmation and enactment of continental popular sovereignty on an utterly unprecedented scale, the Preamble deserves pride of place in constitutional law and constitutional theory. It is no coincidence that the three greatest opinions of America's three greatest Founding-era Justices—James Wilson's *Chisholm v. Georgia*,⁵⁶ Joseph Story's *Martin v. Hunter's Lessee*,⁵⁷ and John Marshall's *McCulloch v.*

49. See 1 William Blackstone, *Commentaries* *98 note e (note added in 1766); see generally Amar, *Of Sovereignty*, supra note, at 1451-62; Amar, *Lincoln*, supra note, at 1124-30.

50. Articles of Confederation, 1781, arts. I-III.

51. *Id.* art. III.

52. 3 *Debates on the Adoption of the Federal Convention* 22 (Jonathan Elliot ed., AYER Co. reprint ed. 1987) (1836)[hereinafter *Elliot's Debates*].

53. *Id.*

54. Letter to R.H. Lee, December 3, 1787 in 4 *Writings of Samuel Adams* 324 (Cushing, ed.)

55. Quoted in Alpheus T. Mason, *The States Rights Debate* 135 (2d ed. 1975).

56. 2 U.S. (2 Dall.) 419, 454, 462-63 (1793) (separate opinion of Wilson, J.); see also *id.* at 471 (separate opinion of Jay, C.J.).

57. 14 U.S. (1 Wheat.) 304, 324-25 (1816).

*Maryland*⁵⁸—each features a prominent discussion of the Preamble. Nor is it surprising that America’s greatest lawyer-President, Abraham Lincoln, built his constitutional Church of Union upon the rock of the Preamble.⁵⁹ What is surprising, and sad, is that citizens, lawyers, and judges today pay rather little attention to the Preamble. Rarely in the last fifty years has a majority opinion of the Supreme Court even cast a glance at the Constitution’s great gateway arch, much less offered any detailed discussion of what is inscribed on this gate, and why we should still care.

III. FACING THE FUTURE

So much for the building’s front portal. Let’s now examine the back.

In 1787, the Constitution ended with Article VII, which proclaims that “The ratification of the conventions of nine states, shall be sufficient for the establishment of this Constitution between the states so ratifying the same.”

This Article was gracefully designed to complement and counterbalance the Preamble, much as a classical building features certain pleasing symmetries. Locationally, Article VII at the Founding was the omega to the Preamble’s alpha—an eye-catching last word complementing the Preamble’s first principles. (Had Article VII been placed anywhere else—except alongside the Preamble itself, prior to Article I—it would have been less architecturally prominent, and its linkage to the Preamble likewise would have been less immediately evident.) Substantively, both the front and the back portals concretize popular sovereignty. The Preamble proclaims that “We, the people . . . do ordain and establish this Constitution.” Article VII specifies how, precisely, We do this, via state ratifying conventions. Textually, Article VII even echoes the exact wording of the Preamble, explaining how “this Constitution” is to be “establish[ed].”

If the Preamble has profound implications for constitutional law and theory, then so too does Article VII. Why were “conventions” under Article VII seen as embodiments of the Preamble’s “We, the People?” In what ways were such conventions decisively different from ordinary legislatures? Why did the Constitution go into effect only among the states that ratified it? Given that when George Washington took office, North Carolina and Rhode Island had yet to ratify the Constitution, how would the new Union have unfolded had these two states persisted in remaining outside the Constitution? How can Article VII be squared with the Articles of Confederation, which proclaimed that any new regime would require the *unanimous* consent of the thirteen state *legislatures*? How could a simple majority within a state ratifying convention in effect alter pre-existing state constitutional norms without complying with the explicit rules of amendment specified in these state constitutions?

Thoughtful students of the Constitution may disagree about the answers to these profound questions, but surprisingly few lawyers and judges today even ask them. The modern Supreme Court has rarely wrestled with any of these questions or tried to explain the general significance of Article VII for deep constitutional principles of

58. 17 U.S. (4 Wheat.) 316, 403-05 (1819).

59. See First Inaugural Address (Mar. 4, 1861) in 4 *Collected Works of Abraham Lincoln* 262, 265 (Roy P. Basler, ed. 1953).

federalism, popular sovereignty, representation, majority rule, and constitutional amendment.⁶⁰

Of course, Article VII was far more architecturally prominent in the Constitution's original design than in its remodeled form. This Article ended the 1787 Constitution, but it sits in the middle of the 2002 version. What began as a back porch is now a passageway of sorts, linking the great acts of popular sovereignty in the 1780s to subsequent acts of popular sovereignty by later generations of Americans—the Preamble's "posterity."

The architectural configuration of these later popular pronouncements is striking. Rather than directly rewriting the original 1787 text—the way a modern wordprocessor reworks an old draft—Americans have chosen instead to add new texts to the end of the document in chronological order. Each new amendment builds out from its predecessor, beginning with Article VII and stretching towards the horizon.

The architectural effect is to call dramatic attention to the arc of history, the chronological unfolding of constitutional law tracking the unfolding narrative of the American people. Readers can see at a glance, for example, how democracy is on the march, how later amendments seek to make amends for—without hiding—earlier democratic exclusions and other lapses. Over the years, by working to redeem the Preamble's boasts of democracy and liberty, We, the people, re-earn the right to call ourselves that without embarrassment. We, the people, mature and expand alongside a maturing and expanding constitutional text. We add a bill of rights; we abolish slavery; we proclaim equal citizenship and bring states to heel; we enfranchise black men, then all women, then the poor and young adults; we embrace progressive income taxation and direct election of Senators; we shorten lame-duck Congresses, and limit imperial presidents to two terms.⁶¹ And we are not yet done.

This dramatic visual image of a Constitution moving forward and stretching toward the horizon has, I think, been missed by most lawyers and judges. Advocates of a "living Constitution" often think more about living than about the Constitution. They pay little attention to the obvious ways in which the document indeed does move forward and change shape, via amendment. At the other end of the methodological spectrum, many self-described textualists exaggerate the Founding text and slight later amendments. Neither side has paid much attention to the trend line of these amendments, to the arc of history showcased by the text itself.⁶²

60. For my own efforts to assess these issues in light of Article VII, see generally Amar, *Of Sovereignty*, supra note , at 1459-62 ; Amar, *Consent*, supra note ; Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 *Colo. L. Rev.* 749, 761(1994).

61. See U.S. Const amends I-X (establishing a Bill of Rights); XIII (abolishing slavery); XIV (proclaiming equal citizenship and bringing states to heel); XV (enfranchising black men); XVI (authorizing predictably progressive income tax); XVII (guaranteeing direct election of Senators); XIX (enfranchising women); XX (limiting lame duck periods); XXII (limiting Presidents to two terms); XXIV (prohibiting poll taxes for federal elections); XXVI (enfranchising young adults).

62. The most prominent exception here is John Hart Ely, whose celebrated Harris Lecture (which later became part of his landmark book) did indeed seek to call attention to the obvious democratizing trendline of post-Founding constitutional amendments. See John Hart Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 *Ind. L. J.* 399, 410-11 (1978);

Had Americans opted to rewrite the Founding text rather than adding amendments to the end in chronological order, the pattern and direction of textual change would have been less visible. It would have been harder to see at glance that, for example, over the years We the People have embraced increasingly strong claims of civil and political equality even as We have scaled back protections for the rich. We freed slaves without compensating slaveholders in the 1860s;⁶³ embraced a predictably progressive income tax in the 1910s; and banned various poll taxes in the 1960s. And “the people” who did all this were more representative in key ways than the more exclusionary “people” of the Founding. Yet many of those who claim fidelity to constitutional text miss all this, in part because they pay no heed to the very shape—the architecture—of that text. Misreading both individual clauses and the document’s evolving structure, these self-described textualists overprotect property, underprotect democracy, and ignore the textual trend line altogether.

History, of course, is still happening. Had amendments been blended into the original text, the document might seem perfect and complete, as is. But the manner of adding amendments to the end reminds us that we ourselves—We, the People today—should ponder how we might leave our posterity a better document than we inherited. Why only twenty-seven amendments, as opposed to twenty-eight, or twenty-nine, or . . . ? The obvious incompleteness and openendedness of the Constitution as a perpetual work in progress is thus dramatized by a series of amendments pointing outward toward the horizon, facing the future.

Or to switch the spacial metaphor from the horizontal to the vertical, note how each amendment text is layered atop its predecessors in a perpetually unfinished pyramid, gesturing upwards. The blank space at the top is a constant reminder to us that the document is not finished. We the People still have work to do.⁶⁴

IV. PRESERVING THE PAST

One further aspect of the Constitution’s chronologically structured text deserves notice. We the People have made amends without hiding or whitewashing our past mistakes. Rather than prying loose and carting off embarrassing textual remnants of American’s imperfect history, like the Fugitive Slave Clause or the Three-Fifths Clause, We the people have added on new rooms to the old edifice. No whitewash: the old mistake remains in place and in view as a lesson to all. If anything, America’s mode of remodeling invites special attention to these later-abandoned clauses. As

John Hart Ely, *Democracy and Distrust* 6-7, 99, 123 (1980). Also worthy of note here is Jed Rubenfeld’s brilliant new book, *supra* note , which conceptualizes the American Constitution as a written project worked out over a large stretch of time.

63. Above and beyond the Thirteenth Amendment itself, note that Section 4 of the Fourteenth Amendment prohibits state and federal governments from compensating slaveholders for emancipation. This stern prohibition applied even to loyal slaveholders from loyal (nonseceding) states.

64. “The architects of These States laid their foundations, and passed to further spheres. . . Now are needed other architects, whose duty is not less difficult, but perhaps more difficult. Each age forever needs architects. America is not finished, perhaps never will be; now America is a divine true sketch.” Walt Whitman, *To Ralph Waldo Emerson*, *Leaves of Grass* (2d ed. 1856).

readers explore a given amendment in the New Wing, we must identify which parts of the Old Wing (and which portions of earlier add-ons)⁶⁵ are consequently no longer fully functional. If today's lawyers and judges were to spend more time pondering these lapsed clauses, we would see our current constitutional situation in a clearer light.

Take the electoral college. The very architectural presence of the Twelfth Amendment separate and detached from Article II calls attention to the Philadelphia Framers' now superseded Article II presidential system. That system failed to anticipate the rise of national presidential parties, and thus needed to be replaced.⁶⁶ This fact alone might prompt us to ask, what other important future developments did the Philadelphia Founders fail to anticipate? Perhaps there are other repair jobs that need to be done by the American people today?

The Twelfth Amendment, standing alone and bearing its own special date apart from all other constitutional texts, also calls attention to itself in a way that direct rewording of Article II might not have. Viewing this standalone amendment, we are prompted to ask why, when dealing with a flawed Founding system of presidential selection, Americans in 1803 didn't simply scrap the electoral college system altogether in favor of direct popular election? And the answer to this architecturally prompted question turns out to have important lessons for today's world.

Most of the reasons that had been given for the electoral college in 1787 made much less sense in 1803. Some founders had defended the original electoral college as a sop to small states. Yet the elections of 1796 and 1800 had made clear that the real division in America ran not between big and small states, but between Northern and Southern states. What's more, the modern system of national presidential parties and winner-take-all state elections—a system already visible, though not yet entrenched, at the time of the Twelfth Amendment—largely nullified any advantage that small states might have had under the Philadelphia plan.⁶⁷ Of the forty-two men to hold the

65. See, for example, the Twenty-first Amendment, explicitly repealing the earlier Eighteenth Amendment, which had constitutionalized Prohibition.

66. In the election of 1800-1, two rudimentary presidential parties—Federalists led by John Adams and Republicans led by Thomas Jefferson—took shape and squared off. Jefferson ultimately prevailed, but only after an extended crisis triggered by several glitches in the Framers' electoral machinery. In particular, Republican electors had no formal way to designate that they wanted Jefferson for President and Aaron Burr for Vice President rather than vice versa. Some politicians then tried to exploit the resulting confusion. Enter the Twelfth Amendment, which allowed each party to designate one candidate for president and a separate candidate for vice president. The Amendment transformed the Framers' framework, enabling future presidential elections to be openly populist and partisan affairs featuring two competing tickets.

67. The key Philadelphia concession to small states was the Framers' back-up selection system: if no candidate emerged with a first-round electoral-vote majority, then the House of Representatives would choose among the top five finalists, with each state casting one vote, regardless of population. U.S. Const. art. II, sect. 1, para. 3. Some framers expected that big states would tend to dominate the first round, while small states might loom large in the final selection. But under a system of two major presidential parties, one candidate almost always wins an electoral majority in the first round, rendering the Framers' pro-small-state back-up system irrelevant. Nor is the first round strongly skewed against big states. Whatever small-state skew results from the rule giving every state a minimum of three electoral votes is largely

Presidency, only two, Franklin Pierce of New Hampshire and Bill Clinton of Arkansas, have run as small state residents.

Some Philadelphia framers objected to direct presidential election because they believed that ordinary Americans across a vast continent would lack sufficient information to choose intelligently among leading presidential candidates. Although voters in a given state would know enough to choose between leading state candidates for House races and for the governorship, these voters would likely lack information about which out-of-state figure would be best for the presidency. But by the time of the Twelfth Amendment, this concern was quickly becoming moot. National presidential parties would link presidential candidates to slates of local candidates and national platforms would explain to voters who stood for what.

The real problem with direct election, both in 1787 and 1803, was altogether different. In a word: slavery. At the Philadelphia convention, the visionary Pennsylvanian James Wilson proposed direct national election of the President.⁶⁸ But in a key speech on July 19, the savvy Virginian James Madison suggested that such a system would prove unacceptable to the South: “The right of suffrage was much more diffusive in the Northern than the Southern States; and the latter could have no influence in the election on the score of Negroes.”⁶⁹ In other words, in a direct election system, the North would outnumber the South, whose many slaves (more than half a million in all) of course could not vote. But the electoral college—a prototype of which Madison proposed in this same speech—instead let each southern state count its slaves, albeit with a two-fifths discount, in computing its share of the overall electoral college.

Virginia emerged as the big winner—the California of the Founding era—with 12 out of a total of 91 electoral votes allocated by the Philadelphia Constitution, more than a quarter of the 46 needed to win in the first round.⁷⁰ After the 1800 census, Wilson’s free state of Pennsylvania had ten percent more free persons than Virginia, but got twenty percent fewer electoral votes. Perversely, the more slaves Virginia (or any other slave state) bought or bred, the more electoral votes it would receive. Were a slave state to free any blacks who then moved North, the state could actually lose electoral votes. If the system’s pro-slavery tilt was not overwhelmingly obvious when the Constitution was ratified, it quickly became so. For 32 of the Constitution’s first 36 years, a white slaveholding Virginian occupied the Presidency.

Most importantly, the pro-slavery skew was plainly visible when the Twelfth Amendment was framed and ratified. The 1796 race between John Adams of Massachusetts and Thomas Jefferson of Virginia had featured a razor-sharp division between northern states and southern states. Adams won that one but in the rematch four years later Jefferson prevailed, with the slavery-skew of the electoral college as the decisive margin of victory. Without the extra electoral college votes generated by slavery, the mostly southern states that supported Jefferson would not have sufficed to give him a majority. As pointed observers remarked at the time, Thomas Jefferson metaphorically rode into the executive mansion on the backs of slaves. Thus, when the

offset by winner-take-all rules tending to favor big states.

68. 1 Farrand, *supra* note _____, at 68 (June 1).

69. 2 *id.* at 56-57.

70. See U.S. Const. art. I, sect. 2.

Twelfth Amendment tinkered with the electoral college system rather than tossing it, the system's pro-slavery bias was hardly a secret. Indeed, in the floor debate over the amendment in late 1803, Massachusetts Congressman Samuel Thatcher complained that "The representation of slaves adds thirteen members to this House in the present Congress, and eighteen Electors of President and Vice President at the next election."⁷¹ But Thatcher's complaint went unredressed. As it had at Philadelphia, the North caved to the South by refusing to insist on direct national election.

Still later amendments highlight the gender exclusions that were also facilitated by the early electoral college. After the Thirteenth Amendment abolished slavery, Southern states were eligible to count all their blacks for purposes of congressional representation and the electoral college, without any two-fifths discount, even though these states did not yet allow blacks to vote. Unless the Constitution were amended, southern states would actually have more national clout after Appomattox than they had before secession! To prevent this, section 2 of the Fourteenth Amendment devised a new apportionment formula which put the word "male" into the Constitution for the first time. In essence, a state that disfranchised any of its adult male citizens would have its congressional apportionment and electoral college allotment proportionately reduced.⁷² But no state would pay any price, in Congress or in the electoral college, for disfranchising adult women citizens! Then came the Fifteenth Amendment, giving black men the vote but doing nothing for women. Only with the adoption of the Nineteenth Amendment in 1920 did We the People vest women with full and equal voting rights. These later amendments—all the more prominent because they have not simply been hidden in the Old Wing—draw attention to an obvious (in retrospect) defect of the early electoral college: The Founding fathers' system didn't do much for the Founding mothers. Under direct national election, any state that chose to enfranchise its women would have automatically doubled its clout in presidential elections. (New Jersey apparently did allow some women to vote in the Founding era, but later abandoned the practice.) Under the electoral college, however, a state had no special incentive to expand suffrage—each state got a fixed number of electoral votes based on population, regardless of how many or how few citizens were allowed to vote or actually voted. As with slaves, what mattered was simply how many women resided in a state, not how many could vote there.

What should this constitutional narrative—made easier to see and tell precisely because the text of the original electoral college remains open to view, and the

71. 13 Annals of Cong. 538 (Oct. 28, 1803).

72.

But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

U.S. Const. amend. XIV, sect. 2.

amendments are nicely arranged in chronological order—mean for judges and citizens today?

Start with the judiciary. The best known case concerning the electoral college and its workings is, of course, *Bush v. Gore*.⁷³ The facts of this case involved rather serious inequalities in voting machinery within the state of Florida. Certain districts with large black and/or poor populations disproportionately had outdated and ill-maintained voting machines that resulted in an extraordinarily high percentage of uncounted ballots, compared to other—whiter, richer—parts of the state with sleeker and more reliable voting systems. The case turned on the meaning of both Founding-era rules about presidential selection and Reconstruction-era principles concerning equality.

In such a case, I would have liked to see at least one Justice tell Americans the basic story of racial and class-based exclusion in the original electoral college, and of the American People's subsequent—imperfect and unfinished but commendable—efforts to make amends. This story would have begun by noting that the electoral college was largely designed in 1787 and revised in 1803 to facilitate black disfranchisement. The story would have noted that although We, the People, formally repudiated racial inequality in voting in the Fifteenth Amendment, the Justices largely turned a blind eye when the provisions of that Amendment (along with Section 2 of the Fourteenth Amendment) were defied on a massive scale for much of the next century.⁷⁴ Until Congress got serious in 1965 with an important voting rights statute that went far beyond what the Court had done,⁷⁵ vast numbers of blacks were wholly disfranchised in much of the former Confederacy. The story might have mentioned that via the Twenty-fourth Amendment, ratified in 1964, We the People prohibited poll taxes in presidential elections in an effort to equalize voting rights between rich and poor. The story would have also noticed that blacks and poor persons in many areas—including Florida—continue to suffer from unequal voting opportunities and machinery. And the story might have concluded that this background narrative, tracking the changing constitutional text itself and the unfolding saga of the American people, was relevant in assessing efforts to recount votes in those Florida counties with especially high percentages of undercounted votes. Given the large initial undercount, and its systemic race- and class-based skew, efforts to minimize this undercount via mildly imperfect recounts should not lightly be deemed unconstitutional; indeed, any imperfections and inequalities introduced by the recount appeared likely to be much smaller than those of the initial count, and the recount inequalities did not appear to have any systemic race- or class-based skew.

Alas, not a single Justice told this story.

Now turn from the Justices to the American citizenry. In light of the less than flattering history of the electoral college, Americans should ask themselves whether we want to maintain this peculiar institution in the twenty-first century. After all, most millennial Americans no longer believe in slavery or sexism. We do not believe that voters lack proper information about national candidates. We do not believe that a

73. 531 U.S. 98 (2000)

74. See, e.g., *Giles v. Harris*, 189 U.S. 475 (1903).

75. See The Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. sects. 1971, 1973 et seq. (1994)).

national figure claiming a national mandate is unacceptably dangerous. What we do believe is that each American is an equal citizen. We celebrate the idea of one person, one vote—an idea undermined by the electoral college.

The obvious trend of constitutional amendments, of the electoral college in particular and more generally, has been in the direction of increased equality. Indeed, judging by the sheer number of chronologically distinct amendments to the electoral college itself—a number made strikingly visible by very architecture of the New Wing—the Framers’ system of presidential selection and succession has been less than a resounding success. Of the 17 amendments ratified after 1791, three amendments (the Twelfth, Twentieth, and Twenty-third) have directly and specifically modified the electoral college; five more amendments (the Fourteenth, Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth) have directly but more generally modified the college by counteracting its facilitation of widespread disfranchisement; and two more amendments (the Twenty-second and Twenty-fifth) have reformed closely related rules governing who shall sit in the Oval Office. All told, no fewer than 10 of the 17 post-1791 amendments have tried to push the system of presidential selection and succession toward increased democracy. The top of the amendment pyramid remains open, but many of the layers thus far seem to point in a certain direction. Shouldn’t a sensible future amendment abandon the electoral college altogether in favor of direct national election, one person, one vote?

V. INTERIOR DESIGNS

Having surveyed the Constitution’s outside—its basic size and shape, front and back, Old Wing and New Wing—let us now take a more detailed look inside. Textualists traditionally focus on the document’s meaning word by word and clause by clause. Architeturalists seek a broader perspective, noting implicit patterns organizing explicit clauses.

For example, there is no explicit clause proclaiming the general separation of powers in so many words. But this general principle—subject, of course to specific exceptions set out in various clauses—seems implicit in the very organization of constitutional text into three separate Articles creating three presumably separate departments. What are the words “Article I,” “Article II,” and “Article III” doing if not marking a separation? The implication becomes even clearer when one notices that each Article opens with a rather similar vesting clause.⁷⁶ Just as the Preamble and Article VII are evidently designed as a pair of matching portals, the three vesting clauses are obviously designed to be read together in light of their precisely symmetrical and prominent locations fronting the first three Articles, their complementary substance, and their similar syntax. Together, they form an ensemble,

76. See U.S. Const. art I, sect. 1 (“All legislative powers herein granted shall be vested in a Congress . . .”); *id.* art II, sect. 1 (“The executive power shall be vested in a President . . .”); *id.* art. III, sect. 1 (“The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish . . .”). For an exploration of the textual similarities and differences among these three opening clauses, see Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 *Harv. L. Rev.* 1153, 1175-86 (1992).

communicating architexturally to a common citizen that the Constitution features three separate and coordinate branches, the first of which (generally) legislates, the second of which (generally) executes and the third of which (generally) adjudicates.

Though no clause says so in so many words, the general architecture of these three Articles would seem to imply a basic co-equality among the three departments. An ordinary citizen in 1787 reading this document would be led to believe that none of these three departments could properly claim to be the only or even the ultimate decider of constitutional meaning. All three departments, our 1787 citizen might have thought, would be part of the constitutional conversation, and in different scenarios different branches might enjoy the last word. Congress, for example, can and should refuse to enact any law it deems unconstitutional, even if the Supreme Court would uphold this law. Likewise, Presidents may properly veto laws they consider unconstitutional and pardon those convicted under such laws, even if the Supreme Court has upheld or would uphold such laws. Courts too may refuse to enforce laws they consider unconstitutional after giving due consideration to the contrary judgments of co-ordinate branches. In cases of sharp and public disagreement among the departments, it would seem most plausible that the people—whose constitutional house this is, whose name is on the front gate—might also render judgment in the long run.

Had the document been designed to privilege the Supreme Court over all other entities—to affirm not merely judicial review but judicial supremacy⁷⁷—surely it should have highlighted such an important point prominently and explicitly. Such a point should have been made explicit in an architexturally prominent place in the document, rather than implied in the fine print or simply conjured up by judicial “interpretation” 150 or 200 years after the Founding. In fact, although the Constitution makes the Supreme Court supreme over inferior courts within its own branch, it nowhere explicitly raises the Court above co-ordinate legislative and executive departments. Rather, the Constitution lists the judiciary *third* among the three great departments. From the order of the first three Articles, and the specific wording of the

77. For my own earlier discussion and analysis of this distinction, see Akhil Reed Amar, *Marbury*, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U. Chi. L. Rev. 443, 445-46 and sources cited therein (1989). Other scholars have offered similar distinctions, see, e.g., Paul Brest, *Congress as Constitutional Decisionmaker and its Power to Counter Judicial Doctrine*, 21 Ga. L. Rev. 57 (1986); Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We, the Court*, 115 Harv. L. Rev. 4 (2001). To summarize some of the troubling dimensions of the Court’s recent trend towards supremacy: (1) The Court is invalidating acts of Congress at an exponential rate—two cases prior to the Civil War; less than one case a year from the mid 1860s to the mid 1920s; slightly more than one case a year in the Warren Court; and more than four cases a year since the mid 1990s. (2) Much of the current Court’s regulatory regime is hard to square with the best reading of the Constitution itself. (3) The Court is increasingly privileging its own precedents—even assumedly erroneous precedents—over the Constitution itself. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 864 (1992). (4) The Court is increasingly aggressive in describing its own constitutional status as “ultimate.” (5) The Rehnquist Court—in sharp contrast to the Warren Court—is trivializing Congress’s co-ordinate role in enforcing and defining the Reconstruction Amendments. (6) The Court is increasingly reaching out to decide constitutional issues properly committed to other government actors, see, e.g., *Bush v. Gore*, 531 U.S. 98 (2000).

Necessary and Proper Clause giving Congress important powers to legislate concerning the other departments,⁷⁸ the document suggested to citizens in 1787 that, if any department could claim to be first among equals, it was Congress. The early buildings in Washington, DC reaffirmed this message and did little to suggest judicial supremacy.⁷⁹

The general symmetry of the first three Articles immediately following a Preamble proclaiming popular sovereignty would seem to imply a symmetric and populist model of constitutional interpretation and implementation. This model is rather similar to what *Marbury* in fact said, trumpeting popular sovereignty and acknowledging that courts could refuse to enforce laws they deemed unconstitutional, *just as legislatures and executives could*.⁸⁰ Juries at the Founding were also part of the constitutional conversation, as were ordinary citizens and voters more generally.

Consider for example how the nation's first major constitutional crisis was resolved. The Supreme Court did not even have jurisdiction to decide whether the Sedition Act of 1798—which made it a federal crime to criticize President Adams—was constitutional. Supreme Court Justices riding circuit *upheld* the Act, but this was hardly the end of the story. Grand juries were wholly free to refuse to indict intrepid publishers if the grand jurors believed the Sedition Law unconstitutional, regardless of what the Justices might think. Distinguished lawyers tried to persuade trial jurors that they too should refuse to participate in enforcing a law they deemed unconstitutional. When Justice Samuel Chase stopped trial jurors from hearing this, he was widely condemned and later impeached.⁸¹ And the story doesn't stop there. With the legal aid of James Madison and Thomas Jefferson, state legislatures in Virginia and Kentucky labeled the Sedition Act unconstitutional, and appealed to citizens to protect their constitutional rights. In the election of 1800, the citizens did just that by sweeping opponents of the Sedition Act into Congress and the Presidency.⁸² The new Congress then allowed the Sedition Act to sunset, and the new President (Jefferson) pardoned all who had been previously convicted.

The Justices in this story were hardly the only or even the last word. Indeed, the

78. U.S. Const. art. I, sect. 8, cl. 18 (empowering Congress to “make all laws which shall be necessary and proper for carrying into execution the foregoing powers, *and all other powers* vested by this Constitution in the government of the United States, *or in any department or officer thereof*. . .”) (emphasis added).

79. The size and early opinion practice of the first Supreme Court are also suggestive. If the Court's institutional pronouncements on the Constitution were seen as qualitatively different from those of other branches—“ultimate” rather than co-ordinate—why did the early Court consist of an even number of members, who delivered individual seriatim opinions?

80. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803) (noting that Constitution is “a rule for the courts, *as well as of the legislature*,” emphasizing the obligations created by judicial oaths under Article VI to uphold the Constitution—oaths identical to those required of Congress and the President under the very same Article, and concluding by declaring that “courts as well *as other departments*, are bound by” the Constitution) (emphasis altered).

81. For details and analysis, see Amar, *supra* note ____, at 98-104.

82. Although, as we have seen, Jefferson's election was complicated by the slavery-skew of the Three-Fifths Clause, the congressional election in 1800 was far more decisive, see Kramer, *supra* note ____, at 97 & n. 414.

Supreme Court as such had *no* word, and the last word went not to the Justices on circuit but to the voters and the newly elected Congress and President. A symmetric and populist model of constitutional interpretation embraces the very old and established idea of *Marbury*-style judicial review—Justice Chase, after all, was reviled and later impeached partly because he *failed* to engage in serious judicial review of the Sedition Act—but rejects the modern and troubling claim of judicial supremacy. Contrary to the words and deeds of the modern Court,⁸³ the nine robed Justices in the great marble temple on First Street are not the unique and ultimate authority on constitutional meaning.

The Article I-II-III ensemble was a prominent feature of the Constitution's original blueprint, but other patterns have emerged later, as the American people have periodically remodeled. The very idea of a *Bill of Rights*—of an interconnected package of what were proposed, after all, as twelve separate amendments, only ten of which were initially ratified—is architecturally highlighted by the adjoining placement of all ten of these amendments, and their common date of ratification, distinct from all other constitutional texts.

Whereas the first three articles adjoin, as do the first ten amendments, still other architectural patterns may be seen in nonadjacent provisions adopted over the years. Thus we find a series of Amendments—beginning with the Thirteenth, Fourteenth, and Fifteenth, then later encompassing the Nineteenth, Twenty-third, Twenty-fourth, and Twenty-sixth—all authorizing Congress in almost identical language to “enforce” their respective provisions by “appropriate legislation.”⁸⁴ Together these enforcement clauses comprise an impressive colonnade of congressional power in the building's New Wing, gesturing back to Old Wing's Necessary and Proper Clause. That clause had spoken of “proper” rather than “appropriate” legislation but in the leading judicial gloss on that Old Wing clause, *McCulloch v. Maryland*, the Court had pointedly equated the two etymologically related words.⁸⁵

The current Supreme Court has misconstrued these New Wing's enforcement clauses, in part because the Justices have failed to see the architectural colonnade. *McCulloch* read congressional power broadly and deferentially. When the American people in Reconstruction pointedly used *McCulloch* language to re-empower Congress, they thereby instructed the Court to construe the new grants of power in the

83. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 922 (1995); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *United States v. Morrison*, 120 S.Ct. 1740, 1753 n. 7 (2000).

84. Id. amend. XIII, sect. 2 (“Congress shall have power to enforce this article by appropriate legislation.”); id. amend. XIV, sect. 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”); id. amend. XV, sect. 2 (“The Congress shall have power to enforce this article by appropriate legislation.”); id. amend. XIX, cl. 2 (“Congress shall have power to enforce this article by appropriate legislation.”); id. amend. XXIII, sect. 2 (“The Congress shall have power to enforce this article by appropriate legislation.”); id. amend. XXIV, sect. 2 (“The Congress shall have power to enforce this article by appropriate legislation.”); id. amend. XXVI, sect. 2 (“The Congress shall have the power to enforce this article by appropriate legislation.”).

85. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”).

same spirit, broadly and deferentially. The Reconstruction Congress also enacted prominent and sweeping legislation under the Thirteenth Amendment in 1866, thus clearly putting would-be ratifiers of the Fourteenth and Fifteenth Amendments on notice that these new grants of power should likewise be read broadly.⁸⁶ Knowing all this, We the People ratified these sweeping new grants of power, only to have the Supreme Court change the interpretive ground rules *ex post facto* with stingy readings of the Fourteenth and Fifteenth Amendment enforcement clauses.

Current caselaw makes a shamble of the constitutional colonnade: the Court has upheld broad Congressional power to define “badges of servitude” under the Thirteenth Amendment⁸⁷ but has never explained how similar broad power to define badges of citizenship is somehow lacking under the symmetrically worded Fourteenth Amendment.⁸⁸ As with its disregard of the I-II-III ensemble, the Court’s misconstruction here reflects its warped view that it is somehow the only or the ultimate judge of all things constitutional. As we have seen, this self-image finds little support in the Constitution’s general architecture. The election of 1800 reaffirmed the spirit of 1789: Congress may properly protect rights more vigorously than the Court when those rights are threatened by federal officials. The antebellum and Civil War experience taught a related lesson: Congress may properly protect rights more vigorously than the Court when these rights are being threatened by *state* officials. In the shadow of the *Dred Scott*⁸⁹ case, the Reconstruction Congress knew that it could not always count on the Supreme Court to protect fundamental rights, especially of blacks down South. Thus, the Reconstruction Amendments offered a system of double checks in which both Court and Congress would protect individual rights against states, with states generally held to the more protective standard, whichever that might be. The great Founding architect James Madison had attempted to build just this double check against unconstitutional state laws into the Philadelphia Constitution of 1787.⁹⁰ He failed in this task, but the great Reconstruction architects succeeded, only to have Court dismantle their handiwork.

VI. LOCATION, LOCATION, LOCATION

The existence of patterns across different Articles and Amendments should also invite more careful attention to patterns within individual Articles and Amendments. For example, why are rules about nonestablishment and free exercise⁹¹ found in the

86. The Civil Rights Act of 1866, 14 Stat. 27, swept far beyond prohibiting “slavery” and “involuntary servitude” as these would be understood by judges acting under section 1.

87. See *Jones v. Alfred Mayor Co.*, 392 U.S. 409 (1968).

88. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *United States v. Morrison*, 529 U.S. 598 (2000); *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 121 S. Ct. 955 (2001).

89. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

90. See Jack N. Rakove, *Original Meanings* 81-82 (1996). Indeed, Madison would have gone even further, giving Congress a general negative on all state laws.

91. See U.S. Const. amend I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”)

same amendment as rules about freedom of speech and of the press, and the rights of petition and assembly?⁹² Why is an obviously substantive right, the takings clause, placed inside an otherwise plainly procedural Fifth Amendment?⁹³ In my book, *The Bill of Rights: Creation and Reconstruction*, I attempt to tackle these and similar questions posed by the first ten amendments. Rather than repeating this analysis, let me offer two canonical examples of the potential significance of the *location* of a given clause in influencing the proper interpretation of this clause. My two canonical examples of what might be called locational textualism feature two of America's greatest constitutional lawyers, John Marshall and Abraham Lincoln.

In *McCulloch v. Maryland*, John Marshall aimed to define the proper scope of congressional power under Article I. In general, affirmative grants of congressional power appear in Article I, section 8; prohibitions on Congress appear in Article I, section 9. Marshall's famous opinion appealed to this basic fact about the Constitution's layout. The Necessary and Proper Clause, he noted, appeared in section 8; and thus was not sensibly read as a restriction on the earlier section 8 power-grants; had it been so intended (as Maryland apparently argued) it would, Marshall wrote, have appeared instead in section 9.⁹⁴ Underlying Marshall's argument is an obvious but powerful architectural fact about the Constitution: like a well designed building, it is nicely organized. Indeed, in the closing days of the Philadelphia Convention, the delegates explicitly created a "Committee of Style and Arrangement" to polish the Constitution's prose and configure its clauses in a graceful and sensible way.⁹⁵

Our second and final example comes from the 1861, when Abraham Lincoln suspended habeas corpus. If we look certain words of the Constitution without

92. This is a question that a noteworthy Harris Lecture on the First Amendment never asks. See Robert H. Bork, "Neutral Principles and Some First Amendment Problems," 47 *Ind. L. J.* 1 (1971). In this lecture, then-Professor Bork argues that "[c]onstitutional protection should be accorded only to speech that is explicitly political," *id.* at 20. Does this mean that explicitly religious speech should not enjoy constitutional protection, even though the First Amendment discusses religion alongside speech and press? Reading the Constitution through clausebound blinders, Bork never confronts this question—indeed, he never quotes the First Amendment as a whole, or even mentions the word "religion." Likewise, he briefly discusses Founding-era understandings of First Amendment freedoms but slights the Reconstruction-era Fourteenth Amendment, which importantly modified earlier understandings of these freedoms. Bork is emphatic that he would not protect "literary expressions" and "novel[s]" but nowhere confronts what might be thought the paradigm case of free expression to the Reconstruction generation: Harriet Beecher Stowe's *Uncle Tom's Cabin*, a novel that blended literary, religious, and political expression. For much more analysis, see generally Amar, *supra* note , at 35-42, 231-57. On paradigm cases generally, see *id.* at 301; Rubinfeld, *supra* note , at 178-95.

93. See U.S. Const. amend V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

94. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 419 (1819).

95. See 2 Farrand, *supra* note _____, at 547, 565.

attending to their location in the overall blueprint, we find the following pronouncement: “The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” So far, the clause would hardly seem a problem for Lincoln. The text seems to envision suspension, and does not explicitly say *who* may suspend. Specifically, it does not say that only Congress may suspend, and there are good textual, practical and structural reasons to think that a President in Lincoln’s situation should be able to make the decision.

Lincoln, after all, was in fact facing a real “Case[] of Rebellion” and the “public Safety” did indeed require extreme measures. Washington, DC, was a slave city surrounded by the slave states of Virginia and Maryland. When Lincoln acted, Virginia had already seceded, and Maryland was teetering on the brink. If rebel sympathizers in Maryland were to succeed in whipping up enough secessionist fervor, Maryland would fall and DC itself would be surrounded and militarily indefensible. Checkmate. What’s more, Congress was not even in session. And this scenario was hardly unforeseeable—the Framers had envisioned that much of the time, legislators would be back home mingling with their constituents.⁹⁶ The Framers must also have foreseen that in some rebellion situations, a rebellion itself might forcibly prevent a congressional quorum from being able to reach the capital. By contrast, the Framers designed the President to be always in session, 24-7-365.⁹⁷ It thus makes obvious structural and practical sense that in circumstances like those of early 1861, the President should have the power to suspend habeas corpus, at least until Congress returned to consider the matter itself. Textually, this limited power to preserve the pre-rebellion status quo until Congress could meet can quite plausibly be seen as part of the “Executive Power” vested in the President by the first sentence of Article II.⁹⁸

But here is the complicating locational fact: The above-quoted nonsuspension clause appears in Article I⁹⁹—Congress’s Article—rather than the President’s Article II. Emphasizing this fact among others, Chief Justice Taney on circuit condemned Lincoln’s suspension as unconstitutional.¹⁰⁰

96. See, e.g., U.S. Const. art. I (discussing annual congressional meetings, congressional sessions and adjournments, and congressional travel to and from the capital); id. art. II (discussing recess appointments, and presidential power to convene special sessions in extraordinary situations).

97. That is of course why Article II gives the President various gapfilling responsibilities when Congress is not in session, such as the power to make recess appointments and convene Congress.

98. See Henry P. Monaghan, *The Protective Power of the Presidency*, 93 *Colum. L. Rev.* 1 (1993).

99. Article I, section 9, clause 2, to be precise.

100.

The clause of the constitution, which authorizes the suspension of the privilege of the writ of habeas corpus, is in the 9th section of the first article. This article is devoted to the legislative department of the United States, and has not the slightest reference to the executive department. . . .

It is the second article of the constitution that provides for the organization of the executive department, enumerates the powers conferred on it, and prescribes its duties. And if the high power over the liberty of the citizen now claimed, was intended to be

Personally, I am with Lincoln on this one. Architextural arguments from blueprint location must be considered alongside, and should ideally cohere with, more general arguments of text, history, and structure. The location of the suspension clause in Article I need not, by itself, mean that the executive power fails to encompass suspension authority on the facts Lincoln faced. The blueprint location may instead be read more modestly, as architexturally reinforcing the idea that the President's suspension power is purely temporary, and lapses once *Congress* has had a genuine opportunity to convene and consider the matter. Lincoln himself understood this, and sought explicit congressional approval for emergency actions that he took in Congress's absence and as Congress's agent, preserving the basic constitutional status quo so that Congress could act. Had Lincoln not acted with alacrity, a violent and unlawful rebellion undermining the very foundations of the Constitution itself and the Preamble's first principles of republican union might well have hardened into a fait accompli that Congress would have been unable to undo when it ultimately reconvened.

VII. PARTING THOUGHTS

It is time to bring our brief architextural tour of the Constitution to a close.

In a document designed for the people, not every detail is explicitly enumerated, lest the Constitution degenerate into a "prolix legal code" that would discourage public involvement.¹⁰¹ *McCulloch* reminds us that certain governmental powers—like to the power to establish a national bank—are implicit rather than minutely specified. The Ninth Amendment reminds us that rights, too, may be implicit.¹⁰² For example, the Constitution does not explicitly *enumerate* a right of defendants to confront physical evidence introduced against them, or the right to introduce physical evidence proving their innocence, but surely these rights are implicit in the logic underlying those specific defendant rights that are enumerated, like the right to confront witnesses, and compel the production of witnesses.¹⁰³ The Ninth Amendment probably goes beyond this, but surely at a minimum it is a reminder that not all constitutional rights are spelled out in tedious detail—some must instead be inferred from the document itself,

conferred on the president, it would undoubtedly be found in plain words in this article; but here is not a word in it that can furnish the slightest ground to justify the exercise of the power.

Ex Parte Merryman, 17 F. Cas. 144, 148 (C.C. Md. 1861) (No. 9, 487). For a similar argument, see Ex Parte Milligan, 71 U.S. (4 Wall.) 2, 41-42 (1866) (oral argument of David Dudley Field).

101. For an earlier meditation in the Harris Lecture Series on ways of interpreting some of the silences of the Constitution, see Laurence H. Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 Ind. L. J. 515 (1982).

102. U.S. Const. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.")

103. Id. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . ."). For more defense of my reading of the implicit logic underlying these rights, see Akhil Reed Amar, *Foreword: Sixth Amendment First Principles*, 84 Geo. L. J. 641, 647-49, 698 (1996).

read holistically. In the words of the amendment, we must not “deny or disparage” rights that are plainly within the document as a whole even if not explicitly, minutely, and specifically “enumerated.” And what is true of both constitutional powers and constitutional rights is also true of constitutional structures, such as popular sovereignty, representation, and separation of powers; these too are not always explicitly enumerated, but are nevertheless implicit in the document as a whole. Architecture is one among several techniques by which readers can get a larger sense of the document’s holistic meaning, its feel and spirit.¹⁰⁴

Nothing turns on the word *architecture* itself; if the neologism distracts, discard it. The basic ideas today are not highfalutin but laughably simple. The Constitution is a short document. Some parts of it—like the Preamble and the introductory language of Articles I, II, and III—are especially eye-catching. It adds amendments to the end, chronologically. It is opened. Thus far, its amendments have trended in the direction of increased democracy and reduced plutocracy. It does not whitewash or paper over its ugly parts. It features three co-ordinate branches of government and vests none of these with ultimate supremacy over the others, over the document itself, or over the people. It is rather carefully organized. There are conceptual and linguistic patterns at work—colonnades, motifs, and the like—if we care to notice. It is written with style, and that style is, in a word, republican; the Constitution’s biggest theme from the beginning to the end in word and deed is popular sovereignty.

These very basic things often escape notice of clausebound textualists, who attend to words and clauses but often miss the spirit of the Constitution as a whole. Many of the features I have tried to highlight are not explicit legal commands, but are nonetheless rich with interpretive meaning. They clarify *what* the Constitution in fact is trying to say, to *whom*, and *why*. These architectural features of the document speak to us, much as good architecture does.

Of course, architecture is only a metaphor. The Constitution is not literally a building. But I am delighted to report to you that an actual building commemorating the Constitution is now taking shape in Philadelphia, directly across the Mall from Independence Hall. The National Constitution Center will open its doors on July 4, 2003. Designed for ordinary citizens—it hopes to host nearly a million visitors a year—the Center aims to reintroduce the American people to the great document that speaks in their name. Along the interior wall of the museum itself, the constitutional text will be inscribed in large readable letters (with open space at the end for future amendments). Within the building a host of multimedia exhibits will try to make the document, its themes, and its unfolding and unfinished history vivid for layfolk from all walks of life, of all ages, and from all parts of the country.

I hope you will visit this extraordinary building honoring an extraordinary document. Before you go, I urge you to take a few minutes to read or reread the

104. I am obviously indebted to the work of John Hart Ely and Charles Black, both of whom preached holism, although Black explicitly defined his brand of “structural” interpretation in contradistinction to textualism. See Charles L. Black, *Structure and Relation in Constitutional Law* 22-23 (19); but cf. *id.* at 31 (acknowledging certain linkages between textual and structural analysis). See also Akhil Reed Amar, *Intratextualism*, 112 *Harv. L. Rev.* 747, 790, 797 n. 197 (1999) (noting differences between Black’s brand of structural analysis and various versions of holistic textualism). On Ely, see *supra* note . For more general analysis of various types of constitutional interpretation and argumentation, see Philip Bobbitt, *Constitutional Fate* (1982).

Constitution itself. Read it aloud to your kids, and discuss it with them. When you visit the National Constitution Center itself, encourage your family to read the writing on the wall. You can even take notes.