

40 WBNLJ 1  
(Cite as: 40 Washburn L.J. 1)

Washburn Law Journal  
Fall 2000

**The Foulston & Siefkin Lecture**

**\*1 BECOMING LAWYERS IN THE SHADOW OF BROWN**

Akhil Reed Amar [\[FNd1\]](#)

Copyright © 2000 Washburn Law Journal; Akhil Reed Amar

Tonight is a time to look back on your three years as law students, and look forward to your future as lawyers. What lies ahead? There are many things you can do with a law degree, many professional lives you can lead. Some of you will work in government, others for nonprofits, still others in the private sector. Will you try cases, argue appeals, or structure transactions? How much should you specialize? In house or outside counsel? Big firm or boutique? Part time or full time? These are some of the choices you confront. Topeka or not Topeka--that too is a question.

I remember my own law journal banquet, sixteen years ago. My friends and I tried to peer into our cloudy crystal balls and prophesy the future. One friend predicted that the "A" students would become professors, the "B" students would become judges, and the "C" students would become rich. She was joking of course, but she was nevertheless onto something: we law professors do not rank among the wealthiest of our classmates. But I like to think we are among the happiest. As I sit in my office, I often say to myself, "boy, this sure beats working." Not that I don't spend long hours at my job--it's just that I love the hours I spend. I do my job because I like it, because it fulfills me. I wish each of you a professional career that fulfills your dreams, whatever they may be.

One of the best parts of my job is that I get to grade the Supreme Court. Well, not exactly--but I do get the chance to reflect on what the Justices have said, and to share my reflections with my students. Tonight, I would like to share with you some thoughts on the most famous case of the twentieth century, a case from this very city, Topeka. After sharing these thoughts, I hope to invite you to reflect on whether this case can give you any guidance about the lives you will live after you graduate from this place.

There are probably as many different legal academic perspectives on Brown v. Board of Education

[FN1] as there are legal academics: if you \*2 laid all the law professors in America end to end, they would not reach a conclusion. Each emphasizes a different facet of Brown, often a facet reflecting his or her general jurisprudential framework. Consider just a few examples. Alexander Bickel, who eschewed originalism, argued that the Fourteenth Amendment's framers did not specifically intend to outlaw racial segregation--on the contrary, they probably meant to allow it--but (said Bickel) this fact should not bind the Brown judges, who should feel free to evolve open-ended constitutional language to do justice.

[FN2] Conversely, the originalist Michael McConnell has argued that Brown can indeed be supported by a careful look at the legislative history of the Reconstruction Congress. [FN3] Bruce Ackerman thinks that Brown is really all about the New Deal--isn't everything? [FN4] Whereas, John Hart Ely insists that the case exemplifies his broader footnote-4 theory of facilitating the representation of minorities. [FN5] Michael Klarman has a narrower view of the proper judicial role, so he justifies the biggest case of the century by stressing the key fact that American blacks in 1954 were largely disfranchised and thus could not adequately protect their own interests in the legislative process. [FN6] David Strauss has argued generally for constitutional gradualism, and so has Cass Sunstein of late. They both accent yet a different aspect of Brown: the fact that it was the culmination of a long series of cases, reflecting an evolution of social attitudes. [FN7] Here was no bolt from the blue, they emphasize. Similarly, Edward Lazarus has argued that anti-death penalty crusaders like, Anthony Amsterdam, saw in Brown the lesson that clever and committed public interest lawyers could change the world by carefully orchestrating an extended litigation campaign bringing a series of lawsuits in just the right order. [FN8] Lazarus himself is skeptical that this is indeed the true lesson of Brown. In general Lazarus calls for broad consensus among Justices in deciding controversial issues of social \*3 policy; for him, the critical fact to be kept in mind is the unanimity of the Brown Court. [FN9] Gerald Rosenberg thinks that courts are less able to transform social policy than is commonly recognized; thus his account of Brown highlights how little judicially-ordered desegregation actually occurred before Congress and the President strongly weighed in with civil rights laws and policies in the mid 1960s. [FN10] Derrick Bell believes that whites rarely give blacks anything unless it suits their own interests; and so he has stressed, in an argument powerfully reinforced by Mary Dudziak, that Brown's verdict served the propaganda interests of a Cold War America trying to win the hearts and minds of colored folk in Africa and Asia. [FN11]

So what, you may ask, is my account of Brown? In general, I have argued in a wide range of contexts that the Constitution itself is a rich source of guidance if read with care. So let's start by looking carefully at the document. Begin at the beginning. "We the People . . . do ordain and establish this Constitution." [FN12] With these bold words, the document seems to commit itself to the project of democratic self-rule. Monarchy and aristocracy are rejected--here, the people rule. Democracy is not simply what the Preamble says. It is also what the Preamble does. The Preamble announces an act, a doing, an ordainment and establishment. And this act of constituting--of constitution--was at that time the most democratic act in the history of planet earth. Hundreds of thousands of ordinary folk got to vote, via elections for special ratification conventions, on the basic ground rules for themselves and their posterity. This kind of broad and explicit popular consent was unheard of in most parts of the world, ruled by strongman fiat or edicts derived from immemorial custom. None of the ancient Greek democracies had allowed the citizenry to actually vote on the constitution itself. [FN13] Most state constitutions during the Revolution had not been put to a popular vote; nor had the Declaration of Independence or the Articles of Confederation for that matter. Thus, the Preamble's bold text and deed

should not be passed over lightly. In this Constitution, the Preamble makes clear, We the People rule--not kings or princes or dukes or earls or mere custom and tradition.

Popular sovereignty--rule by the people--is also the big idea of the \*4 Article IV Republican Government Clause. [\[FN14\]](#) No monarchies or aristocracies will be allowed to take root in the several states--only republics based on self-government among free and equal citizens. [\[FN15\]](#)

If we simply read these two clauses at face value, I think we could generate an admittedly broad yet straightforward argument that neither the federal government nor the state governments may properly pursue Jim Crow/apartheid policies in public schools. (Remember, the Brown case itself raised the issue of racial segregation by state officials; and its companion case, *Bolling v. Sharpe*, [\[FN16\]](#) required the Justices to rule on the constitutionality of federal segregation--in particular, the racially segregated public schools in the District of Columbia.) The straightforward argument against American apartheid goes like this: the purpose and effect and social meaning of racial segregation in America in 1954 is to create two hereditary classes of citizens--first-class (white) citizens, and second-class (black) citizens. These two hereditary classes are a throwback to aristocracy and monarchy, assigning citizens unequal and intergenerationally entrenched places on the basis of birth status. This is a violation of the deep democratic structure of our Constitution, as exemplified by the Preamble and the Republican Government Clause.

A critic of this broad argument might wonder whether the Preamble binds the state government as well as the federal government; and might also wonder whether the Republican Government Clause, which speaks of states, obliges the federal government to honor basic principles of republicanism. The critic might also ask whether either of these clauses is justiciable. Finally, the critic might wonder whether we are overreading these two small patches of constitutional text. Is the deep structure of the document really so dead set against hereditary aristocracy?

I think it is, and as further evidence I would point to two other clauses of the Constitution that are rarely noticed. Article I, section 9 forbids Congress from granting "titles of nobility" and Article I, section 10 imposes a similar ban on states. [\[FN17\]](#) Here clearly are clauses that were designed to work in tandem--we are not overreading when we consider these clauses as a paired set. [\[FN18\]](#) And these clauses are written to condemn the idea of lordship in America: these words proclaim that ours is a democratic republic, not an hereditary aristocracy based on \*5 birth and blood. If read in a broad but straightforward way, these clauses reinforce the simple argument against government-sponsored segregation in public schools as follows: No government in America can, consistent with these clauses and the broader constitutional ethos they embody, name some Americans "lords" and others "commoners." But if no government can name some (light-skinned Americans) "lords" and other (dark-skinned Americans) "commoners," surely it cannot do the same thing through racially segregated schools whose purpose and effect and social meaning is to create a blood-based and hereditary overclass and underclass.

Yet another reinforcing argument against Jim Crow derives from the paired set of clauses in Article I, sections 9 and 10 prohibiting the federal and state governments, respectively, from enacting "bills of attainder." [\[FN19\]](#) These anti-attainder clauses ramify broadly, but one of the deepest ideas they

embody is that no legislature may properly single out a person by name and subject him to special penalty or ridicule or disadvantage. Legislatures may pass general and prospective laws --" all who henceforth commit deed X shall suffer penalty Y"--but the legislature may not target human beings for disfavored treatment because of who they are as opposed to what they do. [\[FN20\]](#) And there is a special historical link between attainders and "corruption of blood" in which legislatures tried to taint or stain a person's bloodline--a link visible in yet another clause of the Constitution that provides that "no Attainder of Treason shall work Corruption of Blood." [\[FN21\]](#) If we take the nonattainder idea seriously, it bars state and federal lawmakers from passing laws designed to humiliate or demean all persons descended from slaves, or all persons with black (corrupt) blood.

Here then are a variety of rather straightforward textual and structural arguments against American apartheid. When the words of the Founders' Constitution are read at face value, they seem to condemn a system that creates a hereditary aristocracy fixed at birth, and that seems aimed at humiliating the disfavored race. The fundamental problem with these arguments, however, is that the Founders' Constitution cannot be taken at face value--at least where slaves are concerned.

Make no mistake: the Founders' Constitution made its peace with, and even propped up, a regime of chattel slavery. The Framers were ashamed to use the words "slaves" and "slavery" so the document is rife \*6 with euphemism here. Thus, Article I section 2 elliptically speaks of "free persons" and "all other persons"--that is, unfree persons. Under the rules of this section, the more unfree persons--slaves--a state imported or bred, the more seats it got in the House of Representatives. And under Article II, it also got more clout in the electoral college. Indeed, the electoral college was largely designed to help slave states such as Virginia. In a system of direct national election, Virginia would derive no clout from her slaves, since slaves of course could not vote. The electoral college, by contrast, enabled Virginia and other slave states to count for more than their fair share of total national voters. Perversely, if Virginia were to free some of its slaves, who then moved elsewhere (say, Pennsylvania), Virginia would actually lose seats in the Congress and the electoral college. Consider also the odious rule laid down by the Article IV Fugitive Slave Clause. This clause actually obliged free states to play the role of slave catchers, and return human beings to bondage when their "rightful owners" came to recapture them. [\[FN22\]](#)

These and other constitutional protections of slavery suggest that we cannot simply read the Preamble or the Republican Government Clause, or the nobility and attainder clauses, at face value. Slavery is surely a relic of the ancien regime, rooted in hereditary and intergenerational inequality based on blood and birth status. In the antebellum South, there were indeed "lords" and "serfs" notwithstanding the nobility clause. Slave children were attainted at birth because of their corrupt blood, despite the language of the attainder clauses. Indeed, the point is hardly unique to these clauses. Slavery contradicted a huge part of the Constitution if read at face value. How could persons born on American soil be deprived of their right to speak and to worship as they pleased? How could persons be sentenced to life imprisonment at birth without any due process, without any individualized adjudication of wrongdoing?

In short, the Founders' Constitution seemed to contradict itself where slaves were concerned. Perhaps we could solve the contradiction by saying that slaves were simply not part of "[w]e the People."

Rather, they were more like aliens among us, not entitled to be part of collective self-governance or the regime of constitutional rights. On this reading, however, free blacks were quite different and had to be treated in accordance with the Preamble and the other clauses we have canvassed.

But the issue was not entirely clear-cut before the Civil War. Proslavery and racist readers, like Roger Taney in *Dred Scott*, [FN23] read the proslavery clauses broadly, and the Preamble and other \*7 antislavery clauses narrowly. And so for decisive constitutional support for the result in *Brown and Bolling*, we must turn to the Amendments adopted after the Civil War, which emphatically repudiated Taney's proslavery, prosubordination, racist reading of our Constitution.

The Thirteenth Amendment abolishes slavery everywhere and forever; [FN24] and with this new birth of freedom our contradiction evaporates. No longer are we forced to read the Preamble or the other clauses we have canvassed at less than face value. The Fourteenth and Fifteenth Amendments provide even clearer and more emphatic support for the idea that our Reconstructed Constitution is refounded on principles of free and equal citizenship. The first sentence of the Fourteenth Amendment confers birthright citizenship on all born in America--black and white, male and female, rich and poor alike. [FN25] All are citizens--and the clear idea here is that all are equal citizens. As the elder Justice Harlan put the point more than a century ago, "[a]ll citizens are equal before the law." [FN26] (Note that this citizenship clause applies to the federal government as well as the states.) In the next sentence, the word "equal" explicitly appears, promising that all persons--black as well as white--will receive "equal protection." (Although the words of this clause speak explicitly of states, I have elsewhere shown how they were understood as declaring precepts that bound federal officials as well.) [FN27] Finally, the Fifteenth Amendment makes clear that blacks cannot be excluded from their equal right to participate in the grand project of American democratic self- rule. [FN28]

With all these clauses in view, the basic argument for *Brown and Bolling* is clear and clean: Jim Crow in 1954 is not truly equal. American apartheid is an effort to create a kind of subordinated caste in violation of the vision of the Thirteenth Amendment; to perpetuate two classes of unequal citizenship in violation of the logic of the first sentence of the Fourteenth Amendment; to deprive blacks of genuinely equal laws in violation of the command of the next sentence of the Fourteenth Amendment (and of the companion Fifth Amendment); and to keep blacks and whites apart in ways that undercut the promise of the Fifteenth Amendment that Americans of different races must come together--at the polls, in the legislature, in the jury box--to govern ourselves.

\*8 It remains to consider some obvious objections to this account. Some argue that the Framers of the Fourteenth Amendment stated that their Amendment would not prohibit segregation. How then can we read their Amendment to do exactly what they denied it would do? I submit that this criticism underreads the text of the Amendment, and overreads the legislative history. The text calls for equal protection, pure and simple. There is no textual exception for segregation, no clause that says "segregation is permissible even if unequal." Nor did the sponsors think that there was such a categorical exception. They merely argued that separation was not ipso facto unequal and unconstitutional. And as a matter of logic they were right. Logically, it is possible to imagine some kinds of separation that are not unequal. For example, separate bathrooms for men and women today are not widely understood--by either men or women--as invidious or stigmatizing or subordinating. Not

yet, at least. But in some places and at some times, separate bathrooms might indeed be a way of keeping women down. By 1954, I submit, it was clear that racially separate schools-- and racially separate bathrooms, for that matter--were not equal in purpose or effect of social meaning. They were a way of keeping blacks down. Blacks knew it--as any secret ballot vote among them would have revealed. And whites knew this too, in their hearts, though many denied it with their lips.

Admittedly, Jim Crow had a different legal form than the 1860s Black Codes that the Fourteenth Amendment framers explicitly sought to outlaw. But it had the same purpose and effect and social meaning: keeping blacks down and depriving them of equal status. The 1860s Black Codes--which the Fourteenth Amendment framers clearly aimed to prohibit as a "paradigm case" of impermissible legislation [FN29]--were formally asymmetric: they imposed disabilities on blacks but not whites. Jim Crow was formally symmetric--blacks could not go to school X, but whites were likewise barred from attending school Y. But formal symmetry does not mean the law is automatically valid; it just means the law is not automatically invalid (as the Black Codes were). Thus, we must look to a Jim Crow law in its entirety, and ask whether it really is equal in purpose and effect and social meaning. It is possible to imagine some parallel universe where blacks as well as whites truly wanted separation, where no stigma attached to separation, where separation was not simply a way of keeping blacks down. But that was not the world of 1954, to any honest observer.

Note also that on my account, certain forms of affirmative action need not, perhaps, be seen as the legal and moral equivalent of Jim \*9 Crow. Consider for example the kind of educational affirmative action Justice Powell was willing to endorse in Bakke. [FN30] Does this kind of affirmative action in effect make racial minorities a favored aristocracy? Is its purpose and effect and social meaning to demean or humiliate or attain whites, or keep whites down? Is its ultimate aim a two-class society of unequal castes? Is it truly the legal and moral equivalent of the 1860s Black Codes? These are some (though they are not the only) questions that my approach would invite us to ask.

Now consider another possible objection to my account. Some have argued that the Fourteenth Amendment prohibited only violations of "civil rights" as opposed to "social rights" and "political rights." Even if we accept this view, it cannot justify a system of government-mandated apartheid in public education. To see why, let's take a closer look at the categories of "political rights" and "social rights."

"Political rights"--paradigmatically voting, militia service, jury service, and officeholding--were repeatedly and emphatically claimed by the supporters of Fourteenth Amendment to lie beyond the reach of Section One. [FN31] A textualist, of course, is entitled to ask where the words of the Amendment signal this limitation of scope. The textual answer is as follows: the Fourteenth Amendment language of "privileges" and "immunities" of "citizens" [FN32] is adapted from Article IV, which in general demands that State A not discriminate against visiting citizens of sister State B. If State A allows its citizens to own real property, it must allow visitors from State B to do the same. Likewise for a vast range of "civil" rights such as the rights to contract, sue and be sued, testify in court, worship, speak, move about, and own a business. But a visitor from State B is not entitled to serve in State A's militia or jury or legislature, or to vote in State A's elections, on equal terms with the citizens of State A. These "political rights" lie beyond the scope of Article IV--and so too they lie beyond the scope of the

similar language of the Fourteenth Amendment, as the Court ruled in an 1875 case, *Minor v. Happersett*. [\[FN33\]](#) Nor is the language of "equal protection" designed to apply to voting and other political rights. This language applies not merely to "citizens" but to all "persons"--paradigmatically aliens who do not have a constitutional right to vote.

It is possible that later constitutional developments and amendments-- especially the Fifteenth and the Nineteenth Amendments--should incline us to read Section One of the Fourteenth more broadly in retrospect so as to encompass even political rights; but \*10 to pursue this possibility now would take us far afield. For now, it suffices to say that even if we read the Amendment to exempt "political rights" such as voting and jury service, *Brown* was not, strictly speaking, a voting rights case but an education case. Public education is not strictly limited to voters, or as tightly linked to voting as, say, jury service. [\[FN34\]](#) And if it were so tightly linked, the rules of the Fifteenth Amendment--forbidding race discrimination in voting--would pick up wherever the Fourteenth Amendment left off. Other clauses governing political rights--such as the Republican Government Clause and Section 2 of the Fourteenth Amendment--would also come into play. So whether government-mandated apartheid in public education is deemed a violation of "civil rights" or of "political rights" or of both, it is unconstitutional.

So much for "political rights." What about "social rights?" Here, the basic claim is that the Fourteenth Amendment does not compel "social equality" between the races. This is what many supporters of the Amendment said; and once again we are entitled to ask where the text says anything of the sort. And the answer I think is as follows: as a private citizen, you will remain free to be, bluntly, a racist. You can view your race as superior, and you are free, for example, to refuse to invite members of other races to your private dinner parties. The textual basis for this continued freedom is what we today call the "state action" doctrine: the Fourteenth Amendment limits governments, but does not impose the same restrictions on private citizens. A government may not enact a Black Code, but a private citizen is free to have a kind of Black Code for his dinner guests: no blacks allowed at the Smith house.

But *Brown* of course was not about private dinner parties. The government was mandating segregation--it forbade even students of different races who wanted to socialize together in school from doing so in the public system. The issue might have been trickier had the government set up three schools--one for blacks, one for whites, and one open to both--with perfect freedom of choice among the schools. Such a scheme might seem to allow genuine "private choice" and "social" freedom not to associate--but even here there is ground for skepticism. Would the choice genuinely be free, and untainted by past governmental discrimination or current pressure? [\[FN35\]](#) Why only three schools, and not, say, four? For example, what about Asian Americans? Would they be obliged to go to the mixed school whereas \*11 blacks and whites had choices? And what if a "black" decided that she was really "white" and insisted on attending the school for whites? Wouldn't the government need to enforce its scheme with an odious set of Nuremberg laws specifying the precise percentage of blood that made a person "black" or "white?" (This issue is less problematic, as a practical matter, for sex-segregated bathrooms, given the conventional view that sex is binary--male/female--with rather few in-between cases.)

There is, of course, much more that could be said about *Brown*, but I hope I have said enough to give you a sense of the constitutional issues as I see them. I would like to conclude by drawing three lessons

of the case for those of us who live professional lives in law.

The first lesson is holism. In law, as in life, try to see the big picture. I have suggested that a complete account of Brown requires us to confront several parts of our Constitution, and to synthesize the meaning of both the Creation era (which gave us the Founders' Constitution) and the Reconstruction experience (which gave us a new birth of freedom in Amendments XIII-XV). The practice of law can sometimes be narrowing--one becomes an expert in subparagraph 4(A)(ii) of Section 1723 of some code or other, and one spends much of one's professional life immersed in that subparagraph. So too, the practice of constitutional interpretation can sometimes be narrowing-- clausebound, in John Ely's fine phrase. I suggest that we resist the narrowing impulse. Good constitutional interpretation is marked by a view of the whole as well as the part; peripheral vision is important. [\[FN36\]](#) And so too, good lawyering is attentive to how various laws and social policies intersect and interact in kaleidoscopic ways.

The second lesson is humility. Lawyers have done great good, but we have often been on the wrong side of history. Dred Scott read the Constitution in a mean and perverse way. The Supreme Court in Brown was part of the solution, but let's not forget that the Supreme Court in Plessy v. Ferguson [\[FN37\]](#) was part of the problem. Remember, the Court itself had blessed Jim Crow in Plessy, calling racial separation "equal" when it was not. This explicit blessing helped entrench American apartheid, leading to huge injustice for many years in many places. The Court in 1954 had blood on its hands. But the Brown Court did not apologize for Plessy; indeed, it did not even overrule it. The Justices merely said that Plessy did not apply to public education. A candid confession of error, I suggest, is often better than a stubborn refusal to admit one's past mistakes. This is true of the Court, but it is **\*12** also true of lawyers in general.

The final lesson is humanity. American apartheid was an oppressive, soul- deadening and degrading system of subordination, yet many persons at the time supported it or acquiesced in it. The same thing could be said of antebellum slavery. But we are hardly at the end of history today. Are there similar injustices, inhumanities, and systems of subordination today that we are ignoring or even supporting? Is the distribution of wealth in our society--or in the world--a just and humane one? Does our law continue to demean and degrade some persons because of morally irrelevant traits fixed at birth-- sexual orientation, perhaps? Tonight is a time for feasting--for good food, good drink, good talk. But for those of you who want to use your law degrees to make the world a slightly better place, take heart and take note: there is much work to be done.

[\[FNd1\]](#). Southmayd Professor, Yale Law School. What follows is the Foulston & Siefkin Lecture, delivered at the annual banquet of the Washburn Law Journal on April 18, 2000.

[\[FN1\]](#). [347 U.S. 483 \(1954\)](#).

[\[FN2\]](#). See Alexander M. Bickel, The [Original Understanding and the Segregation Decision](#), 69 Harv. L.

[Rev. 1 \(1955\)](#).

[FN3]. See Michael W. McConnell, [Originalism and the Desegregation Decisions](#), 81 Va. L. Rev. 947 (1995); Michael W. McConnell, The [Originalist Case for Brown v. Board of Education](#), 19 Harv. J.L. & Pub. Pol'y 457 (1996).

[FN4]. See 1 Bruce Ackerman, We the People: Foundations 142-50 (1991). For a more recent, and somewhat different Ackerman narrative (that also highlights the importance of the New Deal) see Bruce Ackerman, Opinion in Brown v. Board of Education, in "What Brown Should Have Said" (J.M. Balkin, ed., forthcoming).

[FN5]. See John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 145-70 (1980) (linking Brown to the vision of [United States v. Carolene Products Co.](#), 304 U.S. 144, 152 n. 4 (1938)).

[FN6]. See Michael J. Klarman, The [Puzzling Resistance to Political Process Theory](#), 77 Va. L. Rev. 747, 788-814 (1991); Michael J. Klarman, [Brown, Racial Change, and the Civil Rights Movement](#), 80 Va. L. Rev. 7 (1994); Michael J. Klarman, [Brown v. Board of Education: Facts and Political Correctness](#), 80 Va. L. Rev. 185 (1994).

[FN7]. See David A. Strauss, [Common Law Constitutional Interpretation](#), 63 U. Chi. L. Rev. 877, 906 (1996); Cass R. Sunstein, [Foreword: Leaving Things Undecided](#), 110 Harv. L. Rev. 4, 31, 50-51 (1996).

[FN8]. See Edward P. Lazarus, Closed Chambers 89-90 (1998).

[FN9]. Id. at 10, 110, 323.

[FN10]. Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? (1991).

[FN11]. Derrick A. Bell, Jr., [Brown v. Board of Education and the Interest-Convergence Dilemma](#), 93 Harv. L. Rev. 518 (1980); Mary L. Dudziak, [Desegregation as a Cold War Imperative](#), 41 Stan. L. Rev. 61 (1988); Mary L. Dudziak, The [Little Rock Crisis and Foreign Affairs: Race, Resistance, and the Image of American Democracy](#), 70 S. Cal. L. Rev. 1641 (1997).

[FN12]. U.S. Const. pmbl.

[FN13]. For this important insight, as for so many other things, I am indebted to the pioneering work of my colleague Jed Rubenfeld. See Jed Rubenfeld, [Reading the Constitution as Spoken](#), 104 *Yale L. J.* 1119, 1143 (1995).

[FN14]. [U.S. Const. art. IV, § 4.](#)

[FN15]. For more elaboration, see Akhil Reed Amar, [The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem](#), 65 *U. Colo. L. Rev.* 749 (1994).

[FN16]. [347 U.S. 497 \(1954\).](#)

[FN17]. [U.S. Const. art. I, § 9, cl. 8](#) and § 10, cl. 1.

[FN18]. See Akhil Reed Amar, [Intratextualism](#), 112 *Harv. L. Rev.* 747, 769- 70 (1999).

[FN19]. [U.S. Const. art. I, § 9, cl. 3](#) and § 10, cl. 1.

[FN20]. For more elaboration of this view, see generally Akhil Reed Amar, [Attainder and Amendment 2: Romer's Rightness](#), 95 *Mich. L. Rev.* 203 (1996).

[FN21]. [U.S. Const. art. III, § 3, cl. 2.](#) Note that the Philadelphia Framers initially put the Federal Attainder Clause and the Corruption of Blood Clause side by side. See 2 *The Records of the Federal Convention of 1787* 571 (Max Farrand rev. ed., 1937).

[FN22]. [U.S. Const. art. IV, § 2, cl. 3.](#)

[FN23]. [60 U.S. 393 \(1856\).](#)

[FN24]. [U.S. Const. amend. XIII.](#)

[FN25]. [U.S. Const. amend. XIV.](#)

[FN26]. [Gibson v. Mississippi, 162 U.S. 565, 591 \(1896\)](#).

[FN27]. Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 280-83 (1998); Akhil Reed Amar, *Constitutional Rights in a Federal System: Rethinking Incorporation and Reverse Incorporation*, in *Benchmarks: Great Constitutional Controversies in the Supreme Court* 71 (Terry Eastland ed., 1995).

[FN28]. [U.S. Const. amend. XV](#).

[FN29]. For more elaboration of "paradigm cases" and their significance, see Rubinfeld, *supra* note 13, at 1169-79.

[FN30]. See [Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 \(1978\)](#).

[FN31]. See Amar, *The Bill of Rights*, *supra* note 27, at 216-18, 271.

[FN32]. [U.S. Const. amend. XIV](#).

[FN33]. [88 U.S. 162 \(1874\)](#).

[FN34]. On the jury-voting linkage, see Vikram David Amar, [Jury Service as Political Participation Akin to Voting, 80 Cornell L. Rev. 203 \(1995\)](#).

[FN35]. See Paul Gewirtz, [Choice in the Transition: School Desegregation and the Corrective Ideal, 86 Colum. L. Rev. 728, 789 \(1986\)](#).

[FN36]. Here, as elsewhere, I have benefitted from the wisdom of my great friend and colleague, Charles Black. See Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* (1969).

[FN37]. [163 U.S. 537 \(1896\)](#).

END OF DOCUMENT

