In the Hindu tradition of guru-śisya, a śisya (student) must offer something to his guru (teacher). Professor Akhil Reed Amar has been a guru to me, both an esteemed teacher and a wise counselor. Since there can be no better tribute to a professor than to use the knowledge, tools, and skills he imparted as a basis for analyzing his work, in this Article I offer a short and vigorous critique of Professor Amar's latest work, America's Unwritten Constitution. I make four brief points. First, America's Unwritten Constitution reflects the mellowing of Professor Amar. Second, the book's arguments are in tension with his previous work. Third, I question the driving force behind Professor Amar's arguments and ask whether modern Supreme Court doctrine is in the driver seat. Finally, I examine how it was possible for the Warren Court to get so much so right with such misguided reasoning.

I. INTRODUCTION

In the Hindu tradition of guru-śisya, a śisya (student) must offer something to his guru (teacher). In the epic The Mahabharata, an exceptional archer, Ekalavya, willingly offered his right thumb at the request of his guru, Dronacharya. After his offering, Ekalavya was a Bowman no more.¹

Professor Akhil Reed Amar has been a guru to me, both an esteemed teacher and a wise counselor. Though I would never yield up a digit, I owe him more than I can ever repay. Rather than merely singing the praises of his lively and illuminating tome, America's Unwritten Constitution,² it seems to me that the most appropriate guru dakshina (offering to the teacher) is a short and vigorous critique. There can be no better tribute to a professor than to use the knowledge, tools, and skills he imparted as a basis for analyzing his work.

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² AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION (2012) [hereinafter UNWRITTEN].
I make four brief points. First, America’s Unwritten Constitution reflects the mellowing of Professor Amar; the enfant terrible has become rather more conventional, in results, if not in methods. Second, the book’s arguments are in tension with his previous work, for the new arguments and methods call into question many of his earlier reformist claims. Third, I question the driving force behind Professor Amar’s arguments and ask whether modern Supreme Court doctrine is in the driver seat, steering him toward his claims about the Constitution. Finally, I comment on Professor Amar’s claim that the Warren Court was remarkably right about the substance of the Constitution as it was terribly wrong about constitutional methodology.

II. THE MELLOWING OF AKHIL AMAR

Professor Amar’s prior work has three hallmarks. First, he has had a penchant for creative justifications of controversial Supreme Court judgments. For instance, he has offered alternative defenses for Roe v. Wade,7 RAV v. City of St. Paul, 8 and Romer v. Evans. 9 Second, much of his work has sought to reform constitutional doctrine. Whether it is federal jurisdiction,6 the exclusionary rule,7 or the petit jury,6 Professor Amar has been highly critical of current doctrine, arguing for sharp changes. Third, and most prominently, he has consistently given pride of place to text, structure, and early history in constitutional interpretation. Indeed, he has taken the Supreme Court to task for repeatedly favoring its doctrine over the actual document (the Constitution).9 It is fair to say that he is the most prominent liberal to deploy, popularize, and celebrate tools that are typically wielded by constitutional conservatives.

There always has been a tension between Amar the reformer and Amar the creative defender of the status quo. While both versions were


9. See, e.g., Akhil Reed Amar, Second Thoughts, 65 LAW & CONTEMP. PROBS. 103, 110 (2002) (arguing that the Court ignored the language of the Fourteenth Amendment’s Privileges and Immunities Clause for over a century); Akhil Reed Amar, Sixth Amendment First Principles, 84 GEO. L.J. 441, 645 (1996) [hereinafter Sixth Amendment First Principles] (calling the Court’s interpretation of the Speedy Trial Clause “the mother of all upside-down exclusionary rules”); Akhil Reed Amar, Taking the Fifth Too Often, N.Y. TIMES, Feb. 18, 2002, at A15 (criticizing the Court for its reading of the exclusionary rule as it applies to the Fifth Amendment right against compelled self-incrimination for lacking a textual justification).
wedded to text, structure, and history, Amar used those tools for rather different ends. At some level this made sense. If Professor Amar thought that some substantive outcome (e.g., abortion rights) was correct, it made little sense to condemn it—better to critique the reasons given and supply better ones in their place.

In many ways, America's Unwritten Constitution reflects the thoroughgoing triumph of Status Quo Amar. To be sure, there remain traces of Reformer Amar. For instance, he continues to insist that the exclusionary rule has no basis in the Constitution\(^\text{10}\) and he implores us to return to first principles when it comes to jury trials.\(^\text{11}\) But these arguments seem a relic of his previous, and now very much subdued, reformist impulse. In this book, Professor Amar seems driven to justify current practices. At times it seems like the only hint of Reformer Amar is his book's repeated offering of alternative justifications for existing Supreme Court judgments.\(^\text{12}\) But this is tepid reform and, at times, one wonders whether it qualifies as reform at all.

What accounts for the retreat from the robust, reformist impulse characteristic of his early work? I cannot say for certain. But I suspect that Reformer Amar has been worn down. Well-meaning Yale colleagues likely have griped that his constitutional methods were inadequate because they could not explain modern constitutional law. He possibly was dismissed as someone far too concerned with the eighteenth and nineteenth centuries and wedded to tools long associated with conservatives. I also suspect that some wrongly saw him as something of a conservative, an assessment reflecting the perspective of the modern legal academy.

The book can be seen as a belated response to these liberal critics, a response that embraces much of their agenda while still professing fidelity to text, structure, and history. "No less than you, I can embrace the Warren Court and modern constitutional jurisprudence," Professor Amar seems to say. The further message is that Professor Amar is not a constitutional kook who thinks that much of modern doctrine is grievously mistaken. Rather he declares that those results are as right as the opinions underlying them are poorly reasoned and supported. When he dedicates his book to God, Country, and Yale,\(^\text{13}\) the segment of Yale I believe he most has in mind consists of his skeptical Yale Law School colleagues.

10. Unwritten, supra note 2, at 114.
11. Id. at 442-44.
12. See, e.g., id. at 151 (suggesting that the outcome in Brown v. Board of Education was consistent with the original understanding of the Fourteenth Amendment); id. at 156-61 (proposing that the Privileges and Immunities Clause, rather than the Due Process Clause, justified the outcomes in the "incorporation revolution").
13. Unwritten, supra note 2, at v.
III. THE BENEFITS AND COSTS OF MELLOWING

I wonder whether this warm embrace of the Warren Court’s outcomes and much of modern constitutional doctrine is worth it, for in my estimation it yields few benefits and has more than its share of costs. First consider the supposed benefits. It is not at all obvious whether or how Professor Amar’s arguments lead to different substantive outcomes in concrete cases, raising the question of whether the alternative explanations will be of interest to academics alone. For instance, I am unsure of the payoff of having the Supreme Court abandon substantive Due Process if the end result is Privilege and Immunities jurisprudence that mimics substantive Due Process in all but name.¹⁴

Moreover, I very much doubt that critics of Professor Amar’s methods will be much moved by his arguments. Many liberals sense, quite rightly in my view, that an acceptance of text, structure, and early history as yardsticks renders much modern doctrine problematic, notwithstanding Professor Amar’s valiant and creative arguments to the contrary. Far too often, traditional tools of constitutional interpretation cannot be wielded to generate results consistent with existing case law. In the guise of interpreting the Constitution, the successive Supreme Courts have effectively amended it to better reflect changing sensibilities.

In any event, it seems likely that most of Professor Amar’s colleagues will not see the point of coming up with alternative justifications for current doctrine. While he clearly finds some existing justifications for doctrine inadequate and misguided, I suspect that almost all of his constitutional law colleagues are hardly bothered and hence see no need to offer up inventive readings of overlooked clauses. Professor Bruce Ackerman has his theory of constitutional moments that he wields to justify all manner of changes to doctrine and practice.¹⁵ Other constitutional scholars, at Yale or elsewhere, may lack a grand theory of constitutional change but are quite comfortable saying that constitutional doctrine need not be closely tethered to constitutional text, structure, or history. They do not care much if the Fourteenth Amendment did not originally apply to political rights, such as the right to vote. The Supreme Court can make it apply now and has done so.¹⁶ Again, what unsettles Professor Amar barely registers with a good portion of his audience.

While the benefits of embracing modern doctrine using unconventional arguments seem slim, the costs are not insignificant. The first downside is that modern doctrine will eventually be premodern, that is to say outdated. Living constitutionalists have the advantage of never having to believe that existing doctrine is right for all time. Doctrines come

¹⁴. Id. at 117–21.
and go and living constitutionalists can go with the flow. Because Professor Amar never fully embraces living constitutionalism, he lacks this advantage. While he allows for flexibility in what rights the Constitution protects, he seems to regard constitutional structure as more fixed. Yet almost all doctrine, structural doctrine included, has a shelf life. My colleague Ted White has said that average shelf life is about twenty years. Whatever the average, it is absolutely certain that judicial doctrine related to separation of powers and federalism will change over time. In his attempt to justify aspects of current doctrine in these areas, Professor Amar all but guarantees that his defenses will seem dated in a decade or two. If, as the book sometimes suggests, we are living at a constitutional high point where judicial doctrine is uncommonly right, we should enjoy this fleeting moment while it lasts.

The second cost is a profound tension with Professor Amar’s prior work. Consider the friction at the micro level of particular clauses. For instance, he reads the Privileges or Immunities Clause as a delegation to Congress and the courts, allowing either body to generate new sets of rights beyond a constitutional minimum. This argument makes his prior claims about the criminal procedure amendments seem incomplete, if not mistaken. I believe that Professor Amar was exactly right when, in previous work, he criticized the exclusionary rule on textual, structural, historical, and policy grounds. Yet one wonders why the exclusionary rule is immune from the benefits of an evolutionary reading of the Privileges or Immunities Clause. For example, if the Clause grants Congress and the courts the power to expand the rights protected by the Fourteenth Amendment, as Professor Amar now claims, what could possibly be wrong with the Supreme Court creating a ham-fisted remedy for violations of the Privileges or Immunities Clause? We are a society awash with awkward solutions for imagined problems.

Relatedly, the living constitution approach also suggests that substantive due process might be wholly legitimate. Professor Amar makes familiar and powerful textual arguments against substantive due process. But if the people of the United States have embraced the concept, I am unsure why its oxymoronic status matters. If the people can make and unmake constitutions, they surely can ratify somewhat counterintuitive meanings of existing clauses. Of course, there is the difficult question of whether the American polity has embraced the idea of a substantive reading of the Due Process Clauses, but that is a problem that

18. UNWRITTEN, supra note 2, at 134–38.
19. Id. at 118–21.
20. Amar, supra note 7, at 785.
21. UNWRITTEN, supra note 2, at 118–21.
plagues any argument based on popular acquiescence, including the ones that Professor Amar repeatedly makes in his book.

On a macro level, the book is at odds with the “first principles” approach characteristic of Professor Amar’s earlier work. In prior work, he focused on text, structure, and early history. Yet in many cases, conclusions derived from first principles will conflict with modern jurisprudential principles. In situations where this seems so, the book regularly sides with modern jurisprudence. First principles matter little if they are always swamped by other considerations. At that point, they seem more like secondary or tertiary principles.

Amar’s first principles also matter little in a world where the Supreme Court can implicitly propose amendments and the people can implicitly ratify them. Professor Amar flirts with the idea, perhaps recognizing that only such a process could hope to legitimate some of the Court’s more adventurous decisions. But if the people do not know that what the Court really has done is propose an amendment (because the Court pretends to be true to first principles), what we have is a Court amending the Constitution under the guise of engaging in ordinary interpretation.

IV. DOCTRINE AND WAGGING THE DOG

As noted, one of the book’s recurring motifs is the offering of a better argument for existing case law that seems, in Professor Amar’s view, poorly grounded. In these discussions, one wonders about causation. Is the dog wagging the tail or is the tail wagging the dog? One could adopt two rather different approaches to existing judicial doctrine. The first consists of examining judicial opinions hoping to find wisdom within them, without committing to their basic rightness (using whatever standard of rightness one favors). The courts might be right; they might be wrong. We do not know until we dive in and measure the opinions against our favored standard. A second approach consists of accepting judicial judgments as basically correct and then casting about for the best argument in their favor. Under this approach, the courts are (almost)

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22. See, e.g., Amar, supra note 7 (critiquing the Court’s interpretation of the Fourth Amendment for straying from its textual meaning and original understanding); Sixth Amendment First Principles, supra note 9 (explaining a structural approach to understanding the text and original intent of the Sixth Amendment).

23. Professor Amar says the courts should not recognize a new right before the public manifests its support for that right. UNWRITTEN, supra note 2, at 238. But he also says that if the courts do get ahead of the public and the public eventually supports the right, courts should continue to recognize the new right. Id. This theory would have the predictable consequence of encouraging judges to create new rights in the hope that one day, the public would concur. In any event, one wonders whether there has not been an implicit constitutional amendment, derived from years of practice, that implicitly authorizes the courts to propose amendments. Perhaps Congress, constitutional conventions, and the courts can propose amendments.
always right, by definition, even when their reasoning is flawed or misguided.

Professor Amar’s book seems to adopt the latter approach. He confronts numerous data points in the form of judicial outcomes (the one person, one vote principle; abortion rights; the right to state-supplied counsel) and he then sets upon the task of coming up with the best alternative explanation of why the data is trustworthy. Sometimes these explanations are engrossing and convincing; other times they make the best of a bad situation.

If I am right about how Professor Amar approached his task, I think it follows that he does not really believe some of the arguments he advances. That is to say, in his heart of hearts, Professor Amar is not deeply committed to the rightness of the outcomes the Court has generated or to the creative readings he offers.

Take his imaginative justification of the constitutionality of military conscription. On the surface, he writes as if he really believes that the draft is constitutional because some fraction of the army consisted of conscripts during the ratification of the Reconstruction Amendments. Yet despite all that he says, I do not think Professor Amar is wedded to the draft’s constitutionality. Counterfactually, had the Supreme Court, in the early part of the twentieth century, decided that the draft was unconstitutional, citing Daniel Webster and others, I very much doubt that Professor Amar would believe it to be constitutional or have argued as much.

Or consider his spirited defense of Reynolds v. Sims and the one vote, one-person principle. He admits that the result has no basis in the original meaning of the Fourteenth Amendment but embraces it because other text supports Reynolds. The rationale seems to be that non-equipopulous districts violate the right to vote and the Republican Guarantee Clause.

These alternative justifications for Reynolds suggest that the Constitution itself establishes a non-republican federal government and violates the right to vote. Given the constitutional requirement that every state shall have two Senators, the violation caused by the Senate is familiar—rather small electorates (Wyoming) have an outsized influence on the composition of the Senate as compared to large electorates (California).

24. Id. at 223–28.
25. Id. at 122–23.
26. Id. at 112.
27. Id. at 88–94.
30. UNWRITTEN, supra note 2, at 223–24.
31. Id. at 192–194, 223–24; see also U.S. CONST. art IV, §4.
But the House’s transgression against the one-person, one-vote rule is less well understood. For instance, the sixteenth most populous state, Arizona, has a population of 712,522 persons per House seat.\footnote{Kristin D. Burnett, U.S. Dept. of Commerce, Congressional Apportionment: 2010 Census Briefs tbl. 1 (2011), available at http://www.census.gov/prod/cen2010/briefs/c2010br-08.pdf.} The comparable figure for Massachusetts, the fourteenth most populous state, is 728,851.\footnote{Id.} More generally, a cursory glance of the statistics related to population per House seat reveals great variation across the states.\footnote{Id.} Congress could mitigate this malapportionment by greatly increasing the size of the House. But I have never heard it said that the Congress’s failure to do so was unrepublican or a violation of the right to vote.

Did the Founders craft an unrepublican federal government even as they guaranteed republican governments in the states? Were the state governments unrepublican for almost two centuries until the Supreme Court made proper republics of them in Reynolds? It seems more likely that the Republican Guarantee Clause neither incorporates the one-person, one-vote principle nor requires robust protections for the right to vote. That republicanism entails voting does not imply that all must have the right to vote or that all voters must have an equal say in the election of representatives.

The shakiness of Professor Amar’s justification for Reynolds suggests that his limited mission is to do better than the Court. Despite what the Court said, we know that the Fourteenth Amendment’s Equal Protection Clause does not apply to voting. The Amendment’s text indicates as much, as does the evident need for the Fifteenth Amendment,\footnote{U.S. Const. amend. XIV, XV.} so Professor Amar supplies superior arguments. But again, had the Supreme Court never imposed the one-person, one-vote principle, it is doubtful that Professor Amar would argue that the Court got it wrong. In the absence of Supreme Court doctrine favoring that result, he would have been hard pressed to argue that non-equipopulous electorates are constitutional in federal congressional elections and presidential elections are unconstitutional at the state level.

The tail is vigorously wagging the dog in other areas too. His inventive defense of statutory restrictions on removal of commissioners heading independent agencies\footnote{Unwritten, supra note 2, at 384–86.} is likely driven by a desire to reconcile doctrine to text. The tail might even be doing the work when it comes to his political process arguments about anti-abortion laws and Roe v. Wade.\footnote{Id. at 291–93.} In each of these cases, Professor Amar seems more interested in offering what he believes is a sounder justification for the results in much
the same way that he offered advice about the relevance of the Reconstruction Amendments in his article on *R.A.V. v. City of St. Paul.*

It is a testament to Amar’s fidelity to text, structure, and history that he feels the need to make difficult textual, structural, and historical arguments in a bid to rehabilitate doctrine. Yet he also recognizes that sometimes the doctrine cannot be rehabilitated. I believe that is true far more often than Professor Amar admits. There are many “odd corners” where the unwritten Constitution cannot be squared with the written.

V. THE WARREN COURT AS SCOOBY DOO

Professor Amar’s treatment of the Warren Court is a mixture of adulation and scorn. Somehow the Warren Court almost always got the Constitution right even as its reasoning was flawed or nonexistent. At one point he says the Court “seemed contemptuous” of constitutional text. The Warren Court is the gang that could not shoot straight, but that somehow almost always hit its target.

Needless to say, someone that cannot shoot straight should have a rather difficult time hitting the bull’s-eye. The idea that an institution could consistently reach the right result while repeatedly resorting to flawed reasoning is rather improbable. For instance, math students who use the wrong formula for determining the area of a circle should only rarely get the right answer. Reaching the right answer consistently when using the wrong formula is nothing short of incredible.

It seems to me that one of two possibilities is far more likely. Perhaps the Warren Court got the right results because it basically had the right formula. On this account, that Court’s view of the Constitution as an eminently flexible framework, deputizing courts as agents of constitutional change, was fundamentally right; hence, the Court’s imposition of its policy preferences was wholly sound. Alternatively, the Warren Court, because it had a rather mistaken view of the Constitution, generated doctrine not grounded in the actual Constitution. The Court thought that the Constitution could be reshaped as it saw fit when the framework has far less plasticity.

Either alternative is more plausible than an approach that treats the Warren Court as a juridical version of Scooby Doo—a Court that always manages to unmask the truth in a bumbling, stumbling, lucky way. Mysteries, of the constitutional sort or otherwise, are not solved this way, at least not very often.

38. *Amar, supra* note 4, at 151.
39. *See, e.g., UNWRITTEN, supra* note 2, at 183 ("[T]he exclusionary rule cannot stand as a principled interpretation or implementation of the terse text. In this odd corner of modern case law, America’s unwritten Constitution cannot be squared with the Constitution as written.").
40. *Id.* at 193.
This brings me to a related point. I agree with Professor Amar that the Warren Court was contemptuous of traditional tools of constitutional interpretation. Given its contempt, I do not see why we ought to praise the contemnors, even if they (on some accounts) got the answers right. If I wrote a constitutional law exam and supplied all the right answers while adducing all the wrong reasons (and sometimes none at all), I do not think I would get an “H” (Honors) from Professor Amar. Either something is wrong with the standards by which Professor Amar judges the Warren Court, or something is rather amiss with his evaluation of their work.

VI. CONCLUSION

America’s Unwritten Constitution reflects a commendable optimism and a belief in constitutional progress, however belated. In this view, for more than a century, there was a doctrinal darkness punctuated by a few bursts of light in the form of certain Amendments that were subsequently misread. At long last, the Warren Court ushered in a sustained and brilliant constitutional dawn. If humans can progress in the moral sciences, as many believe we have, surely it is no surprise that we have progressed in constitutional law too. Though I do not share the same cheerful sensibility about modern constitutional doctrine, I can admire someone who does. Professor Amar, in his own inimitable and sunny way, prods each of us to become better readers of constitutional text, structure, and history and better diviners of the constitutional interstices—the silences that speak volumes.