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### Our Boggling Constitution; or, Taking Text Really, Really Seriously

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## Article

# OUR BOGGLING CONSTITUTION; OR, TAKING TEXT REALLY, REALLY SERIOUSLY

ANONYMOUS\*

## INTRODUCTION

Textualism is at a dead end.<sup>1</sup>

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\* The author is a constitutional law expert at a top American law school. This may not narrow things down much, since every law school calls itself a top law school and every law professor considers himself or herself a constitutional law expert. If it helps, the author did not graduate from Yale Law School, which brings the number of suspected authors down to the single digits. Of course, if my name does get out, let me hasten to say that any offense to any authors cited herein, living or dead—especially living!—is strictly unintended.

Inspiration for the title of this piece is taken from the “Our [Your Word Here] Constitution” series of law review articles and books. *See, e.g.*, Steven D. Smith, *Our Agnostic Constitution*, 83 N.Y.U. L. REV. 120 (2008); SANFORD LEVINSON, *OUR IMPERFECT CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006); ADAM TOMKINS, *OUR REPUBLICAN CONSTITUTION* (2005) (an English ringer, arguing, with no little irony, that the British constitution is republican, despite the fact that England is not a republic and lacks a constitution); John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703 (2002); Mark D. Rosen, *Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community*, 77 TEX. L. REV. 1129 (1999); Daniel A. Farber, *Our (Almost) Imperfect Constitution*, 12 CONST. COMMENT. 163 (1995); Akhil Reed Amar, *Our Forgotten Constitution: A Bicentennial Comment*, 97 YALE L.J. 281 (1987); Book Note, *Our Obsolete Constitution*, 46 HARV. L. REV. 1222 (1983) (author unknown, but given the title it is a sure bet he or she has been teaching constitutional law for the last quarter-century); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981). These works are not to be confused with the “Our” series in literature, *see, e.g.*, CHARLES DICKENS, *OUR MUTUAL FRIEND* (1864); GRAHAM GREENE, *OUR MAN IN HAVANA* (1958); theater, *see, e.g.*, THORNTON WILDER, *OUR TOWN* (1938); TOM TAYLOR, *OUR AMERICAN COUSIN* (1858) (now best remembered for the question, “Apart from that, Mrs. Lincoln, how did you enjoy the play?”), or radio and television, *see, e.g.*, *Our Miss Brooks* (CBS radio broadcast 1948-57, CBS television broadcast 1952-56); *OUR GANG* (short films syndicated for television in the 1950s as *The Little Rascals*), all of which share an opening pronoun with the legal sub-genre of “Our” studies, but are vastly more entertaining.

1. This helps distinguish it from its cousin, originalism, which is merely at a dead hand. *See, e.g.*, Adam M. Samaha, *Dead Hand Arguments and Constitutional*

I do not mean this methodologically or normatively. Those are mere trifles. I mean that textualism is at a dead end professionally.

It had a good run, to be sure. If you got in on the ground floor, you might even have managed to leverage lifetime tenure on the Supreme Court out of it. But not anymore. A good product needs differentiation and distinctness, and good (well, famous) academics need the same thing. Which means that if “we are all textualists now,”<sup>2</sup> we are also all, academically speaking, in serious trouble.

I am not the first person to notice this, of course. Some ten years ago, an obscure scholar named Akhil Reed Amar made the same observation. Like any up-and-coming young man with a name to make for himself, however, he did something about it. One can just imagine him, glowering over a beer at Mory’s, struck both by the fact that the textualism field was now so full of entries that anything new was unlikely to attract attention and by the fact that he was running out of provisions of the Bill of Rights to reinterpret. He was not going to take this lying down—although, with another beer or two, he might take it in something less than an upright position.

Happily, Amar had an insight. In Yale-speak, it went something like this:

Interpreters squeeze meaning from the Constitution through a variety of techniques—by parsing the text of a given clause, by mining the Constitution’s history, by deducing entailments of the institutional structure it outlines, by weighing the practicalities of proposed readings of it, by appealing to judicial cases decided under it, and by invoking the American ideals it embraces. Each of these classic techniques extracts meaning from some significant feature of the Constitution—its organization into distinct and carefully worded clauses, its embedment in history, its attention to institutional architecture, its plain aim to make good sense in the real world, its provision for judicial review (and thus judicial doctrine), and its effort to embody the ethos of the American people. Here is another feature of the Constitution: various words and phrases recur in

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*Interpretation*, 108 COLUM. L. REV. 606 (2008).

2. See, e.g., Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1057 (1998) (“In a significant sense, we are all textualists now.”); Hon. Marjorie O. Rendell, *2003—A Year of Discovery: Cybergenics and Plain Meaning in Bankruptcy Cases*, 49 VILL. L. REV. 887, 887 (2004) (“We are all textualists now.”); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 43 (2006) (ditto).

the document. This feature gives interpreters yet another set of clues as they search for constitutional meaning and gives rise to yet another rich technique of constitutional interpretation.<sup>3</sup>

In plain English, Amar's point was as follows: "Heyyy . . . If *some text* is good, then *lots of text* must be great!"

Thus was born intratextualism, a theory of constitutional interpretation in which "the interpreter tries to read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase."<sup>4</sup>

To be sure, the argument that *more* must be better than *some*, that intratextualism must be to textualism as two scoops of chocolate ice cream are to one scoop of chocolate ice cream, has its problems. It is, some might say, further evidence that folks in New Haven have not been exposed to certain realities—like, say, basic logic. Nevertheless, intratextualism promised to do what we expect of new theories of constitutional interpretation: provide fame for its inventor and a full employment program for its devotees. We could all easily have wrung a decade or more of new work out of it, instead of its actual measly yield of one *Harvard Law Review Foreword*<sup>5</sup> and a Comment in that journal's annual Supreme Court issue.<sup>6</sup>

Unfortunately, there were spoilers. Recognizing that textualism had a pretty nice thing going, and that intratextualism would muscle in on this action and, what is worse, require textualists to—well, to read the text—swift action was taken. Meetings were held at the Federalist Society; Grover Norquist got involved; and before long, marching orders had been dispatched. Actually, by accident *two* sets of orders were sent out. But a compromise was reached, and within a year Adrian Vermeule and Ernest A. Young took together to the pages of the same *Harvard Law Review* in which *Intratextualism* had appeared, in an attempt to strangle the infant in its cradle.

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3. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999). As a side note, after the first two sentences in this passage, the editors of the *Harvard Law Review* punished Amar by prohibiting him from using the words "by" or "its" for the remainder of the article.

4. *Id.*

5. See Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000).

6. See Akhil Reed Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145 (2008).

*Hercules, Herbert, and Amar: The Trouble with Intratextualism*<sup>7</sup> developed at some length a fundamental critique of intratextualism. The trouble with it, in short, was that it was too much trouble. It was like textualism with homework. Vermeule and Young’s article was rich, persuasive, carefully argued, and blah blah blah. Really, Amar was a goner once you read the title of Vermeule and Young’s article. Those whom the gods would destroy they first call “Herbert.” It was impossible for anyone to take intratextualism seriously again, since every obligatory “*But see*” footnote would have the name “Herbert” in it. It was a cruel blow—you will doubtless be shocked to hear that one of the authors was teaching at Chicago at the time—but an effective one. Intratextualism was declared dead on arrival, consigned to a landmark on the roads not taken in constitutional theory: Intratextualism-ville, population one.

Despite the abortive status of intratextualism, however, one must give Amar his due. He was right: professionally speaking, textualism has all the sparkle and vitality (although less gold lamé) of a Sunday matinee performance by Siegfried and Roy. The Constitution is a spare document of some 8000 words, including the amendments. To add insult to injury, some 180 of those words are made up of *signatures*, which, let’s face it, doesn’t help much.<sup>8</sup> Even if you include some of the “presupposition[s]”<sup>9</sup> or “fundamental postulates implicit in the constitutional design”<sup>10</sup>—*i.e.*, “made-up stuff,” like the bit where the Eleventh Amendment applies to actions against states brought in state courts,<sup>11</sup> federal administrative proceedings,<sup>12</sup> and afternoon television court shows like *Judge Judy*<sup>13</sup>—there’s still not a hell of a lot of meat on that body, and most of it has been picked over.

There are a few possible responses to this dilemma. Some have turned to obscure provisions of the Constitution as new grist for the textualist mill—lesser passages of little importance

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7. Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730 (2000).

8. *But see* Michael Coenen, Note, *The Significance of Signatures: Why the Framers Signed the Constitution and What They Meant by Doing So*, 119 YALE L.J. 966 (2010).

9. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996).

10. *Alden v. Maine*, 527 U.S. 706, 729 (1999).

11. *See id.*

12. *See Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002).

13. *See, e.g.*, John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663 (2004) (out-textualism-izing his former boss, Justice Scalia).

with little likelihood of drawing significant public attention, like the Letters of Marque and Reprisal Clause, or the Second Amendment. But at the rate that law schools (or Yale, anyway) are churning out professors, this can't be an effective long-term strategy; we will run out of unnoticed clauses all too soon.<sup>14</sup>

Others have turned to new models of textualism and its cousin, originalism. Jack Balkin, for example (another Yalie! What *is* it with that place?), has argued at length for a theory of textualism and originalism under which “constitutional interpretation requires fidelity to the original meaning of the Constitution and to the principles that underlie the text.”<sup>15</sup> This theory has the tempting virtue of being, on closer examination, neither originalist nor textualist. But it has failed to persuade so far. (If you doubt me on that, consider that the article setting out this theory is over 60 pages long, while the article attempting to rebut critics of the theory is over 100 pages long.<sup>16</sup> In this business, we call that a rough start.)<sup>17</sup>

Still others—well, one person<sup>18</sup>—have taken a different route, arguing that “[m]uch of the Constitution, . . . including some of [its] most important parts, is invisible.”<sup>19</sup> Apart from the fact that any constitutional theory that has Justice Kennedy as its intellectual godfather is starting at a disadvantage, the “invisible Constitution” theory also has one minor problem: it is difficult to engage in textualist analysis of a text that *you can't see*. Finally, many have rejected textualism altogether. However, rejecting textualism is also rather passé these days. It might win you an invitation to the next American Constitution Society convention, but you won't even get a free drink coupon.

A new approach is needed. Amar did his best with intratextualism, but the deadly “Herbert” label, and the unfortunate fact that people actually read the article, meant that he failed to fly under the radar long enough to entrench it. No,

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14. Statistical analysis in fact suggests that, at current rates, within 15 years there will be more law professors than there are law students. This suits most law professors just fine, but presents an unsustainable financial model.

15. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 293 (2007).

16. See Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427 (2007).

17. Nor does it help if someone calls your theory “disgusting.” See Andrew Koppelman, *Why Jack Balkin is Disgusting*, 27 CONST. COMMENT. (forthcoming 2010).

18. See LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* (2008).

19. Kermit Roosevelt III, *The Indivisible Constitution*, 25 CONST. COMMENT. 321, 321 (2008).

what is needed is a new form of textualism, one that is radical enough to make the reputation of its sole creator,<sup>20</sup> but whose author is still, oddly, not as famous as the claims of justice and merit demand, and who thus stands a chance of slipping by the fuddy-duddies at the Federalist Society. I am that person, and this is my crazy theory.<sup>21</sup>

As we have seen, Amar's intratextualism theory asks, if a little bit of textualism is going to light everyone's fire and get people appointed to the Supreme Court, how about even more? He asks whether we might all get a professional bump by taking the constitutional text really seriously.<sup>22</sup> The next step should be obvious: What would happen if we treated the constitutional text really, *really* seriously?

The implications of this approach, as I will show, are Boggling. Literally. I propose to Boggle both the Constitution and . . . your mind.

Everyone is, I hope, familiar with the family word game Boggle. Players are confronted with a box forming a four-by-four grid in which sixteen dice, each with letters on its sides, are contained. The box is shaken, and players have three minutes to come up with as many words as they can that be constructed by looking among horizontally, vertically, or diagonally neighboring letters. Hilarity (and fisticuffs, depending on the intensity and alcoholicity of the participants) invariably ensues.<sup>23</sup> Boggle, for those who either prefer variants or wish to avoid copyright violation claims when designing iPhone apps and Facebook games, is just as one of a family of games involving word scrambles, anagrams, and similarly deliriously exciting play.

Our Boggling Constitution—or, if you prefer, *intra*-*intra*-textualism, or *intra*-textualism 2.0<sup>24</sup>—is what happens when text

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20. Not, of course, if he remains anonymous. Or even Anonymous. But I'm keeping my options open here. If this pans out, I can always claim authorship later, under my actual name. If not, I'll be the first one to sign the public letter of complaint to the journal for publishing this tripe.

21. Cf. ANIMAL HOUSE (Universal Pictures 1978) (“[Otter:] I think this situation requires a really futile and stupid gesture be done on somebody's part.” “[Bluto:] We're just the guys to do it.”).

22. See William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar's Bill of Rights*, 106 MICH. L. REV. 487 (2007); cf. Jordan Steiker, Sanford Levinson & J.M. Balkin, *Taking Text and Structure Really Seriously: Constitutional Interpretation and the Crisis of Presidential Eligibility*, 74 TEX. L. REV. 237 (1995).

23. See, for a totally authoritative and not at all unreliable source, Wikipedia, *Boggle*, <http://en.wikipedia.org/wiki/Boggle/> (last visited Mar. 31, 2010).

24. See CASS R. SUNSTEIN, REPUBLIC.COM (2002) (making arguments about the

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is taken really, really seriously—so seriously, in fact, that we stop taking the *text* seriously and start caring about the *letters*. It posits that our Founders did not just deed to us a Constitution in the form of words and phrases, but a whole exciting grab bag of consonants and vowels (and the letter *y*, which swings both ways).

If, the theory goes, all of the words in our Constitution are thick with authoritative interpretive meaning, then we would be even better off if we take that meaning, jumble it all together, hit the timer, and reach for our number two pencils. After all, if the *words* are authoritative sources of meaning, surely the *letters* are too! And given the ancient status of the Constitution, which was written in an age in which neither aeronautics nor thermal imaging searches, let alone smooth jazz or medical marijuana (although there was a reason why all the Founders grew hemp), were even conceivable, surely a Boggling Constitution would give us the interpretive leg-room we need to confront modern problems, in a way that is not only conducive to sound policy-making and the proper allocation of authority among a diverse set of post-Weberian governing institutions, but also fun for the whole family. In short, I want to argue in this Article that We the People might benefit from rethinking our basic sources of constitutional commitment and taking our reformed and reconstituted place as Elope He Wept—or, for the more daring, Pee Hep Towel.

Part I of this Article lays out the theory of Our Boggling Constitution in painful detail. Part II examines some of the arguments for and against the theoretical legitimacy and pragmatic value of my intra-intra-textualist approach to constitutional meaning in—for reasons that are no more apparent to me than to you—the form of a dialogue. Part III presents some puzzles of constitutional meaning that might be asked or answered—or even asked *and* answered, if no one objects—by a Boggling approach to the Constitution. The Conclusion briefly, mercifully, and tautologically, concludes.

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status of democracy and free speech in the Internet age); CASS R. SUNSTEIN, *REPUBLIC.COM 2.0* (2007) (adding a digit to the title and a single footnote reference to Friendster in the text and then reselling the original book at another \$20 a pop). And people ask how he can be so prolific!



## I . . . THEN YOU SHAKE IT ALL ABOUT

Recall the basic insight of Amar's intratextualism: more is, um, better.<sup>25</sup> If we like a little bit of textualism, we should enjoy a whole lot of it even more. Thus, we should reject "clause-bound textualism," which does nutty things like "read[ing] the words of the Constitution in order, tracking the sequence of clauses as they appear in the document itself."<sup>26</sup> This approach leads to all kinds of embarrassments, like coherence and political conservatism.

Worse, it is dull. Hey, we're among friends, right? So we can admit that the Constitution is, in a word, boring. Hell, it's dry as dirt. It is so dull that, when constitutional theorists started reading Lacan and Wittgenstein in the 1980s, they did so because they thought the writing was *better*. If we had picked a more exciting subject to teach and write about than constitutional law, we might have a more enjoyable text to spend our time with—say, the Federal Insecticide, Fungicide and Rodenticide Act of 1947. But, as of this writing, there is no Southmayd Chair of Fungicides at Yale. We might have become literary critics instead, and spent our time reading novels. But Stanley Fish had already sucked the life out of that field before trying to muscle in on ours, and anyways the pay is worse in English departments. Face it: the Constitution is our field, and we are stuck with it. But, Amar argues, we might at least have more fun with it if we tried reading the words out of sequence.

By arguing for an intratextualist approach that "reads the words of the Constitution in a dramatically different order,"<sup>27</sup> Amar is not arguing that we should scramble the order of particular *clauses*. (See "clause-bound textualism, ridiculing of.") That approach might be entertaining, but can lead to absurd results. For instance, we might read Article I, Section 2, clause 2, to say "No person shall be a Representative who shall have attained to the age of seven years. . . ." This would lead to a bunch of squalling infants serving in the House. (Which, actually, does roughly describe the House of Representatives.) Or we

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25. *But see* CECILE ANDREWS & WANDA URBANSKA, *LESS IS MORE: EMBRACING SIMPLICITY FOR A HEALTHY PLANET, A CARING ECONOMY AND LASTING HAPPINESS* (2009); E.F. SCHUMACHER, *SMALL IS BEAUTIFUL: ECONOMICS AS IF PEOPLE MATTERED* (1973). On the other hand, see *THE ANDREA TRUE CONNECTION, More, More, More, on MORE, MORE, MORE* (Buddah Records 1976); *see also id.* ("How do you like it?").

26. Amar, *supra* note 3, at 788.

27. *Id.* at 789.

might read the presidential oath of office out of sequence, which under our current constitutional system is unlikely to occur. (Okay, bad example.)

Instead, intratextualism demands that the Constitution be read out of sequence in a broad, big-thinking kind of way. For instance, we would read the provisions of the Fifteenth, Nineteenth, Twenty-Fourth and Twenty-Sixth Amendments, all of which use “the same highly elaborate set of words, ‘the right of citizens of the United States . . . to vote,’” “*in pari materia*.”<sup>28</sup> Or, to take a now-aging example, in trying to make sense of the “inferior officer” language in the Appointments Clause of Article II, section 2, we would turn to other uses of the word “inferior” in the Constitution to answer the question, “To whom exactly is [Independent] Counsel [Kenneth] Starr ‘inferior?’”<sup>29</sup> Or we might focus more specifically on particular word choices, noting, for example, that “In the Constitution, . . . ‘the United States’ is consistently a plural noun.”<sup>30</sup>

All of this is to the good. From a Coverian perspective, intratextualism is a decidedly jurisgenerative project.<sup>31</sup> Once we are liberated from our “clause-bound” prisons, and focused instead on the question “What are words for?”<sup>32</sup> we can get a lot more life out of the old grey mare. Playing with words, combinations of words, and recurring words and phrases multiplies arithmetically<sup>33</sup> the possibilities for constitutional interpretation, in a way that can reach up to, if not beyond, tenure. It can generate new ideas, new interpretive modalities, new conference invitations. And because it’s constitutional

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28. *Id.* See someone who knows Latin.

29. *Id.* at 748. This is, incidentally, a trick question. The answer to the question “To whom is Kenneth Starr inferior” is, “Everyone.”

30. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 846 n.1 (Thomas, J., dissenting); see also AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 29 (2005). *But see* Treanor, *supra* note 22, at 489 (pointing out that, “in the late eighteenth century, nouns ending in the letter *s* were commonly assigned plural verbs, regardless of whether or not the noun itself was plural.”). This kind of killjoy focus on trivialities like accuracy and context is why law faculties should avoid hiring too many actual historians. We can get along just fine with Bruce Ackerman instead, thank you.

31. See generally Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983). “Jurisgenerative” is a compound term meaning, “Tending to generate more jurists.” Admittedly, no one is sure what the rest of Cover’s article means, but that has not stopped it from being cited in the Supreme Court, albeit by Justice Brennan, who went in for that sort of thing. See *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 342 n.3 (1987) (Brennan, J., concurring).

32. See MISSING PERSONS, *Words, on* SPRING SESSION M (Capitol Records 1982).

33. Or geometrically—I’m not sure which. If I was good with numbers, I would have gone to medical school.

scholarship, it is unlikely to do anyone in the real world any harm.

Amar concedes, more than 50 pages into his *Intratextualism* article, that, if “[c]arried to extremes, intratextualism may lead to readings that are too clever by half—cabalistic overreadings conjuring up patterns that were not specifically intended and that are upon deep [*sic*] reflection not truly sound but merely cute.”<sup>34</sup> Talk about burying the lead! He thus asks, “Intratextualism helps us see clearly a possibly attractive reading [of the Constitution]—it leads us to water. But should we drink?”<sup>35</sup> (It should be noted that the reference to drinking tends to confirm my theory that the whole thing was cooked up over beers at Mory’s.) In any event, Amar concludes that if undertaken carefully and sensitively, if used in the right hands—say, those of a certain Southmayd Professor of Law—intratextualism offers unlimited promise as a method of constitutional interpretation.

Amar goes wrong in two places, however. The first error is his suggestion that “extremes,” “cabalistic overreadings,” and readings of the Constitution that are “not truly sound but merely cute” are a *bad* thing. In a fairly typical Yale dig at Harvard,<sup>36</sup> he writes: “As illustrated most vividly by [Christopher] Langdell, intratextualism can become a mechanical exercise that blunts good judgment and leads to outlandish outcomes.”<sup>37</sup>

To be sure, if Amar is right about this, intratextualism would be indistinguishable from textualism, whose very purpose is to provide mechanical exercises that blunt good judgment and ensure outlandish outcomes. Still, any attempt to cast doubt on a theory of constitutional interpretation just because it might be fanciful and useless begs the impatient response: “Okay. And that is a bad thing because?” After all, as Chief Justice John Marshall famously wrote, “[W]e must never forget it is a constitution we are expounding.”<sup>38</sup> Which is another way of saying, it’s not like we’re cardiologists, auto mechanics, or something important. Our livelihood as constitutional theorists does not depend on being “sound,” or “right,” or “not crazy.” To the contrary: if we want to keep this great gig going, we need all

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34. Amar, *supra* note 3, at 799.

35. *Id.* at 807.

36. And in the *Harvard Law Review*, no less! Presumably the student editors had stopped reading by this point and didn’t notice the insult.

37. Amar, *supra* note 3, at 799.

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

the cabalistic overreadings and outlandish outcomes we can get. When you start running out of unsupportable and borderline-insane readings of the Constitution, you might as well abandon your constitutional law treatise and call it a day.<sup>39</sup>

Second, as Vermeule and Young point out *ad nauseam*, intratextualism is hard work. Really, really hard. “Clause-bound textualists” at least have the luxury of only having to read the Constitution one clause at a time. This eliminates the need to read the whole thing in context, and allows readers who are pressed for time to skip over most of the unimportant words, like “a,” “the,” and “well regulated militia.” Intratextualists, by contrast, have to read every damn word of the document, often more than once. Which brings us back to the core problem: the Constitution is just not a fun read.

This point is important not just because, as a general rule, it is better to do fun things than not-fun things. It also raises questions of legitimacy. Americans, who need instructions to operate a toothpick and think Thomas Jefferson is that fellow who moved on up to the East Side to a deluxe apartment in the sky, are in no position to read the entire Constitution, whether word by word or clause by clause.<sup>40</sup> Even seasoned professionals will find it rough sledding, and may find it difficult to ascertain the most basic facts, like whether the President is supposed to be selected by the people, the Electoral College, or a slim majority of the Supreme Court. We Americans are, not to put too fine a point on it, barely qualified to elect the winner on *American Idol*, let alone interpret the Constitution.

The difficult and demanding nature of intratextualism as an interpretive method thus raises serious questions of democratic legitimacy. What kind of Constitution would we have—indeed, what sort of system of government would we have—if constitutional interpretation were so difficult that it became the rarefied province of just a few unrepresentative graduates of elite law schools?

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39. See Laurence H. Tribe, *The Treatise Power*, 8 GREEN BAG 2D 291 (2005) (discussing Tribe’s decision to abandon further work on the second volume of the third edition of his magisterial constitutional law treatise). At the end of the second volume, Tribe would have revealed who the murderer was, and the hero and heroine would have been reunited and lived happily ever after.

40. See, e.g., Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287 (2004).

Okay, forget I asked that question. Still, a number of constitutional scholars have made a similar point in different ways. They have advocated “taking the Constitution away from the courts,”<sup>41</sup> or “popular constitutionalism,”<sup>42</sup> as a means of restoring some of the democratic luster of the Constitution. True, they will abandon those theories once liberals again constitute a majority on the Supreme Court. But until President Obama gets a chance to do something more than just replacing old liberals with young ones, this may be a while in coming. In the meantime, it makes sense to search for a theory of constitutional meaning that can be undertaken by what Kramer would call “the people themselves”—or, as Justice Holmes calls them, “imbeciles.”<sup>43</sup>

These two points—that any theory of constitutional interpretation should be both fun and popularly available—leads to the question that animates this Essay: Why not a form of constitutional interpretation that is fun *for the whole family*? Enter Boggle.

Different games have their partisans *qua* games, to be sure. But the question we confront here is: are there particular family games that are also totally legitimate, not-at-all-wacko devices for interpreting our Constitution? On this question, some games fall short. Constitutional theory may be a trivial pursuit, for example, but it is not Trivial Pursuit. Monopoly might have been helpful, but mostly in interpreting the Constitution in the nineteenth century.<sup>44</sup> Some think the popular board game Diplomacy might do, but memos written by the Office of Legal Counsel in the last Administration have declared that diplomacy has no application to constitutional interpretation or, in fact, anything else. That pretty well leaves us with Boggle.

I have already laid out the rules of Boggle, but perhaps an illustration would help here. (In any event, I have never had a chart in one of my articles, and I would like to add a sense of

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41. See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

42. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004). Kramer here means “popular” in the sense of “more than nine,” rather than in the Nada Surf sense.

43. See *Buck v. Bell*, 274 U.S. 200, 207 (1927).

44. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1979); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960* (1994). Note that there is a ten-year gap between the two volumes, covering the years between 1860 and 1870. Happily, nothing of note happened in American history or law during that period.

meaning and excitement to the otherwise drab lives of the editors.) This is a typical Boggle board:

<b>B</b>	<b>A</b>	<b>D</b>	<b>E</b>
<b>M</b>	<b>E</b>	<b>R</b>	<b>R</b>
<b>A</b>	<b>R</b>	<b>T</b>	<b>Y</b>
<b>R</b>	<b>B</b>	<b>U</b>	<b>R</b>

The object, of course, is to find as many words within this jumble as possible, generally within a three-minute period. So, for instance, in the illustration above one may form the words “BAD,” “ERR,” “ART,” “MARBURY,” “RUB,” and so on. I told you this was fun!

Some variants on Boggle—also known as “ways to get around copyright violations”—may also be helpful in our project of limning the Boggling Constitution.<sup>45</sup> The online game “Text Twist,” for instance, generates six-letter combinations which can then be reordered to form different words of various lengths.<sup>46</sup> Similarly, the iPhone—which has bettered the human condition

45. They also give rise to the possible critique that I’m really talking about these other games, or word-scramble games in general, and not Boggle. But 1) “Our Boggling Constitution” is a really smashing title, much better than “Our Anagrammatic Constitution,” and I’m not going to let anything stand in the way of using it, and 2) if Amar can bury the problems with his approach, I can do the same with mine.

46. See Text Twist on Yahoo! Games, <http://get.games.yahoo.com/proddesc?gamekey=texttwist> (last visited Mar. 31, 2010). One should be cautious about playing this game too much, however. I once came home abuzz with the thought that “meat,” “mate,” and “team” are all variations of the same letters, and was nearly thrown out of the house by my spouse. And it turns out that most professional clergy already know that “God” spelled backwards is “dog,” and are not impressed when you point this out to them.

by offering about fifty different “fake lighter” applications, but whose onerous contract terms obliging users to sign on with AT&T for life are, ironically, in clear violation of the Thirteenth Amendment—has dozens of word scramble games, such as Twisty Text, TextTwist, and BoggWords. (Remember what I said about copyright law?) Let’s just agree to call the whole megillah Boggle. If the Parker brothers have a problem with that, they know where to find me.

Our Boggling Constitution, or intra-intra-textualism, is simply a means of bringing this zany and educational leisure pursuit to bear on the activity of constitutional interpretation. Consider, for example, the Preamble to the United States Constitution. We are all familiar with its evocative language—“in order to form a more perfect Union,” “secure the Blessings of Liberty,” and so on. But the Preamble, read Boggle-style, also tells us that the United States is a land in which “people shoot the butts off tons of the most sweet creatures to stuff, but feel that to require a permit is evil.”<sup>47</sup> This conclusion took Justice Scalia and his “hapless law clerk[s]”<sup>48</sup> endless hours of trolling through old microfilms of colonial-era Connecticut newspaper articles to reach in *District of Columbia v. Heller*,<sup>49</sup> but could have been reached with far greater speed, and no particular loss of credibility, if they’d been willing to just mess around with the words a little. The Preamble, suitably rearranged, also tells us that “former presidents’ children assume they deserve the top job too, on no more than name,”<sup>50</sup> which again could have saved the Court no end of time and trouble about ten years back. And then there is this gem, which has a certain *McCulloch v. Maryland*, sea-to-shining-sea spirit to it, and also may help in interpreting the Religion Clauses of the First Amendment:

Columbus to Perry, Edison to Einstein, Ruth to Ryan, Reuter to Hoffa, Disney to Spielberg: O honored pioneers!

Adventurous to timid, carefree to burdened, refined optimists to crude pessimists, enfeebled to health nuts; Republicans to Democrats, Christians to Jews; Harlem to Watts, Queens to

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47. See Anagrams by Richard Grantham, *Only in the U.S...*, <http://www.anagrammy.com/literary/rg/poems-rg6.html>.

48. *Conroy v. Aniskoff*, 507 U.S. 511, 527 (1993) (Scalia, J., concurring). Which raises the question, is there such a thing as a hapful law clerk? And what’s a hap, anyway?

49. 128 S. Ct. 2783 (2008).

50. See Grantham, *supra* note 47.

Glendale, Fifth Avenue to Main Street, Atlantic to Pacific: no lie, 'tis home to the free!<sup>51</sup>

And that's just the Preamble! There's lots more where that came from, believe me.

First Amendment scholars, for instance, as well as local businesses in Pawtucket, Rhode Island with surplus clowns they're trying to unload,<sup>52</sup> have long puzzled over the meaning of the Establishment Clause. Does it prevent the state from turning us into "insiders" and "outsiders" by endorsing particular religious messages?<sup>53</sup> Does it prevent us from denying "Equal Liberty" to particular religious believers or non-believers?<sup>54</sup> Does it mean "absolutely nothing?"<sup>55</sup>

The meaning of the Establishment Clause is a seemingly difficult, if not intractable, question—I *hope* it's intractable, since my livelihood depends on it—but, as it turns out, it is "happily . . . not of an intricacy proportioned to its interest."<sup>56</sup> One need simply stare more closely at the word "Establishment." No, more closely than that. Closer. That's it. Now we can see that "Establishment" is simply a fancy way of saying "A Blent Theisms." In other words, under an intra-intra-textualist reading of the Establishment Clause, if you just smush all theistic religious beliefs together into a shapeless pudding of generic God-talk—a "blent theism"—you've got no Establishment Clause violation. Which, as it turns out, is pretty well what the Court has said anyway.<sup>57</sup> But this approach to

51. See Anagrams by Richard Brodie, <http://www.anagrammy.com/literary/rb/poems-rb3.html>.

52. See *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984).

53. See *id.* at 688 (O'Connor, J., concurring).

54. See CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* (2007) (setting out a theory of "Equal Liberty").

55. See *generally* Antonin Scalia.

56. *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 176 (1803).

57. See, e.g., *Marsh v. Chambers*, 463 U.S. 783, 792-95 (1983); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 35 (2004) (O'Connor, J., concurring). This is fairly close to Justice Scalia's view as well, although in his understanding "blent theisms" refers exclusively to good upstanding Christian sorts of God, and not the more unsavory foreign kinds. See, e.g., *McCreary County v. ACLU of Kentucky*, 545 U.S. 844, 889-900 (2005) (arguing that the Establishment Clause permits government acknowledgement of "monotheism," defined as including Judaism, Christianity, and Islam, but not Cthulhu worship or Scientology, and asserting that it also permits the "disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists [and Democrats]"). According to Justice Scalia, ignoring atheists and agnostics, as well as worshippers of Hinduism, Buddhism, pantheism, and the Jackson Five, leaves us with "a broad and diverse range of the population—from Christians to Muslims." *Id.* at 894. This calls to mind Dorothy Parker's review of a Katharine Hepburn performance, in which she said Hepburn had run the gamut of emotions from A to B. See *THE QUOTABLE WOMAN* 245 (Elaine Partnow ed., 1978).



the same reading is actually superior, because, unlike the Court's view of ceremonial deism in *Marsh v. Chambers*, it kind of makes sense.

Our Boggling Constitution reaches insights about other aspects of our Founding document, both structural and substantive, obscure and notorious. What does Article III mean by "controversies," to take a relatively simple example?<sup>58</sup> A number of things, as it turns out, including cases involving "cons," "notes," "sins," and "ire," which embraces most of the criminal law and the UCC, as well as canon law. It also, contrary to current opinion, may include cases without genuine adverse interests (or "contrive[d] sores"), cases involving product defects in tennis and fishing ("corrosive nets"), and disputes involving Murphy beds ("cot reversions"). More broadly, we can see clearly the function of Article III as a dispute-resolution mechanism that enables parties to resolve public and private disputes without resorting to violence. What are legally resolved controversies, after all, but "converse riots?"

To take a more controversial example, the courts have struggled mightily to determine the scope, contours, and implications—oh, and also the, um, existence—of "substantive due process." One approach to this mess has been that of Justice Douglas: to find the content of substantive due process rights not in the Due Process Clause itself (partly to avoid the risk of so-called *Lochner*-ization, and partly because people sometimes actually read the Due Process Clause and realize it's a non-starter), but instead in "penumbras" and "emanations" from the substantive guarantees of the Bill of Rights.<sup>59</sup> But this approach has generally been ridiculed. As I have learned in teaching constitutional law, law students, as somber as they usually are, cannot help tittering when they read the word "emanations." (Or the word "tittering," for that matter.)

More guidance on the scope and nature of substantive due process rights can be found, however, when we rearrange the words, or actually the letters, of Section One of the Fourteenth Amendment itself. That section includes, in an admittedly scrambled form, the words "abortion," "sodomy," "right to die," and "vibrators"—although not, interestingly, "a right of access to

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58. See RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (6th ed. 2009) (making short work—a mere 1631 pages—of the 375 or so words of Article III).

59. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

experimental drugs that have passed limited safety trials but have not been proven safe and effective.”<sup>60</sup> (It does, however, happily include both “reefer” and “salvia.”) It also includes the letters that make up the words “green pastel redness,” incidentally, so this Essay can stand as one more effort to refute John Hart Ely.<sup>61</sup>

Intra-intra-textualism, in short, provides the means for discovering new sources of meaning in the letters of our founding document. It is less difficult than originalism, and also less likely to result in significant library fines for overdue eighteenth-century books. It has as much integrity as Dworkinian method, and has the advantage of not spending half of each year in England. It has as much capacity to find worthy principles of constitutionalism as so-called “justice-seeking” methods of constitutional interpretation,<sup>62</sup> but exceeds it in its ability to seek not only “justice,” but also “ice” and “tics.” And it outdoes popular constitutionalism, because it could actually be . . . popular. More than popular, in fact. Downright uproarious.

## II. ANONYMOUS, HERBERT, HERCULES, AMAR, BOB, CAROL, TED AND ALICE: A DIALOGUE

Another way to explore the implications of Our Boggling Constitution is through the form of a dialogue. The dialogic model, in addition to holding out the hope of a screenplay or an Off-Off-Broadway run,<sup>63</sup> is helpful here because it makes plain what might be obscure, clarifies what might seem complicated, and dispels doubts where they might arise. This is why Henry

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60. *Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 697 (D.C. Cir. 2007) (en banc).

61. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 18 (1980). For examples of people lining up to give Ely a good whacking, see, for example, Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 *YALE L.J.* 1037 (1980); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *YALE L.J.* 1063 (1980). And that’s just in the *Yale Law Journal*. Apparently Ely failed to make sufficient contributions to the Yale alumni fund.

62. See, e.g., Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 *NW. L. REV.* 410 (1993); cf. Lawrence G. Sager writing as Stephen King writing as Richard Bachman, *THINNER* (1984).

63. This is not entirely far-fetched. The dialogue sections of Judge John T. Noonan, Jr.’s book, *NARROWING THE NATION’S POWER: THE SUPREME COURT SIDES WITH THE STATES* (2002), were actually optioned by Hollywood, although the characters were renamed, some of the action was altered, and the movie was released under the title *The Babysitter Murders*.

Hart's famous dialogue on the federal courts is so easy to understand.<sup>64</sup> Or maybe not. On the other hand: screenplay!

So imagine a figure like Dworkin's Hercules, only more so: a figure of infinite wisdom, grace, intellect, far-reaching vision, and smashing good looks. Call this hypothetical figure "Anonymous." His interlocutor is a less wise, more skeptical, oddly hirsute individual wearing a thick pair of glasses. Call him, naturally, "Herbert." Herbert is friendly but a little dim. Let us assume he is a federal judge.

As our dialogue begins, Anonymous and Herbert have just taken their seats in a café. They are sitting at a table at which the previous occupants, who failed to bus their table and left little or no tip, were Rodrigo and Richard Delgado,<sup>65</sup> who were discussing the plight of the working poor. Herbert is familiar with the nascent theory of intra-intra-textualism, but has a few doubts. (He also has been hiding the fact that he is having an affair with a former law clerk and has mob ties. But John Grisham will have to finish off that part of the story.) And . . . action!

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Herbert: You're joking, right?

Anonymous: Not at all.

Herbert: Come on.

Anonymous: Well, yes, a little. But bear with me.

Herbert: I'll listen until my latte's done. Then I'm out of here.

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64. Henry Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

65. See Richard Delgado, *Rodrigo's Roundelay: Hernandez v. Texas and the Interest-Convergence Dilemma*, 41 HARV. C.R.-C.L. L. REV. 23, 63 (2006). This cite is the result of a thoroughly unscientific search on Westlaw of the 31 or so Rodrigo tales published in law journals, which reveals only *one* reference to a tip over countless lunches and dinners enjoyed by Delgado, Rodrigo, and friends. This consists of a reference to Rodrigo "fishing in his pocket for some change to leave a tip," after tying up a coffee shop table for several hours discussing social justice over about five bucks' worth of coffee. Any law-and-economics scholar worth his or her salt, after totaling up the cost of the drinks, the work involved in preparing them, the opportunity costs for occupying the table that long, and recent regional figures from the Bureau of Labor Statistics, would surely have left at least a couple of bucks as a tip, not just spare change—unless they teach at George Mason, in which case the waiter would be lucky to escape with a stern lecture about Ayn Rand and a complimentary Ron Paul bumper sticker. Incidentally and perhaps tellingly, the story does not say whether Rodrigo actually left a tip for the waiter in the end or not; I'm betting he stiffed the poor sap.

Anonymous: Fine. Now, is Our Boggling Constitution really so ridiculous?

Herbert: Yes. Yes, it is.

Anonymous: Well, what makes it any more ridiculous than any other theory of constitutional interpretation?

Herbert: If that's your point of comparison, you're rigging the game. Still, surely it's more ridiculous than, say, originalism. At least that has a theory of legitimacy behind it.

Anonymous: Which is?

Herbert: Historical pedigree, for one. Plus popular consent, and the fact that any activity that is too difficult for non-historians to do well must be just the thing for poorly trained lawyers.

Anonymous: Well, I think intra-intra-textualism has the first two categories covered.

Herbert: Excuse me?

Anonymous: Look, word games have been around a long time. People have been doing this sort of thing since the Babylonian era.<sup>66</sup> And they invented the ziggurat! Plus, Parker Brothers has been around since the 1880s. On the other hand, originalism was invented by Ed Meese.<sup>67</sup> And he wrote his first draft of the theory on a cocktail napkin in an airport bar at Dulles.

Herbert: Point taken. But surely originalism's roots extend back to the Founding era?

Anonymous: Oh, please.

Herbert: Come on. Let's be polite about this.

Anonymous: Sorry. Sip your latte; it's getting cold.<sup>68</sup> Anyway, while no one really knows what the Founders thought about originalism,<sup>69</sup> we know what they thought about Our Boggling Constitution. Kind of.

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66. See TONY AUGARDE, *THE OXFORD GUIDE TO WORD GAMES* 1 (2d ed. 2003).

67. See Edwin Meese III, *The Law of the Constitution*, 61 *TUL. L. REV.* 979 (1987).

68. This is the kind of dramatic detail that gives the Rodrigo stories their incredible verisimilitude.

69. Compare H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 *HARV. L. REV.* 885 (1985), with Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 *CONST. COMMENT.* 77 (1988) (reprinting Powell's original article—in a much more prestigious journal!—but adding a question mark to the title). See also Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 68 *OHIO ST. L.J.* 1239 (2007) (reprinting both Powell and Lofgren, but with a new cite to Gadamer).

Herbert: This should be good.

Anonymous: Consider this. In a letter to the delegates of Congress on January 20, 1786, Charles Pettit writes that while some Commissioners “have Resolution enough to exercise this Discretionary Power so as to let few Obstacles impede their Progress,” others, “more timid, or less inclined to dispatch the Business, *boggle* at many Things which the former pass pretty easily over.”<sup>70</sup>

Herbert: Who is Charles Pettit? And what the hell was he talking about?

Anonymous: I have no idea.

Herbert: Hmm . . . .

Anonymous: Okay, take another example. George Washington, writing to Benjamin Harrison on May 5–7, 1779—the middle of the Revolutionary War, no less—wrote: “Little did I expect when I begun this letter that I should have spun it out to this length or that I should have run into such freedom of sentiment; but I have been led on insensibly and therefore shall not *boggle* at the mention of thing more which I am desirous to touch upon.”<sup>71</sup>

Herbert: Um, he said “shall *not* boggle.”

Anonymous: But he *could* have! He *wanted* to boggle, and would have if he hadn’t been insensible at the moment. And, you know—he was just the *father of our country*, for Pete’s sake.

Herbert: They did have pretty strong mead in those days; a lot of the Founders were probably half-“insensible” most of the time.

Anonymous: And here’s another one. Josiah Bartlett—*another* American President—wrote to William Whipple on December 31, 1776, to discuss the question of bounties with respect to the Revolutionary War, and said that “the proposal of giving lands as a part of the bounty has *boggled* us, however it will be got over in a few days I believe, and sent forward.”<sup>72</sup>

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70. See Letter from Charles Pettit to Nathanael Greene (Jan. 20, 1786) (emphasis added), available at [http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field\(DOCID+@lit\(dg02389\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(dg02389))) (last visited Mar. 31, 2010).

71. See Letter from George Washington to Benjamin Harrison (May 5-7, 1779) (emphasis added), available at [http://memory.loc.gov/cgi-bin/query/r?ammem/mgw:@field\(DOCID+@lit\(gw150015\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/mgw:@field(DOCID+@lit(gw150015))) (last visited Mar. 31, 2010).

72. See Letter of Josiah Bartlett to William Whipple (Dec. 31, 1776) (emphasis added), available at <http://memory.loc.gov/amem/hlawquery.html> (search “Bartlett boggled”; then follow the first link).

Herbert: Josiah Bartlett wasn't the President!

Anonymous: Sure he was! He was even re-elected despite having lied about having multiple sclerosis, and even though he was incredibly literate and eloquent.

Herbert: That's *The West Wing*. It was fictional. Plus that Bartlett didn't become President until the twentieth century.

Anonymous: *The West Wing* was fictional? That explains a lot. I didn't *think* the American people would elect someone who was so articulate.<sup>73</sup>

Herbert: Okay, okay. Let's just put us both out of our misery and assume that the Founders would have enjoyed Boggling the Constitution. What does that prove?

Anonymous: Not much. I mean, if I went running off to the Founders for advice every time I had a pressing concern, I would be treating my arthritis with leeches and trying to cast the demons out of my television set. But it does suggest that Our Boggling Constitution has a historical pedigree that's at least as strong as anything Leonard Leo can offer.

Herbert: Okay. But what about popular consent? At least the state ratifying conventions agreed to the particular language of the Constitution.

Anonymous: Except for when Congress forced a bunch of states to ratify the Fourteenth Amendment.

Herbert: Well, yeah. Still, the original ratifying conventions agreed to the language, right? Except for the slaves, women, and Indians.

Anonymous: Right.

Herbert: Right?

Anonymous: Exactly.

Herbert: Exactly? What kind of answer is that?

Anonymous: They agreed to the *language* of the Constitution. All of it.

Herbert: And?

Anonymous: Doesn't that include the letters?

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73. *But see* Xuan Thai & Ted Barrett, *Biden's Description of Obama Draws Scrutiny*, CNN.COM, Feb. 9, 2007, <http://www.cnn.com/2007/POLITICS/01/31/biden.obama/> (recounting the controversy over then-Senator and presidential candidate Joe Biden's description of fellow Senator and presidential candidate Barack Obama as "the first mainstream African-American who is articulate and bright and clean and a nice-looking guy"). Obama later punished Biden by forcing him to serve as Vice-President.

Herbert: Grr.

Anonymous: Well, they did. They even capitalized a bunch of them.

Herbert: Yeah, I never understood that.

Anonymous: Me neither. But do you think it's really a coincidence that if you take just the capital letters contained in Article I, Section two, Clause three of the Constitution, which discusses the division of the members of the Senate into classes for purposes of holding elections for one third of the Senate every two years, you get the words "A Cyclic Secrecy?"

Herbert: Well, in fact, I do—

Anonymous: Exactly. It can't be a coincidence.

Herbert: That's not what I was—

Anonymous: Or that it contains the name "Claeys?"<sup>74</sup>

Herbert: Okay, that one's cool. But so what?

Anonymous: The point is that the whole Constitution is pregnant with meaning.

Herbert: [Titters.]

Anonymous: Grow up. And that meaning goes all the way down, right to the letters. Rearranged, the Constitution gives us countless clues to its meaning. It's like some kind of fractal arrangement.

Herbert: What are fractals again?

Anonymous: Well, they're . . . They involve . . . A fractal is . . . Never mind. Just trust me on this one.

Herbert: Fine. But how does that get us to popular consent? Even if they agreed to all the letters, they couldn't have agreed to all the *combinations* of letters.

Anonymous: Well, that depends on what you mean by "popular." That's something most lawyers don't really know much about. Most of the time, when we talk about "popular" consent to the Constitution, we don't mean "popular" in the sense of "popularly agreed to," right? We mean something like, "agreed to by a few elite individuals who showed up for the ratifying conventions." And half of those people only showed up because they were offered a free three-day stay at a vacation

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74. See Faculty Web Page for Constitutional Law Professor Eric R. Claeys, [http://www.law.gmu.edu/faculty/directory/fulltime/claeys\\_eric](http://www.law.gmu.edu/faculty/directory/fulltime/claeys_eric) (last visited Mar. 31, 2010).

resort, on the condition that they attend a ratifying convention and sit through a short sales talk on time-shares first.

Herbert: What?

Anonymous: Right. So once we're operating at that level of fiction about consent,<sup>75</sup> is it really any more ludicrous to say there was "popular" consent to Our Bogging Constitution?

Herbert: I guess. What's the other meaning of "popular" you had in mind?

Anonymous: Do you like interpreting the Impairment of Contracts Clause?

Herbert: I'm a federal judge. I don't interpret the Impairment of Contracts Clause.

Anonymous: Well, how about the Commerce Clause, then.

Herbert: I wouldn't really call it "interpreting," actually. More like "rubber-stamping it unless violence against women is involved."

Anonymous: Well, is there anything in the Constitution you *do* interpret?

Herbert: Not if I can help it. Do you know what salaries for federal judges are like these days?

Anonymous: Well, do you like reading the thing?

Herbert: Again, I'm a federal judge. If I need to know what's in it, which I don't, I ask a law clerk to look it up. *You* teach constitutional law. Do *you* or your students read the Constitution?

[Both laugh. An awkward silence follows.]

Anonymous: Um, as I was saying. Interpreting the Constitution isn't really a popular activity. It's actually kind of tedious.

Herbert: You said it, brother.

Anonymous: Boggle, on the other hand, is wicked fun. If you *had* to interpret the Contracts Clause, wouldn't it be more fun if you could figure out all the words hidden within it? Like "tracts," "imps," or "rim snot?"

Herbert: True. Although I'm not sure "rim snot" is too helpful.

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75. See, e.g., Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CAL. L. REV. 1482 (1985).



Anonymous: Plus it's not only fun—it's fun for the whole family. Did you know that Boggle is suitable for ages "8 to Adult?"<sup>76</sup> If we really want a Constitution that is open to reading and interpretation for everyone, that can truly engage the whole community of citizens, isn't this the way to go?

Herbert: Sure, but you can't even vote if you're under 18.

Anonymous: Yeah, but the Constitution—read in an un-Boggling fashion, that is—only has age limits for members of the executive and legislative branches, not the judicial branch. An eight-year-old might not be able to serve in Congress or the Presidency, but she could at least sit on the Supreme Court or the lower federal courts, at least if she can get a note from her parents.

Herbert: Okay, I'm coming around a little. Intra-intra-textualism does sound like a lot more fun than the usual kinds of constitutional interpretation. And I'd save a hell of a lot on labor costs if I could have children serving as my law clerks. I might even be able to find summer work for my son. Fourteen years old and doesn't even get out of bed until after noon! But I have to say, the whole thing still sounds a little meshuggenah. Do you folks in the academy really get paid for this sort of thing?

Anonymous: We do until tenure, anyway. After that, we don't even have to write. But if you want to *advance* in constitutional theory, this is exactly the kind of thing we're looking for. I mean, come on—it's brilliant!

Herbert: "Brilliant," huh? Don't suffer from self-doubt much, do you? Didn't one of you fellas knock "brilliant" constitutional theories a while back?

Anonymous: Sure—Daniel Farber.<sup>77</sup> He argued that "brilliant scholarship [had] recently become rampant" in constitutional law, that brilliant theories of constitutional law "by definition . . . would not occur to most people," and that since these kinds of theories "can only be brilliant because [they are] actually false," we should instead focus on more "pedestrian" approaches to the field.<sup>78</sup>

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76. See Hasbro, BOGGLE Game, [http://www.hasbro.com/objects/products/print.cfm?product\\_id=9619](http://www.hasbro.com/objects/products/print.cfm?product_id=9619).

77. See Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917 (1986); Daniel A. Farber, *Brilliance Revisited*, 72 MINN. L. REV. 367 (1988).

78. Farber, *The Case Against Brilliance*, *supra* note 77, at 924, 925, 929. To say that brilliant theories have *ever* been rampant in constitutional law seems to be stretching it a little, but the piece was cite-checked by a 24-year-old law student, so it must be true.

Herbert: So what do you say to that?

Anonymous: He didn't mean it.

Herbert: What?

Anonymous: Look, complaining about "brilliance" is itself a brilliant move. I mean, the article has been cited over 120 times—or about 12, when you discount for self-citation.<sup>79</sup> If that's not a self-refuting move, I don't know what is.

Herbert: True.

Anonymous: Plus, haven't you ever heard of pulling the ladder up after you've climbed it yourself?<sup>80</sup> I'm pretty sure that's what Farber was doing. Try being "brilliant" after that! Farber would be ready to cite his own article at you before the ink was dry on your new theory.

Herbert: Sneaky devil, isn't he?

Anonymous: Trust me—brilliance still sells in constitutional theory. People can talk all they like about how boring legal scholarship has gotten,<sup>81</sup> but a really outlandish theory of constitutional interpretation is still going to pack 'em in.

Herbert: Or a really stupid one.

Anonymous: Tomayto, tomahto.

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And . . . scene!

### III. A RESEARCH AGENDA FOR BOGGLING CONSTITUTIONALISM; OR, I'M BUSY—YOU DO IT

By now, it should be utterly clear that Our Bogging Constitution is more than a mere fantasy, jest, or really bad idea. (Or not. The difference between serious constitutional theory

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79. See, e.g., J.M. Balkin & Sanford Levinson, *How to Win Cites and Influence People*, 71 CHI.-KENT L. REV. 843 (1996).

80. See HERMAN MELVILLE, *MOBY DICK; OR, THE WHALE* 34 (Oxford University Press 2008) (1851). See also the general phenomenon of law professors achieving tenure and then complaining that tenure standards aren't strict enough.

81. See, e.g., Daniel R. Ortiz, *Nice Legal Studies* 1–2 (Va. Pub. Law and Legal Theory Research Paper No. 2009-12, 2009), available at <http://ssrn.com/abstract=1474402> (complaining that kids these days don't know what it was like to do legal theory back when Ortiz was younger). For a grander, more eloquent statement along these lines, see Bruce Ackerman, *A Generation of Betrayal?*, 65 FORDHAM L. REV. 1519, 1528 (1997) (calling ours a "generation of midgets" that, among other sins, refuses to concede that the Constitution can be legitimately amended outside the confines of Article V through a process of iterated approval by Congress, the Supreme Court, Professor Ackerman, and the starting lineup of the New York Mets).

and outright parody is, after all, about as thin as the difference between Coke and Coke Classic. If there's a point to this Article—and that's a big “if”—that may be it.<sup>82</sup>) It is a living, breathing, occasionally dancing and singing reality. By looking at the Constitution at an atomic level, by breaking through the tyranny of words and sentences constructed in what *they* would like you to think is a coherent and purposive manner, and seeing instead the glorious and protean *letters* that are the final source of constitutional legitimacy, we open up new vistas of constitutional meaning—and, more importantly, professional opportunities for constitutional interpreters. We're sitting on a gold mine here, people!

That being said, one should concede that Our Boggling Constitution raises as many questions as it answers, or possibly slightly more. Or maybe a lot more. A skeptic might say that intra-intra-textualism raises serious doubts and concerns about little things like credibility, legitimacy, and application. That's what a skeptic would say, anyway. A constitutional scholar would call the same thing “a fertile and promising theory.”

Clearly, I can't do all the work. It wouldn't be fair. Plus, my laptop battery is running down, and I'm starting to get dirty looks from the manager of this Starbucks for sitting here too long without buying anything. So let me suggest some questions that might form the foundation for future work on Our Boggling Constitution and its implications.

*Congress.* Article I, section one of the Constitution says that “All legislative Powers herein granted shall be vested in a Congress of the United States,” which shall consist of a “Senate” and House of “Representatives.” But is the legislative power also vested in “inveterate sneer pests?” And is there a difference? Furthermore, if the legislative power is vested in an “enervate peeress stint,” does this affect the Constitution's bar on titles of nobility?

*Federalism.* The Tenth Amendment reserves the powers not delegated to the United States by the Constitution or prohibited to it by the states to the “States respectively,” or to the people. The classic argument for this arrangement is that it allows the states to serve as laboratories for experiment.<sup>83</sup> But would our

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82. See, e.g., Steiker et al., *supra* note 22, at 253–57 (taking three authors to make the same point.)

83. See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

views change if we realized that these words also suggest that the states can be “pacesetters evil sty?” And do we have to keep capitalizing the word “States?” Are they really that insecure?

*Separation of Powers.* Some have suggested that the scope of inherent executive authority reserves to the President substantial power to act in times of war or emergency, in ways that would seem to violate the settled terms of the Constitution, and despite any efforts to restrain the President by the members of the coequal Legislative Branch of the federal government.<sup>84</sup> As an intra-intra-textualist matter, does it present a problem that the phrase “he shall take Care that the Laws be faithfully executed,” in Article II, Section two of the Constitution, cannot be Boggled to spell out the names “Yoo,” “Addington,” or “Clarence?”

*Guaranty Clause.* Article IV, Section four guarantees to every state a “Republican” form of government. (*Every* state, mind you; not just South Carolina.) Does this form of government include “panic,” “rapine,” “bile,” “earl[s],” and legislatures that would seek to “ban cruel pi?”<sup>85</sup>

*Signatures.* To date, not much interpretive meaning has been squeezed out of the names of the signatories to the Constitution. What wealth of interpretive meaning could intra-intra-textualism wring from this last remaining source of work for eager constitutional theorists? Is it a mere accident that “Cotesworth Pinckney” can be reassembled as “concrete pithy wonks,” or “choices went krypton?”

*Individual Rights.* The Eighth Amendment prohibits the infliction of “cruel and unusual punishments.” Does that include such terrible penalties as “undue slurs,” “unclad luaus” (wouldn’t that be awful!), “lunar dances,” and “dull saunas?” Or are these harsh measures only forbidden if they are not part of

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84. See, e.g., Hamdi v. Rumsfeld, 542 U.S. 507, 579–99 (2004) (Thomas, J., dissenting) (arguing that the President’s executive authority during wartime extends to everything and everyone except owners of mobile homes).

85. This last one is not far from the truth. See Cecil Adams, *Did a State Legislature Once Pass a Law Saying Pi Equals 3*, THE STRAIGHT DOPE, Feb. 22, 1991, available at <http://www.straightdope.com/columns/read/805/did-a-state-legislature-once-pass-a-law-saying-pi-equals-3> (last visited Mar. 31, 2010) (discussing the history of a proposed Indiana state law that would have assigned various possible values to pi, none of which were the actual value of pi). The bill was, among other things, sent to the House Committee on Swamp Lands and the Senate Committee on Temperance before dying a quiet death after being ridiculed by a math professor from Purdue “who happened to be passing through.” This is why proposals to make the Guarantee Clause justiciable, see, e.g., Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849 (1994), are so urgent.

an execution—in which case, according to the current Court, anything goes?

#### CONCLUSION

As should be clear by now, I could go on. This Essay notwithstanding, however, less is often more.<sup>86</sup> (Although, strictly speaking, less is also less. Go figure.)

It should be enough to observe that Our Boggling Constitution is as rich with meaning as it is rich with implausibility. It offers questions that could easily fuel AALS conferences for the next decade, only with people other than close relatives actually showing up for the panels. If music, as a wise writer once observed,<sup>87</sup> be the food of love, intra-intra-textualism could well promise to be the tasty breakfast bar of legal scholarship. Jefferson once wrote that “the earth belongs in usufruct to the living.”<sup>88</sup> As a constitutional law professor, I got a C in property, so I’m not quite sure what he was getting at. But I think he meant that the Constitution itself, ultimately, *is* that nutritious treat, waiting only to be scrambled and rearranged so it can reveal all its secrets.

We have tried the best that constitutional theory has to offer us—textualism, originalism, intra-textualism, living constitutionalism, the *I Ching*,<sup>89</sup> and so on. At best, they have given us Frank Michelman and John McGinnis. At worst, they have given us . . . Frank Michelman and John McGinnis. We have, in short, tried the best. Isn’t it time we tried the rest? Surely it is time for all constitutional scholars to say what our students have been telling us for years: Go ahead, Boggle me.

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86. *But see* sources cited *supra* note 25 (pointing out that more can also be less).

87. I’m not sure which one. Unfortunately, my law school’s Westlaw contract does not allow me to search the Early Elizabethan Literature database.

88. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in THOMAS JEFFERSON: POLITICAL WRITINGS 593, 593 (Joyce Appleby & Terence Ball eds., 1999).

89. *See* JACK M. BALKIN, THE LAWS OF CHANGE: I CHING AND THE PHILOSOPHY OF LIFE (2002). Not having read it, I am unaware of whether Balkin’s book actually relates the *I Ching* to constitutional interpretation, but no piece on tendentious theories of constitutional interpretation would be complete without mentioning Balkin again.