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## The First Amendment's Firstness

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### I

First: *First*?

Less cryptically, the first and main question that I shall explore in today's McClatchy Lecture on the First Amendment is whether that amendment is genuinely first — first in fact, first in law, and first in the hearts of Americans. In the process of exploring this question, I also hope to shed some light on the meaning of this amendment in particular and the nature of constitutional interpretation in general.

### II

Let's begin with the Constitution's text. A simple question: Do the actual words "the First Amendment" or "Amendment I" themselves appear in what we all unselfconsciously refer to as "the First Amendment?"

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\* Copyright © 2014 Akhil Reed Amar. Sterling Professor of Law and Political Science, Yale University. This Essay derives from the McClatchy Lecture on the First Amendment, delivered on October 16, 2013, at the University of California at Davis Law School. Special thanks to Vikram Amar, Kevin Johnson, and Susan McClatchy. This Essay is dedicated to my parents.

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The answer to this simple question is rather complicated. There are a dizzying number of different versions of the Constitution available in print or online, with a wide variety of design lay-outs. In some of these versions we do find the words “Amendment I” or some close approximation thereof. But in others we don’t.

So which version is the correct one? Interestingly enough, even before the thing that we now call “the First Amendment” became part of the Constitution, the question of which particular version of the original — pre-amendment — Constitution was the truly official touchstone had arisen. And here is a shocker: From a strictly legal point of view, the iconic parchment that now sits in the National Archives is *not* the Constitution’s official version.<sup>1</sup>

Photocopiers, fax machines, and scanners did not exist at the Founding. The parchment could be in only one place at one time and this version was thus utterly inaccessible to the vast majority of those who were deciding whether to ratify the written Constitution in 1787–88. The version that did officially come before the various ratifying conventions during that momentous year was thus not the now-famous parchment, but rather a mass-produced printed version authorized and distributed by the Confederation Congress in late September 1787. While the words of the parchment and this print were nearly identical, the two versions featured notably different punctuation, capitalization, and lay-out.

Shortly after the new Constitution went into effect, the fledgling House and Senate concurred in a July 6, 1789, resolution authorizing the publication of a “*correct* [my emphasis] copy of the Constitution.” The “correct copy” thereupon published in the fall of 1789 by the printing firm of Francis Childs and John Swaine pursuant to that resolution tracked not the parchment but rather the broadly circulated and widely copied printed version that had been prepared on September 28, 1787, and then submitted to the various state conventions for ratification.

What, you might ask, does any of this trivia have to do with the First Amendment? After all, none of the myriad versions of the Constitution that were floating around in 1787–88 — the now-iconic parchment, the official September 28 print, and countless reprints and republications in newspapers of the era — contained our First Amendment or anything closely approximating it. That amendment, of course, came along later, when it was proposed by the requisite

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<sup>1</sup> For details and documentation of the claims made in the next few paragraphs, see AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 62-63 (2012) [hereinafter UNWRITTEN].

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two-thirds majorities of the House and Senate in late 1789 and thereafter ratified by the necessary three-fourths of the several states. The very fact that the First Amendment came along later is of course what makes it . . . an *amendment*.

True enough, but the July 6, 1789, resolution and the ensuing Childs & Swaine publication do confirm that for the founding generation, the official legal version of the Constitution was the specific text that was *in fact ratified* by the American people. No other version could claim the incomparable democratic legitimacy and momentous popular authority of this ratified version, not even a now-priceless parchment signed by George Washington, Benjamin Franklin, and some three dozen other continental notables. Viewed in this light, the official legal text of what we now call “the First Amendment” should likewise be the version that was in fact proposed by the First Congress and thereafter ratified by the states.

By this test, the official words of what we all call “the First Amendment” do not in fact contain the phrase “First Amendment” or “Amendment I.” Voltaire might well have taken special pleasure in claiming that, as a matter of strict textual self-definition, the “First Amendment” is neither “First” nor an “Amendment.” The Congress that proposed the sentence beginning “Congress shall make no law . . .” put this item *third* on a list of twelve proposed amendments sent out to the states for ratification. Each proposed item in this dozen was textually captioned as an “Article” and not as an “Amendment.” In the version sent out to the states, the proposal beginning “Congress shall make no law . . .” was thus textually captioned “Article the Third” — not “the First Amendment” or “Amendment I” or “Amendment the First.”<sup>2</sup> Thus, not a single state ratified *our* First Amendment as *their* “First Amendment.” Rather, almost all of the states that said yes in that era ratified our first as their third.<sup>3</sup> Only because Congress’s initial pair of proposed amendments failed to gain enough support in the states in 1789–91 did the words “Congress shall make no law” move up to first place in the set of *ratified* amendments.<sup>4</sup> To summarize, the words of our “First Amendment” were neither textually proposed nor textually ratified as the “First Amendment.”

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<sup>2</sup> 2 U.S. DEP’T OF STATE, DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES 321-24 (1894), *available at* <https://archive.org/details/cu31924032537676>.

<sup>3</sup> *Id.* at 325-90.

<sup>4</sup> *See generally* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 8, 16-17, 317 n.45 (1998) [hereinafter BILL].

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The process of amendment ratification also reminds us of how the ultimate textual order of amendments can involve a large dose of randomness. Suppose, counterfactually, that the “Congress shall make no law” amendment had in fact been proposed in 1789 as the first of ten items on Congress’s list and indeed textually designated as “the First Amendment.” Suppose further that in the early 1790s each of the necessary ratifying states save one had in fact ratified these words as “the First Amendment” and also ratified each of the other nine items as “the Second Amendment,” “the Third Amendment,” and so on, respectively. But suppose that the very last necessary state to say yes to the amendments — the joker in our constitutional deck — did something unexpected and ratified Congress’s proposed Second through Tenth Amendments a month *before* that state ratified Congress’s proposed First Amendment. Because amendments become valid as soon as they are ratified, the intended Second Amendment would have ended up in the written Constitution as the first one to be ratified and the intended First Amendment would have lagged behind all the rest. As eventually codified in the Constitution, the would-be first would be last!

Indeed, this at-first first would be at-last last even if every single Representative and Senator intended for it to be first; and even if almost every ratifying state legislator shared that intent; and even if the handful of legislators in the one outlying state — the joker in our deck — simply gave no thought whatsoever to the matter of ultimate textual order. Imagine, further, that after ratification by the requisite number of states, every single remaining state proceeded to ratify the originally intended First Amendment as “the First Amendment,” piling on additional (though legally superfluous) yes votes as a symbol of support and solidarity. No matter. The original first would still remain last in the ultimate constitutional text.

In these respects, the early amendments differ dramatically from the original Constitution. In that original document, the various captions and headings composed by the 1787 Philadelphia draftsmen — “Article I,” “Article II,” and so on — were approved by each state as parts of a single integrated whole, and no re-ordering of the text did occur or indeed could have easily occurred during the ratification process. Everyone in this 1787–88 ratification process thus understood and anticipated the precise sequence and order in which the various proposed constitutional Articles would, if ratified, be textually codified and configured. Given this, it may well make sense for interpreters to attend closely to, and perhaps at times derive significant implications from, the particular textual ordering of the Articles constituting this original document. Let us note, for example,

that the document as a whole was in fact purposefully designed to list Congress *first* among the branches — a *primus inter pares* priority confirmed by the specific language of the Necessary and Proper Clause giving Congress certain sweeping lawmaking powers over sister branches, and confirmed also by the fact that Congress members would routinely help choose Presidents and Justices, not vice versa.<sup>5</sup>

By contrast, the ultimate textual ordering of the first set of amendments was a remarkably random thing. Congress's initial first amendment — regulating congressional size — was ratified by one state less than was necessary. Had only one more state said yes to this amendment in timely fashion, it would have become the first amendment.<sup>6</sup> Put another way: In the Founding era, only the tiny state of Delaware said no to this initial first amendment while saying yes to the ten amendments that cleared the bar and became our Bill of Rights.<sup>7</sup> Amusingly enough, Delaware also said yes to Congress's initial second amendment, regulating congressional pay — an amendment that failed to win sufficient support in the other states in the Founding era, and only centuries later was ratified as our Twenty-Seventh Amendment.

To recap: Our “First Amendment” does not officially say that it is “First;” Congress never proposed it as “First;” and the overwhelming majority of the ratifying states never ratified it as “First.”<sup>8</sup> All this should make us hesitate before blithely assuming that what we call “the First Amendment” is first because the Founding generation obviously viewed it as the most important amendment.<sup>9</sup>

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<sup>5</sup> See generally AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 57, 105, 110-11, 208-09 (2005) [hereinafter BIOGRAPHY].

<sup>6</sup> See AMAR, BILL, *supra* note 4, at 16.

<sup>7</sup> *Id.* at 16-17, 317 n.45 and sources cited therein.

<sup>8</sup> See 2 U.S. DEP'T OF STATE, *supra* note 2, at 325-90.

<sup>9</sup> It's also worth noting that the initial ordering of the proposed amendments in the First Congress had little to do with their intrinsic importance or relative rank. Rather, the amendments were originally sequenced in the First Congress so as to track the textual order of the original Constitution. Thus an amendment modifying congressional size came first, because that issue appeared first in the original Constitution — in Article I, Section 2 to be specific. Then came a proposed amendment modifying the rules of congressional salary — a topic addressed in Article I, Section 6 of the original Constitution. Then came a series of amendments limiting congressional powers (modifying Article I, Sections 8 and 9); followed by some amendments concerning the general operations of the federal judiciary (modifying Article III); and capped off by a pair of concluding proposals at very end of the list, setting forth some global rules of interpretation applicable to the entire constitutional text. For more on this point, see AMAR, BILL, *supra* note 4, at 36-37.

## III

If you are an ardent admirer of the First Amendment, and you find the foregoing facts a tad deflating, do not lose heart. There are many other ways to think about the First Amendment's firstness. (Recall that I warned you earlier that the right answer to our simple question was "rather complicated.")

For starters, let's remind ourselves that even though the thing that we call "the First Amendment" does not quite call itself "the First Amendment" in the official Constitution's text, this thing is — and always has been — the *first amendment* in the official Constitution's text. Textually, it is first, whether or not it explicitly says it is "First."

And who says that the official text of the Constitution must govern for all purposes — even for all legal purposes? The brute fact that millions of copies of the U.S. Constitution (including, I should say, copies included in the appendices of my own books)<sup>10</sup> include the words "Amendment I" or something closely approximating these words alongside the amendment's meat — "Congress shall make no law . . ." — should arguably suffice for us to treat these technically unratified words as if they had indeed been formally voted upon in 1789–91. Analogously, most lawyers, law professors, and judges today use the parchment copy as their touchstone, and do so without even thinking about the matter. This version has become the focal point for our generation, even if the Founding generation treated a different version — with virtually the same text, but notably different punctuation, capitalization, and formatting — as their "correct" copy.

A key function of a Constitution is to provide society with a strong focal point — a widely agreed-upon basis for social co-ordination and co-operation. Such a focal point can arise and work brilliantly even if it is not in an official legal text. For example, Americans of all political stripes and from all regions regard and revere the Declaration of Independence as a document of deep constitutional significance; so too, the Gettysburg Address, and the Federalist Papers are in our legal/political/cultural Pantheon — they are all central elements of what I have elsewhere called "America's symbolic Constitution" — even though none of these icons was formally proposed and ratified in a manner exactly corresponding to the formal processes that generated the particular set of words in the official written Constitution.<sup>11</sup>

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<sup>10</sup> See *id.* at 309; see also AMAR, BIOGRAPHY, *supra* note 5, at 491; AMAR, UNWRITTEN, *supra* note 1, at 503.

<sup>11</sup> See AMAR, UNWRITTEN, *supra* note 1, at 243-75.

It's also worth remembering that many of the concepts that are central to American constitutional law are not *in* the text itself even though they closely describe certain components and features *of* the text. We speak of “the Bill of Rights” as an intelligible component of our Constitution, even though these words do not appear in the official text itself. (By contrast, many a state constitution does feature a separate section explicitly captioned as a “Bill of Rights” or a “Declaration of Rights.”) “Federalism,” “separation of powers,” “checks and balances,” “the rule of law” — all of these are key constitutional concepts even though none of these phrases appears explicitly in the official text.

#### IV

Even if we insist on focusing strictly on the exact process of amendment proposal and ratification to derive our legally proper amendment text, there remains one other, admittedly quirky, way in which we might say that the specific number “I” is indeed the proper textual caption for the “Congress shall make no law . . .” prohibition — regardless of what Congress or the ratifying states might have thought or done in 1789–91.

In the wake of the Civil War, Congress proposed and the states ratified a series of three transformative amendments ending slavery, guaranteeing a wide range of civil rights against the states, and banning race-based disfranchisement. Each of these amendments — the Thirteenth, Fourteenth, and Fifteenth — was officially captioned with its proper roman number. When these three provisions were ratified as amendments “XIII,” “XIV,” and “XV,” respectively,<sup>12</sup> why shouldn't we say that they implicitly christened all their predecessors with proper retrospective roman numbers — I, II, III, IV, and so on? Whether or not the Founding generation called it Amendment “I,” the Reconstruction generation did quite clearly think of it as Amendment “I” and enacted a series of formal amendments that codified this understanding in the formal text of the Constitution itself, albeit implicitly. On this view, the roman “XIII” expressly and officially added to the text in 1865 implicitly added a roman “I” to the “Congress shall make no law . . .” text ratified in 1791. The Reconstruction Amendments invite/compel us to read the earlier amendments in a new way.

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<sup>12</sup> See 13 Stat. 567, 774-75; 14 Stat. 358, 358-59; 15 Stat. 708, 708-11; *id.* at 346, 346; 16 Stat. 1131, 1131-32.

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With this quirky thought in mind, we are now poised to appreciate several deep and quite general truths about American constitutional interpretation. Our Constitution is an *intergenerational* textual project. Though the text begins with words crafted by the Founding generation, the text does not end then and there. The Constitution encompasses the words and vision of later generations — Amending Mothers (among others) who must be reckoned with alongside the Founding Fathers.<sup>13</sup>

In particular, much of what we think of as part of the Founders' Bill of Rights in fact owes more to the Reconstruction generation's reinterpretation and textual amendment of their fathers' text. The Reconstruction Republicans read the early amendments through the prism of the Civil War experience, and so should we today — if for no other reason, then simply because this Civil War generation textualized their prism in the Reconstruction Amendments themselves. For them, the First Amendment was indeed first — *not just in text, but in importance*. Reconstruction Republicans had seen with their own eyes massive suppression of political speech and religious speech; and they understood from this experience that religious speech was intimately intertwined with political speech. They read the First Amendment to reflect this vision, and they did so even though it is doubtful whether the Founding era framers and ratifiers of this amendment prophetically shared this mid-nineteenth-century understanding.

Concretely: No Founding-era state constitution textually linked religious rights with expressive rights; the First Amendment linked the two topics largely for reasons of federalism, not freedom. The Declaration of Independence did not prominently discuss religion or speech; and the Founding generation had not in fact experienced the sort of massive suppression of free expression that the Reconstruction generation had personally witnessed. The Republican Party had been functionally outlawed in the Deep South in the 1850s; men of the cloth had been prosecuted and imprisoned — indeed threatened with capital punishment! — for preaching in the pulpit that slavery was sin; and Lincoln had gotten zero — zero! — popular votes south of Virginia in 1860. The basic slogan of the Republican Party in the presidential election of 1856 did indeed treat expression rights as First Freedoms. The Party thus famously stood for “Free Speech, Free Press, Free Men, Free Labor, Free Territory, and Fremont.”

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<sup>13</sup> The ensuing several paragraphs summarize themes developed in great detail in AMAR, BILL, *supra* note 4.



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Elsewhere I have spilled much ink explaining how a great deal of what we now think about “the Bill of Rights” — indeed, even the very phrase “Bill of Rights” as a shorthand for the first eight (or nine) amendments — owes a greater debt to the vision of the Reconstruction generation than to the Founders’ world-view. A simple but powerful illustration: Take a minute to think about the five or ten biggest “Bill of Rights” cases that first pop into your head. Now think of how many of these — most, I would predict — are in fact not “Bill of Rights” cases at all, strictly speaking. Remember, the Founders’ first set of amendments applied only as limits on the federal government. Their Bill began with the words “Congress shall make no law . . .” of a certain sort, and said nothing about limiting states. Yet I suspect that most of the prominent “Bill of Rights” cases that popped into your head involved a claim against state or local government, not the federal government. Strictly speaking, these cases are not “Bill of Rights” cases. Or put differently, in popular understanding they are “Bill of Rights” cases *only because we read the entire set of early amendments alongside and through the prism of the Reconstruction Amendments that made the rights declared in these early amendments generally applicable against state and local governments (via what lawyers call the “incorporation doctrine”).*

And even when a case involves only the federal government, we still read the Bill of Rights through the prism of the Fourteenth Amendment. We read the Fifth Amendment Due Process Clause through the prism of the Fourteenth Amendment’s Due Process and Equal Protection Clauses (the so-called “reverse incorporation doctrine”). We read the Second Amendment’s ambiguous language through an individual-rights prism championed by the N.R.A. — a group founded after the Civil War by ex-Union Army officers who were powerfully influenced by the pressing need to ensure that Southern blacks in the 1860s would have access to private weapons in their homes to protect themselves against white thuggery. We read Fourth Amendment principles of reasonableness in light of Fourteenth Amendment values of racial and gender equality. We read the Ninth Amendment’s cryptic language of unenumerated rights alongside and through the prism of the Fourteenth Amendment’s commitment to broad, albeit unspecified, “privileges” and “immunities” of citizens. And so on.

Nor is this intergenerational and intratextual synthesis limited to the Fourteenth Amendment. A simple question: Does a woman have a right to run for president even if a state tries to deny this right by preventing women’s names from appearing on the ballot? Of course she does! But nothing in the original Constitution’s text says this in so

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many words, and in fact Founding era practice strongly supported limiting political rights to males. And nothing in the later Nineteenth Amendment explicitly speaks of a woman's right to run for President. But in effect, we now read the words of Article II — "he," "him," and "his" — as if they explicitly said "he *or she*," "him *or her*," his *or hers*." And we do this because the later Nineteenth Amendment strongly invites — indeed, I would say compels — this textual reinterpretation and intergenerational synthesis.

So I return to my quirky claim: The adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments can be understood to retrospectively and officially number the rule that "Congress shall make no law . . ." of a certain sort. Thanks to the letter and spirit of the Reconstruction Amendments, the Constitution's formal text does indeed and officially (though impliedly) affix to the "Congress shall make no law . . ." amendment the proper roman numeral "I."

## V

At this point, you may be wondering, to bend a line from the bard, "what's in a number?" Why does it matter if what we all call "the First Amendment" is first or third — or three hundred and forty-ninth, for that matter? Doesn't an amendment by any number smell as sweet?

I suggest that textual firstness should matter if and only if this textual firstness is a surface signal of some much deeper conceptual or functional fundamentality. If it isn't — if the textual order is merely an accident or happenstance — then it really doesn't matter who or what is number 1. But if something is number 1 for a special reason, then interpreters should take care to treat it with the special respect and generosity befitting . . . *Number 1*.

Consider what we call the "Preamble" — a word, interestingly enough, not found in the Preamble itself. The textual firstness of this grand sentence is in fact a conscious and conspicuous reflection of its extraordinary conceptual significance. Here is what the Preamble is exuberantly proclaiming, at the very threshold of the Constitution: "Listen up, folks! This Constitution is being ordained and established by the People! We are voting on it, in a process of unprecedented breadth and inclusion, democratically surpassing anything before in the history of planet earth. We are trying to form a more perfect and indeed indivisible union, for decades and centuries to come, and we are doing so to accomplish certain basic purposes — continental defense, peace, liberty, justice, public wellbeing." This is big news, and it is thus wholly fitting that this news comes first. (For this reason, I

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spent fifty pages on this single sentence in my 2005 book on the Constitution: The Preamble is *that* important.<sup>14</sup>)

I have already mentioned that Congress comes first among the three branches because it was indeed designed to be first among equals — the most democratic branch, and the branch tasked with special responsibilities to help select, oversee, and regulate the other branches. Similarly, the Constitution's Article VI Supremacy Clause lists the Constitution, federal statutes, and federal treaties in that order. The Constitution comes first because it is the supreme law — the most democratic law, the legal Ace of Spades. This textual firstness did not escape John Marshall's eagle eye. In *Marbury v. Madison*, Marshall observed that “in declaring what shall be the supreme law of the land, the constitution itself is *first* mentioned.”<sup>15</sup> Building on Marshall's numerological insight, I have elsewhere argued that the Supremacy Clause likewise lists federal statutes ahead of federal treaties because statutes outrank treaties, democratically and legally.<sup>16</sup> (The House of Representatives — the people's House — participates in statutes but not treaties.) Throughout the Supremacy Clause, textual priority/firstness signals legal superiority. Every single one of the five kinds of law mentioned in the clause legally trumps every later-mentioned item. Here, then, is a precise legal ranking, in quite purposeful order: The U.S. Constitution, federal statutes, federal treaties, state constitutions, state laws.

## VI

Now, let's apply all this to the First Amendment. The First Amendment does not deserve special regard merely because it happened to win a weird race in 1791. Its placement as first was a mere happenstance, an accident — wholly unlike the firstness of the Preamble generally, or of Article I vis-à-vis other Articles, or of the Constitution vis-à-vis other laws in the Supremacy Clause.

But even though this textual firstness was simply an accident, it was an extraordinarily fortunate accident — a truly happy happenstance. When, providentially, only ten amendments were ratified in 1791, led by the “Congress shall make no law . . .” rule, these amendments came to be seen by later Americans — especially Reconstruction Republicans — as a kind of temporal Ten Commandments, with the first one seen, naturally enough, as akin to the First Commandment.

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<sup>14</sup> AMAR, BIOGRAPHY, *supra* note 5, at 3-53.

<sup>15</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) (emphasis added).

<sup>16</sup> AMAR, BIOGRAPHY, *supra* note 5, at 208-09, 299-300, 302-03.

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This Civil War generation, after all, had little memory of the precise drafting and ratification details of these Founding-era amendments. And, most importantly, this generation had seen with its own eyes why the First Amendment's first freedoms of expression and conscience and political association — speech, press, free exercise, assembly, petition — were indeed so vital, so fundamental, so . . . *first*. When the pro-slavery South tried to shut down these first freedoms — with prison sentences and gag rules and bullwhips and beatings, all aimed at silencing free speakers, free thinkers, and free exercisers — the American Republic almost died, and hundreds of thousands did die to save it.

When Reconstruction Republicans set out to mend the tattered Constitution, they made emphatically clear, in the *first* section of their longest amendment, that states would thenceforth not be allowed to violate fundamental rights and freedoms — “privileges” and “immunities” — of Americans. In the Thirty-Ninth Congress that drafted this first section, Reconstruction Republicans returned again and again to the need to guarantee free speech and free press — rights mentioned more often and more passionately than any others.<sup>17</sup> Indeed, the very words chosen in this first section reveal on their surface their tight link to and genesis in the First Amendment itself: “No state shall make or enforce any law which shall abridge . . .” basic rights. *No, shall, make, law, abridge* — all words lifted directly from the First Amendment itself. Nowhere else in the Constitution does one find this cluster of words.

## VII

You will have noticed, perhaps, that with these last remarks, I have looped back to the quirky thought that later amendments retrospectively make the First Amendment deeply and more than merely coincidentally *first*.

But there are four other ways, having nothing to do with the Civil War, to see the deep foundations of the First Amendment's firstness — its special claim to interpretational respect and generosity above and beyond the already-high respect due every constitutional clause.

First, a structural thought, associated most famously with the work of the scholar Alexander Meiklejohn.<sup>18</sup> Popular sovereignty and free elections — two principles at the very bedrock of America's

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<sup>17</sup> AMAR, BILL, *supra* note 4, at 235.

<sup>18</sup> See generally ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

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constitutional system — logically entail a broad scope for citizen expression. If “We, the People,” are truly sovereign, then we must be free to think political thoughts and express political opinions amongst ourselves. We must be free to elect whom we wish and to urge them to legislate as we wish. Government agents cannot properly suppress expressions of political opinion. They work for us, not vice versa. (That is what it means that the people are sovereign, not the government.) The Constitution’s entire structure presupposes free elections, but elections cannot truly be free if incumbents are able to silence challengers. The people have an inalienable right to alter or abolish government, but the practical ability to exercise this right depends on broad popular freedom to formulate political ideas and advocate political reform agendas. Thus, freedoms of thought, of opinion, and of political association are first freedoms because they are *conceptually first*. They are logically prior. The entire system of constitutional government presupposes these freedoms in a way that it does not, for example, presuppose the right to be free from prosecution absent grand jury indictment. It is possible to have a robust constitutional democracy without grand juries as screens against unwarranted felony prosecutions. (Indeed, California itself is an example.) But it is not possible to have a robust constitutional democracy without a very broad protection of political expression, opinion formation, and association — without, in other words, something closely akin to the core of our First Amendment.

Second, a historical point. The Constitution itself came to life in a land teeming with free speech. Indeed, the document was voted upon via a process featuring a vast outpouring of free expression on all sides of the ratification controversy. No one was censored or stifled in any serious systematic way in the yearlong conversation in which “We, the People of the United States,” actually agreed to the Constitution. This fact was pointedly noted in the Founding era by the two leading constitutional theorists of the era, James Wilson and James Madison.<sup>19</sup> Indeed, Madison himself wondered whether the Constitution could ever have been adopted had existing state governments tried to suppress criticism of their own lapses. Seen from this angle, broad free expression was *chronologically first*. It was part of the very enactment process by which the Constitution was born. It was an embodied and acted-upon constitutional right baked into the constitutional cake itself — part of the Constitution’s very *being* even before the first set of amendments came along. Perhaps not all of the First Amendment’s

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<sup>19</sup> For specifics, see AMAR, UNWRITTEN, *supra* note 1, at 51-56.

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textual guarantees were on display and at work in the very act of constitutional ratification; the existence or nonexistence of religious establishments had rather little to do with the actual enactment of the Constitution. But free political expression had everything to do with the Constitution's very enactment. The document came to life through and because of uninhibited, robust, and wide-open political speech.

Which brings me to my third point, concerning modern judicial doctrine. If the phrase "uninhibited, robust, and wide-open" seems familiar to you, that is of course because you remember this fabulous phrase from the Supreme Court's landmark 1964 opinion in *New York Times Co. v. Sullivan*,<sup>20</sup> one of the landmark cases of the last century. In that case, the Warren Court made clear that it would provide muscular support for rights of free political expression. Earlier Courts had been less reliably speech-protective. Before 1930, no law, state or federal, had ever been invalidated by the Justices purely as a matter of free-expression law. And even when *Sullivan* was decided, the Court had yet to invalidate an Act of Congress on First Amendment grounds. The earlier victories for free expression had typically involved state or local governments; only in 1965, in the case of *Lamont v. Postmaster General*,<sup>21</sup> would the Court actually deploy the "Congress shall make no law . . ." amendment against Congress itself.

Today, however, free-expression principles are enthusiastically championed by all segments of the Supreme Court. Never in history have First Amendment freedoms been protected as vigorously by the Court, and no other set of freedoms today is protected more vigorously. Sometimes the Court deploys these first freedoms to vindicate "liberal" outcomes (as when it struck down congressional strings on the speech of legal services lawyers<sup>22</sup>); other times, the Court has used free-expression principles in ways that have thrilled conservatives. (*Citizens United* springs first to mind.<sup>23</sup>) But whether the results have leaned left or right, they have definitely leaned in favor of a very broad, generous interpretation of the freedoms outlined in the First Amendment. So these freedoms are also *doctrinally first*.

And they are, fourthly, *culturally first*. Or to put the point in the language of Professor Philip Bobbitt, the First Amendment's freedoms loom large in America's *ethos*.<sup>24</sup> Ordinary citizens of all persuasions

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<sup>20</sup> 376 U.S. 254, 270-71 (1964).

<sup>21</sup> 381 U.S. 301 (1965).

<sup>22</sup> See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001).

<sup>23</sup> *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

<sup>24</sup> See generally PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF CONSTITUTION* 93-119 (1984).

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and of all regions fiercely claim expressive and religious rights and embody them in their daily practices. Rich and powerful groups within society have taken the First Amendment under their wing, and have also claimed shelter under that amendment. Think about some of the most influential sectors of society that have a special, professional interest in the amendment. The clergy, the bar, the academy, the book-publishing industry, the news media, the music and movie and video business, bloggers, advertisers — quite a broad and powerful alliance, with considerable cultural and economic clout.

At this point, I should formally reiterate what I have already mentioned informally, namely, that I am extremely grateful to the McClatchy family for its exceedingly generous financial support for this very lecture. I hope it is not ungracious of me to remind us all that this is a lecture on the First Amendment endowed by a family with a special professional interest in that very amendment. Are there, I wonder, any endowed lectures — McClatchy or otherwise — specially dedicated to discourse on, say, the Third Amendment, or the Eighth?

#### VIII

All this leads me to ask a further question: Might the very strength of the amendment today, its very firstness, be grounds for concern? Precisely because we all love the First Amendment — because it truly is first in our text and first in our hearts — is there a danger that all sorts of less deserving ideas and principles will cleverly try to camouflage themselves as First Amendment ideas when they are really wolves in sheep's clothing?

Take the tobacco and liquor industries. They have no absolute constitutional right to ply their wares — especially to children. As a constitutional matter, sales of smokes and booze can be altogether prohibited, even to adults. But these industries have recently, and quite successfully, wrapped themselves in the cloak of the First Amendment. Whenever liquor is allowed to be sold, liquor sellers must be allowed to advertise exuberantly, according to the liquor industry — and indeed according to a majority of the Supreme Court, which has sided with the industry.<sup>25</sup> But why doesn't the greater power to prohibit sale altogether subsume a lesser power to discourage sale in various ways?<sup>26</sup> If government can completely ban cigarettes, why

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<sup>25</sup> See 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

<sup>26</sup> Cf. *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 345-46 (1986) (“In our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling . . .”). Note that the

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can't it take the smaller step of insisting that for every one square foot of billboard showing a beautiful young woman smoking and smiling, it must show four square feet of a hideous old woman dying a horrible death from emphysema?

Now consider the porn industry. If paying a woman simply to perform sex acts can be prohibited under the laws of prostitution, how does paying her to perform the same acts while filming it all for resale to others turn this into something entirely different and wholly protected?

Next, consider the issue of animal cruelty. I fully concede that one has an absolute right to endorse animal cruelty, to encourage it, and to use animation and other technology to simulate it. But does one really have a right, as the Supreme Court has held,<sup>27</sup> to cruelly vivisect animals so long as one is clever enough to film the whole thing and to sell viewing rights to this snuff film to others who enjoy watching this kind of stuff? Why wasn't it a decisive answer to the First Amendment challenge in that case to point out that *simulated* animal cruelty was wholly protected, a key fact that proved that the law in question was not an improper suppression of expression, but a proper protection of real-life animals?<sup>28</sup> Under the law that the Court too quickly struck down, no one could be prosecuted if he could show that he did not in fact commit acts of cruelty to actual animals.

Finally — in case you thought I had overlooked it — consider the issue of campaign finance. It is generally a crime to bribe a lawmaker, and rightly so. But earlier this month in the oral argument of the *McCutcheon v. FEC*<sup>29</sup> case, various Justices seemed to suggest from the bench that Congress cannot make it illegal to give thousands of dollars to the campaign fund of each and every lawmaker in the legislature — even if these gifts are given in the justifiable hope that these lawmakers will then repeal campaign finance laws altogether, or enact all sorts of other laws desired by Big Money! Yes, you can call this free speech, if you choose. And the first amendment — precisely because it is first in so many ways — should be vigorously protected and generously interpreted. But the free speech clause is ultimately about

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later *Liquormart* Court largely abandoned the deep wisdom of *Posadas* as applied to mere commercial speech.

<sup>27</sup> *United States v. Stevens*, 559 U.S. 460 (2010).

<sup>28</sup> For an earlier version of this general analysis, see Akhil Reed Amar, Comment, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 137-38 (1992).

<sup>29</sup> *McCutcheon v. Fed. Election Comm'n*, The Oyez Project at IIT Chicago-Kent College of Law, [http://www.oyez.org/cases/2010-2019/2013/2013\\_12\\_536](http://www.oyez.org/cases/2010-2019/2013/2013_12_536) (last visited March 11, 2014).



popular sovereignty and free elections. Which way does a broad and generous interpretation of free speech really cut on the issue in the *McCutcheon* case? Are the people truly sovereign if plutocrats and oligarchs can buy legislators and legislation? Unlike independent expenditures urging freethinking voters to vote for Smith, campaign contributions go more directly into politicians' pockets — or at least, their war chests. This money is not always spent on advertising and public advocacy. It can also be spent on pizza and gasoline during the campaign. Is pizza speech? Is gasoline? How about hefty salaries paid to campaign staffers, including the candidate's kin and cronies?

## IX

To clarify the campaign-finance issue, let us turn one last time to the meat of the First Amendment, its operative text, which reads in full: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

When we survey the amendment as a whole we see yet another element of its firstness. It covers a lot of ground, and declares a veritable host of rights: religious rights, expressive rights, and associational rights. Having already noted in passing the importance of understanding economic interests in interpreting the Constitution, let us consider a distributional question: Are the First Amendment's rights crafted so as to guarantee a tightly egalitarian distribution, or might these rights result in severe inequalities of distribution? Voting rights, for example, are intrinsically egalitarian today, as a rule: One person, one vote. By contrast, property rights may end up resulting in widespread and indeed republic-destroying inequality. Some folks have little property; others, lots; and those that have lots and lots of property may well try to use their vast wealth to undermine democratic equality by, in effect, buying up lawmakers and laws.

Of the six main rights in the First Amendment, five are strongly egalitarian — indeed, intrinsically so, in that equality of a certain sort is built into the very logical structure of the right, properly conceived. Religious free exercise is a right of each and every natural person, who has a conscience and a soul and a body and a mind. This right is not about wealth or property as such. It is not about oil industry PACs. The right against religious establishments (if we choose to interpret the nonestablishment principle in this way — an interpretation that makes special sense if we read the First Amendment through the

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prism of the later Fourteenth Amendment experience)<sup>30</sup> is a right against government-supported religious monopolies of a certain sort. This, too, has a distinctly egalitarian feel.

Now turn to the right of the people to assemble. This is a right of *people* — of natural persons. Yes, yes, for some legal purposes, “corporations are people,” my friends. But at its core, the First Amendment right of assembly is about *natural* persons gathering in political and religious conclaves — one person, one body. No one can assemble in multiple places at once; the right by its very nature features a highly egalitarian distribution. The First Amendment right to petition is also distinctly egalitarian — one person, one signature, as a rule. Yes, of course you can scribble a petition and personally sign it fifty-three times if you like, but what sense would it make to count your signature more than once in tallying the number of signatures on the petition?

The First Amendment’s freedom of speech is also based upon an intrinsically egalitarian ideal — namely, parliamentary freedom of speech and debate. Parliament — from the French *parler*, to speak — is a speech spot, a parley place. But it is a place for a special kind of speech, speech about political affairs — as distinct from, say, speech about why you should buy and smoke Marlboro cigarettes (which of course you shouldn’t, by the way). In eighteenth-century England, only Parliament had absolute freedom of political opinion — broad “freedom of speech and debate,” in the language of the celebrated 1689 English Bill of Rights. But when America proposed the words “freedom of speech” exactly one century later in its 1789 Bill of Rights, it extended this textual right to the ordinary citizenry. Here, we, the people, are the ultimate Parliament. We, the people, are sovereign, and we must therefore enjoy a sweeping right to express political opinions among ourselves free from any government interference or abridgement.

Note the deeply democratic and egalitarian structure of this free-speech principle, properly construed. Public funds are used to create a space — a parliament building, a legislative assembly room, a town meeting hall — where proponents of different political visions square off in fair and open debate. Debate time is allocated by principles of democracy, not plutocracy. The rich man does not automatically get more time in parliamentary debate, just because he has more money than his less wealthy opponent in parliament. Even if the Koch brothers own more than the rest of us put together, they are not

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<sup>30</sup> See AMAR, BILL, *supra* note 4, at 246-54; see also AMAR, UNWRITTEN, *supra* note 1, at 171.

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entitled to speak at the town meeting longer than the rest of us put together. Speech time in our assembly hall must be distributed more equally — a working man should get his turn at the microphone, too, in a proper town meeting, as Norman Rockwell so beautifully reminded us in his painting depicting American freedom of speech.

The sixth right in the First Amendment — the freedom of the press — is less intrinsically democratic. It focuses not on a sociological group — the “media,” the institutional press corps — but on a physical item, a printing press. It focuses on a thing — on a piece of property. And in 1791, not everyone had a printing press. The press, in essence, was free to those fortunate enough to own a press. But “the freedom of the press” at the Founding was a rather limited freedom, a freedom merely from licensing laws and systems of prior restraint.<sup>31</sup> The broader freedom of expression that America properly claims today is thus much more directly and firmly rooted in the freedom of speech, and not the freedom of the press. And the freedom of speech, as I have just noted (and explained in more detail elsewhere<sup>32</sup>), is in fact rooted in images and ideas that are deeply and intrinsically democratic and egalitarian.

The question of campaign finance thus becomes, how should we resolve the tension between equality and property — between freedom of speech and freedom of the press? Where truly independent expenditures are at issue — an ad in the McClatchy newspapers or an editorial endorsement in those papers, for that matter — our law generally sides with the press right of those who own or can rent presses to say what they want, with virtually no permissible limits on the amount they are free to spend on these independent publications. If this makes sense, it does so, I submit, because in the end, equality has its day — Election Day, to be specific — when each voter gets to decide for himself whether to heed the McClatchy ads or editorial endorsements. On that day, all the votes are counted up equally. One person, one vote. And corporations do not get to vote on Election Day. Not yet, at least.

Where the issue is instead one of campaign contributions, there is far less reason to see the matter as one of pure property rights. A person or a corporation has no absolute right to give property to a legislator in exchange for the legislator’s favor. We call that “bribery” and it is in fact an impeachable offense in the Constitution itself. True, when the property is given not directly to a candidate for his personal

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<sup>31</sup> See AMAR, UNWRITTEN, *supra* note 1, at 167-70.

<sup>32</sup> See *id.* at 32-38, 51-56, 167-70, 286; see also AMAR, BIOGRAPHY, *supra* note 5, at 101-04; AMAR, BILL, *supra* note 4, at 23-25, 223-24.

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use, but rather to his campaign fund, the matter is slightly different. But let me remind you that this campaign fund can be used to pay for campaign pizza, campaign gasoline, and hefty campaign-staff salaries to the candidates' friends and family. Pizza, gasoline, and hefty salaries are not themselves intrinsically and entirely expressive; they are not themselves pure speech protected by the First Amendment as such. So it makes sense to uphold — as the Court until now has upheld — reasonable limits on the amount any person can give to an individual campaign fund.

And it also makes sense to uphold reasonable limits on the total amount a person may give to all candidates put together. We must guard against not just individual corruption of individual lawmakers, but also against corruption of the legislature as a whole. If every single legislator feels financially beholden to the same one person or the same tiny group of oligarchs, then the soul of democracy itself is at risk.

The framers, I submit, shared this understanding. Consider Article I, Section 6 of the Constitution, which contains the Constitution's *other* free speech clause. That Section guarantees freedom of "Speech or Debate" in both congressional houses, nicely foreshadowing the even broader "freedom of speech" guaranteed by Amendment I. (Here we see another tight intratextual linkage between Article I and Amendment I.<sup>33</sup>) And in the very next sentence, the Founders' introduced a key anti-corruption rule, prohibiting congress members from holding executive or judicial offices that had been created on their watch or whose salaries ("emoluments," to be precise) had been inflated on their watch. This anti-corruption rule focused on the legislature as a whole. Even if Congressman X voted against creating a sinecure or inflating its salary, no matter. Congressman X would still be barred from taking a newly created office or receiving a newly inflated salary as part of a broader prophylactic anti-corruption rule aimed at the legislature as a whole and inscribed in the Constitution itself.

The prophylactic and systematic anti-corruption law in the *McCutcheon* case is, I submit, of the very same sort as the prophylactic and systematic anti-corruption clause in the Constitution itself — a clause, I remind you all, that appears exactly alongside our Constitution's first free speech clause, Article I's precursor of Amendment I.

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<sup>33</sup> See generally Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 812-18 (1999).

## X

Ladies and gentlemen, our hour is up, and I must conclude. I have suggested today that there are many ways in which the First Amendment is indeed first. This firstness of the First Amendment — textually, intratextually, intergenerationally, historically, structurally, doctrinally, and culturally — is generally cause for celebration. This strong and overlapping firstness is a reason, to borrow a phrase from Meiklejohn (who borrowed from Motown), for “dancing in the streets.”<sup>34</sup> And street-dancing of various sorts is of course protected by the First Amendment itself.

The very firstness of the First Amendment surely requires that we protect it vigorously from its enemies — from those who would try to stifle genuine political and religious freedom, as has happened far too often in American history. But the First Amendment's firstness also places this amendment at risk from its false friends.<sup>35</sup> Beware. There are those today who claim that they are vindicating first freedoms who are in reality pushing agendas that are at best oblique, and at worst opposed, to the egalitarian and democratic heart of our First Amendment.

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<sup>34</sup> See Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191, 221 n.125 (quoting the elderly Meiklejohn's reaction to the Court's decision in *New York Times Co. v. Sullivan*).

<sup>35</sup> For a wise and early warning, see J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375.