

## THE PARTS WE SKIP: A TAXONOMY OF CONSTITUTIONAL IRRELEVANCY

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### I. A “VERSION” OF THE CONSTITUTION

On January 6, 2011, for the first time in the history of Congress, the Constitution was read out loud on the House floor.<sup>1</sup> “We hope,” said Rep. Bob Goodlatte, who organized the event, “this will inspire many more Americans to read the Constitution.”<sup>2</sup> There are millions of pocket-sized Constitutions in circulation; millions of Americans could have taken Goodlatte’s advice and followed along in their copies of the text.<sup>3</sup> Speaker of the House John Boehner began the reading: “We the People of the United States, in order to form a more perfect Union . . . .”<sup>4</sup>

In a show of bipartisanship, the reading alternated between Republican and Democratic members. After Boehner finished the Preamble, House Minority Leader Nancy Pelosi took over: “All legislative powers herein granted shall be vested in a Congress of the United States . . . .” Then Rep. Cantor, “No person shall be a Representative who shall not have attained to the age of twenty-five years and been seven years a citizen of the

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1. Jennifer Steinhauer, *Constitution Has Its Day (More or Less) in House*, N.Y. TIMES, Jan. 6, 2011, <http://www.nytimes.com/2011/01/07/us/politics/07constitution.html>.

2. HOUSE OF REPRESENTATIVES, 112th CONG., READING OF THE CONSTITUTION 157, at H53–62 (COMM. PRINT 2011).

3. There are at least twenty million copies of two pocket editions of the Constitution alone, printed by the National Center for Constitutional Studies and the Cato Institute. THE CONSTITUTION OF THE UNITED STATES, copyright page (National Center for Constitutional Studies eds., 2nd ed. 2016) (“Over 16 million copies distributed.”); Cato Institute, *The Cato Pocket Constitution*, CATO INSTITUTE, <https://store.cato.org/book/cato-pocket-constitution> (“more than five million copies in print.”).

4. READING OF THE CONSTITUTION, *supra* note 2, at 53–54. All following quotes from the congressional reading come from the Congressional Record.

United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.” For those following along at home, everything seemed all right. But then Rep. Cantor continued: “The actual enumeration shall be made within three Years . . .” Even just listening to the reading, something sounded off: “The actual enumeration . . .” What enumeration? For readers following along, it was even more jarring. A whole sentence had been skipped, as Rep. Cantor jumped from the requirements for Representatives to the establishment of the census. The missing sentence apportioned taxes and Congressional representation according to state population, “adding to the whole Number of free Persons . . . three fifths of all other Persons.”<sup>5</sup> The three-fifths compromise, included in the Constitution to appease slave states during the Framing, must be one of the most famous clauses in the document.<sup>6</sup> Why had it been skipped over?

The reading continued. Rep. Hoyer read the original number of Representatives for each state; Rep. McCarthy read the establishment of the Senate: “The Senate of the United State shall be composed of two Senators from each State for six years.” Again—something was wrong. This awkward-sounding sentence was missing a whole clause after “each State”: “chosen by the Legislature thereof.”<sup>7</sup> Another missing phrase between Reps. Rothman and Conaway (Senate recess appointments)<sup>8</sup> and a whole sentence gone between Reps. Poe and Weiner.<sup>9</sup> Rep. Keating read the clause enshrining the slave trade until 1808, and Rep. Schiff read the Fugitive Slave Clause, but a whole paragraph about the electoral system<sup>10</sup> was cut between Reps. Payne and Young, as was a paragraph about presidential succession<sup>11</sup> between Reps. Pallone and Griffith. What was being kept in and what was getting cut out? It was almost impossible to follow along. Rep. Fortenberry read the second 1808 clause of the Constitution,

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5. U.S. CONST. art. I, § 2, cl. 3.

6. *See, e.g.*, the extended discussion of the three-fifths clause in a typical and popular high school U.S. History textbook, ERIC FONER, *GIVE ME LIBERTY!* 205-06, 234 (brief 4th ed. 2014).

7. U.S. CONST. art. I, § 3, cl. 1.

8. U.S. CONST. art. I, § 3, cl. 2.

9. U.S. CONST. art. I, § 4, cl. 2. (“The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall be law appoint a different Day.”)

10. U.S. CONST. art. II, § 1, cl. 3.

11. U.S. CONST. art. II, § 1, cl. 6.

Rep. Matsui read about Confederation debt—Rep. Hirono even read the interlinear notes after Article VII, corrections from the parchment copy: “The word ‘the’ being interlined between the seventh and eight lines of the first page . . . .” Four Representatives read the signatories, but only from New Hampshire through Pennsylvania. By the time they got to Delaware, the Representatives had moved on to reading the rarely-encountered “Preamble” to the Bill of Rights. Part of the Twelfth Amendment was skipped, but the Fourteenth Amendment’s reference to voting rights for “male inhabitants . . . twenty-one years of age” was included. Reps. Clarke and Ellmers read about Confederate veterans and debt, but the Eighteenth Amendment was skipped entirely. This led to even more confusion when Rep. Platts read the Twenty-First Amendment: “The eighteenth article of amendment to the Constitution of the United States is hereby repealed.” The Representatives read the ratification dates for the Nineteenth and the Twenty-First through Twenty-Seventh Amendments, but only for those. Finally, after Rep. Fincher finished the Twenty-Seventh Amendment, Rep. Goodlatte concluded: “We have now completed the first reading aloud of the United States Constitution.” Had they?

Rep. Goodlatte insists that they read (and have continued to read in recent Congresses<sup>12</sup>) “the Constitution as it currently operates.”<sup>13</sup> In an email from his Communications Director, Goodlatte elaborated: “Members read the version of the Constitution printed by the Government Printing Office . . . omitting those sections the GPO version brackets-off as superseded . . . . They do not read inoperative clauses . . . .”<sup>14</sup> It might be a surprise to learn that there are *versions* of the

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12. The latest—fourth—congressional reading of the Constitution took place on January 5, 2017. As with earlier readings, the 115th Congress continued to skip parts of the text. HOUSE OF REPRESENTATIVES, 115th CONG., READING OF THE CONSTITUTION 163, at H101-08 (COMM. PRINT 2017) (skipping, for instance, the Three-Fifths Clause and the Eighteenth Amendment). The 116th Congress has yet to continue the Constitution-reading tradition. David Sherfinski, *House Democrats Put off Rite of Reading Constitution to Convene New Congress*, WASH. TIMES (Jan. 8, 2019), <https://www.washingtontimes.com/news/2019/jan/8/house-democrats-put-rite-reading-constitution-conv/>.

13. Philip Rucker & David A. Fahrenthold, *After Wrangling, Constitution is Read on House Floor, Minus Passages on Slavery*, WASH. POST (Jan. 7, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010602807.html>.

14. E-mail from Beth Breeding, Commc’ns Dir. for Congressman Bob Goodlatte (Apr. 10, 2017, 3:26 PM) (on file with author).

Constitution in the first place. Immediately after the reading concluded, the commentary began. Rep. Clyburn called the editing of the Constitution “revisionist history,”<sup>15</sup> a senior vice president at the NAACP called it “sanitizing history,”<sup>16</sup> and Rep. Jackson inserted lengthy critical remarks into the Congressional Record.<sup>17</sup> Adam Serwer at the *Washington Post* argued that the “superceded text” helps “remind us that the Constitution . . . was not carved out of stone tablets by a finger of light,”<sup>18</sup> while Adam White at the *Weekly Standard* said that “to call the three-fifths clause and other superseded provisions part of the current ‘Constitution’ is silly.”<sup>19</sup> Jack Balkin blogged that reading the whole Constitution would have been “a way of reminding ourselves that the Constitution is always a work in progress,”<sup>20</sup> and Matthew Franck at the *National Review* went further: “When parts of [the Constitution] are amended, or even explicitly repealed, they remain a part of the document . . . They’re still there, and in a true copy of the Constitution, should not only be present, but should be unmarked by italics, brackets, or asterisks.”<sup>21</sup> But what is a true copy of the Constitution? One that reflects all the provisions with legal force today—and only those provisions? One that includes every word added to the document—and not a single annotative word in addition? Or one that includes all the words—and notes (or, online, hyperlinks) to clarify what has been “superseded” or revised?

The text of the Constitution is short, and every word matters—people notice when they are cut. But parts of this legal document are indeed legally inoperative, some more obviously than others. But which parts are they? Did Rep. Goodlatte pick the right ones; can anyone? Should we be paying more attention to these parts? How should we pay attention? Should they be legally “operative,” in any sense?

Justice Scalia had a test for identifying plain meanings in debated words: Could you “use the word in that sense at a cocktail

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15. Rucker & Fahrenthold, *supra* note 13.

16. Rucker & Fahrenthold, *supra* note 13.

17. READING OF THE CONSTITUTION, *supra* note 2.

18. Tobin Harshaw, *The Constitution, Sort Of*, N.Y. TIMES: OPINIONATOR (Jan. 7, 2011), [https://opinionator.blogs.nytimes.com/2011/01/07/the-constitution-sort-of/?\\_r=0](https://opinionator.blogs.nytimes.com/2011/01/07/the-constitution-sort-of/?_r=0) (compiling journalist and blogger reactions to the reading).

19. *Id.*

20. *Id.*

21. *Id.*

party without having people look at you funny”?<sup>22</sup> Similarly, the rough test for which parts of the Constitution are really without legal force today would be: Could you rely on that clause in a court of law without having the judge look at you funny? Sometimes the answer is obvious: you cannot rely on the Eighteenth Amendment (Prohibition) in court. But other times the answer is not so clear: Could you rely on the Preamble’s guarantee of “the blessings of liberty”? Can you cite to the 1808 clauses, or use the ratification dates in an argument?

For such a short text,<sup>23</sup> the number of frequently-skipped clauses is striking. Rep. Goodlatte had his version of what should be ignored; the academy has its version.<sup>24</sup> Constitutional law classes “have long had the same relation to the Constitution as the Elgin Marbles have to the Parthenon,”<sup>25</sup> writes Mary Ann Glendon. “The student sees the professor’s prized collection of fragments, but the well-proportioned structure in which these treasures once had their appropriate place is nowhere on display.” The Supreme Court has warned us against this kind of blinkered approach to the document. Chief Justice Marshall declared in *Marbury v. Madison*, “It cannot be presumed that any clause in the constitution is intended to be without effect . . . .”<sup>26</sup> Or in *Sturges v. Crowninshield*: “[E]very word and sentence was the subject of critical examination, and great deliberation.”<sup>27</sup> And in *Holmes v. Jennison*: “[N]o word was unnecessarily used or needlessly added . . . . No word . . . can be rejected as superfluous or unmeaning . . . .”<sup>28</sup>

22. *Johnson v. United States*, 529 U.S. 694, 718 (2000) (Scalia, J., dissenting).

23. Akhil Amar’s *America’s Unwritten Constitution* refers to the document as a “terse text” forty-seven times. AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION passim* (2015).

24. Here it is worth making clear that, as useful descriptions of constitutional clauses, *inoperative* and *ignored* frequently overlap—but that is not always the case. Section 3 of the Fourteenth Amendment is both legally inoperative today and frequently ignored. The Commerce and Equal Protection Clauses are both operative and not ignored. Cases where these adjectives might diverge include the Three-Fifths Clause or the Eighteenth Amendment (Prohibition), which are legally inoperative today, but still frequently studied or discussed. Or the Bill of Attainder and Letters of Marque and Reprisal Clauses, which are both legally operative, but basically ignored today. Generally, the focus of this Article is on *inoperative* clauses (skipped by the Congressional readers, skipped by lawyers and judges, often skipped by scholars), though most of them are also *ignored*.

25. Mary Ann Glendon, *Comment in* ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 111 (1997).

26. 5 U.S. 137, 174 (1803).

27. 17 U.S. 122, 133 (1819).

28. 39 U.S. 540, 570–71 (1840).

Even if there are parts of the Constitution without legal force, they should not be ignored. At minimum, we should study them to know where they are—and not just take Rep. Goodlatte’s word for which parts are operative and which are not. Every year, thousands of students and citizens encounter the Constitution for the first time—they need to be told which parts are still in force and which are not. But furthermore, they should be studied because maybe they are not entirely inoperative, after all. Maybe, in a laconic document like the Constitution, even phrases without legal force can be rich with meaning and utility. “The document is short,” writes David Strauss. “[E]ven shorter than it appears, if we leave out provisions that are never invoked today . . . .”<sup>29</sup> But “we are in a better position to use the text as common ground if we can say that the whole Constitution is binding than we are if we routinely disregard parts of the Constitution and try to insist that only certain clauses are binding.”<sup>30</sup>

To study these routinely disregarded parts, we must first, then, identify them. But then we must also categorize them. Otherwise we are left with “an arbitrary list, like random items on the menu of an eclectic restaurant.”<sup>31</sup> Taxonomies help us “think intelligently about law.”<sup>32</sup> If we can sort all the ignored provisions of the Constitution into categories—a taxonomy of irrelevancy—then we can see which, if any, might still be useful to us today.

Almost every clause that lacks legal force today can fit into one of four categories. The first is the category the House reading tried to identify: provisions that have been *amended*—repealed or revised by later additions to the Constitution. The second did not make the House’s cut-list, but may have as little legal force as amended items: *lapsed* clauses—clauses that have sunset through time or changed circumstances. The third is borrowed from literary theory: *paratext*,<sup>33</sup> all the bits and pieces of text and style in and around the main text, which frame its reading or interpretation (introductions, titles, dates, formatting, etc.). The fourth category contains all the clauses that have been *minimized*, typically by judges but sometimes by other constitutional actors

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29. DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 7 (2010).

30. *Id.* at 111.

31. Tim Kaye, *A Sound Taxonomy of Remedies*, 36 QUINNIPIAC L. REV. 79, 84 (2017).

32. Emily Sherwin, *Legal Taxonomy*, 15 LEGAL THEORY 25, 25 (2009).

33. See GERARD GENETTE, *PARATEXTS: THRESHOLDS OF INTERPRETATION* (Jane E. Lewin trans., 1997).

(the President, Congress)—clauses that might have held legal force (and might yet again) but for their narrow readings. These categories—amended, lapsed, paratext, and minimized—should be comprehensive. Scholars and citizens will continue to argue over which phrases fit into which categories, but all the clauses that might be inoperative should fit into at least one. Furthermore, like Philip Bobbitt’s typology of constitutional argument,<sup>34</sup> this typology of constitutional irrelevancy serves more than just an organizational function. Each kind of irrelevancy is different—each has different implications for how the clauses should be studied, what force (interpretive, if not legal) they should have, and what might happen to them in the future.

Returning to Mary Ann Glendon’s Parthenon metaphor might be helpful. Her argument for studying the whole building as opposed to just the prized fragments is an argument for holism: for studying the Constitution as a complete document, not as a collection of citable clauses. But even the holistic approach misses out on a focused approach to the supposedly irrelevant pieces. To study the Constitution—or the Parthenon—comprehensively, you need to study every element. Part of the history of the Parthenon is the fact that for a while, it was a mosque—Islamic minarets came up and went down over its long history. These are the *amended* parts of the building. Over centuries of construction and reconstruction, columns which once held weight are no longer actually serving a function, though they remain part of the structure. These are the *lapsed* parts of the building. There is visitor information—placards, posters, guides—all around the Parthenon; how you view it is inevitably shaped by these elements, though not literally part of the structure. This is the *paratext* surrounding the building. And finally, later preservationists and politicians have kept the building in a pristine white condition—even though it was probably brightly-painted in ancient times.<sup>35</sup> This is how aspects of the building were *minimized*. You can study the building as a whole, or study the Elgin Marbles in isolation—but if you ignore all the other

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34. PHILIP BOBBITT, CONSTITUTIONAL FATE 3–8 (1982) (outlining a “Typology of Constitutional Arguments”: historical, textual, structural, prudential, and doctrinal—and later in the text adding “ethical” to the list).

35. Chris Irvine, *Parthenon Was Covered in Colourful Paint*, TELEGRAPH, May 18, 2017, <http://www.telegraph.co.uk/news/worldnews/europe/greece/5560715/Parthenon-was-covered-in-colourful-paint.html>.

fragments and pieces, the parts you were told do not matter, the parts you thought you could skip—you would be missing something important.

Two final notes before examining each of the four categories of constitutional irrelevancy. First, the Supreme Court cannot help us here. If the one thing these clauses have in common is that they are without legal force today, then they will not—by definition—usually form the basis of a justiciable case or controversy. Perhaps they might be glanced at in dicta, but we are unlikely to ever have a holding that articulates the meaning and use of the Confederate Debt Clause, or state legislature elections of Senators. The important exception is for minimized clauses: what the Court has done, the Court can undo, and a minimized clause might very well be brought back to life.

Second: why are there legally inoperative phrases in a legal document, anyway? After all, the states typically edit their constitutions when they amend them;<sup>36</sup> why does the U.S. Constitution just keep growing? As it turns out, there was nothing inevitable about the expanding-list style of the Constitution. James Madison, as part of the first Congress, suggested that the first amendments be interwoven into the text—he even had locations picked out for each one.<sup>37</sup> He was outvoted by supporters of Roger Sherman’s proposal: that the amendments be tacked on lest the “whole fabric”<sup>38</sup> of the document be destroyed. “We might as well endeavor to mix brass, iron and clay, as to incorporate such heterogeneous articles,” Sherman argued. Madison disagreed—foreshadowing the exact problem that would later result in the criticism of Congress’s edited reading: “[I]t will be difficult to ascertain to what parts of the instrument the amendments particular refer,” he wrote. “[T]he question will often arise and sometimes not be easily solved, how far the original text is or is not necessarily superceded, by the supplemental act.”<sup>39</sup>

One scholar has suggested that Madison’s decision to give in to Sherman’s argument rested on as historically contingent a fact as that the summer was incredibly hot in 1789, and the

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36. AMAR, *supra* note 23, at 468.

37. Edward Hartnett, *A ‘Uniform and Entire’ Constitution; or, What if Madison Had Won?*, 15 CONST. COMMENT. 251, 252 (1997).

38. *Id.* at 253.

39. *Id.* at 254, 258.



Representatives were restless.<sup>40</sup> Perhaps we owe the “archaeological feel”<sup>41</sup> of the amended-not-edited Constitution to a heat wave. In any case, that same scholar, Edward Hartnett, tried to recreate Madison’s “Uniform and Entire” Constitution, by interweaving the twenty-seven amendments to the Constitution into the body of the text, and by deleting the parts that had been superseded.<sup>42</sup> Perhaps not surprisingly, the result of this effort to create a Constitution as it operates today looks very different from Rep. Goodlatte’s efforts at the same project. Which parts really are irrelevant, and what we are supposed to do with them, turn out to be hard questions, after all.

## II. AMENDED

The House reading of the Constitution attempted to edit out what had been amended.<sup>43</sup> They left in all the other forms of legally force-less elements: the lapsed parts (Rep. Israel reading about Confederate debt obligations)<sup>44</sup>, the paratext (Rep. Fincher letting us know when the Twenty-Seventh Amendment was proposed and ratified)<sup>45</sup>, and the minimized parts (Rep. Rigell reading the “privileges or immunities” clause<sup>46</sup>).<sup>47</sup> To be fair, the parts that have been amended make up the most obvious category of constitutional irrelevancy. But what is not obvious is the full extent of what should be included in this category, what tools are most useful in analyzing amended clauses, and what interpretative force or guidance we can draw from them.

Each of the categories of irrelevancy can be further divided into two types: amended provisions, for instance, can either have been amended directly or indirectly. Direct amendment happens when a later provision (e.g. the Twenty-First Amendment) explicitly refers to the part that it is revising (e.g. the Eighteenth

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40. *Id.* at 256–58.

41. AKHIL REED AMAR, THE BILL OF RIGHTS 292, note (1998).

42. Hartnett, *supra* note 37, at 284–99.

43. Breeding, *supra* note 14 (“Members read the Constitution as amended.”).

44. U.S. CONST. amend. XIV, § 4.

45. HOUSE OF REPRESENTATIVES, *supra* note 2, at H61 (“Amendment 27, originally proposed September 25, 1789; ratified May 7, 1992”).

46. U.S. CONST. art. I, § 2, cl. 3.

47. Accepting, for the moment, David Strauss’s argument that the Privileges or Immunities Clause has indeed been minimized into irrelevancy: “[I]t is hard to say that a position that has been consistently and explicitly rejected by the courts is still the law.” David A. Strauss, *Not Unwritten After All?*, 126 HARV. L. REV. 1532, 1551 (reviewing AKHIL AMAR, AMERICA’S UNWRITTEN CONSTITUTION (2015)).

Amendment). Or when a later provision directly revises an earlier part of the Constitution (even without referring to it by name—as when the Twelfth and then the Twentieth Amendments revised the Article II system for presidential election). Indirect, or implicit, amendment requires an extra step: for instance, the amendment changes something which then affects an earlier provision.<sup>48</sup> An example might be the Three-Fifths Clause itself. The Thirteenth Amendment did not change the Apportionment Clause of Article I—it abolished slavery, which left no one to be counted as three-fifths. These implicit amendments—or implied repeals—make the exact boundaries of the amended category controversial. One of the reasons Congress’s edited Constitution did not match Edward Hartnett’s edited Constitution is that legitimate disagreements over the existence or extent of implicit amendments can—and do—exist. That, again, was precisely Madison’s fear regarding an amended (not edited) document.

But in any case, what is to be done with implicitly or explicitly amended clauses, once we identify them? How should they be read or used? One sensible approach—here and for all the parts we skip—would be to analyze these clauses in the same way we analyze the operative parts of the Constitution. That is, we could apply the standard tools of constitutional interpretation or argumentation to these clauses, and see what—if anything—results. Philip Bobbitt’s six modalities of constitutional interpretation are probably the most famous of these tools, but we could use any such list.<sup>49</sup> We could use Jack Balkin’s recently

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48. There is, however, a canon of statutory interpretation suggesting a presumption against “implied repeals.” WILLIAM N. ESKRIDGE JR. ET AL., *STATUTES, REGULATION, AND INTERPRETATION* 568 (2014) (describing “The Presumption Against Implied Repeals”); see also *Morton v. Mancari*, 417 U.S. 535, 550 (1974) (“In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable”) (citing *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456–457 (1945)). Justice Scalia argued that this canon should apply even more forcefully to constitutional interpretation. See Antonin Scalia, *Response* in ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 141 (1997) (“If the Constitution, intended to be a more permanent document, should be treated at all differently [from statutes] insofar as amendments are concerned, one would think that, if anything, the normal rule of construction that repeals by implication are disfavored would be more rigorously applied.”) (citing *Posadas v. National City Bank*, 296 U.S. 497, 503–05 (1936)). But see Akhil Amar, *Introduction* to ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (forthcoming ed.) (arguing that the Constitution has “no detailed instructions about how extensively to reinterpret earlier clauses in light of later amendments. Nowhere does the intergenerational text *itself* say that ‘repeals by implication are disfavored’ or anything close to that”).

49. BOBBITT, *supra* note 34.

proposed eleven *topoi* instead, for instance.<sup>50</sup> His *topoi*, or topics—like Bobbitt’s modalities—are simply “shared tools for solving problems and inventing persuasive arguments.”<sup>51</sup> Can we use the standard tools of constitutional argument to solve the problem of supposedly-skippable clauses? Can we use these tools to invent persuasive arguments about what those clauses can do?

Some of the best tools for analyzing the amended clauses are probably the structural, historical, and ethical modalities. Each of these modalities is particularly well-suited to squeezing meaning or interpretive force out of parts of the document that have been specifically rejected or revised. Together, they ask: how has the document (and the country) reshaped itself? How has it evolved? What commitments or practices have we abandoned; what projects have we repeatedly returned to? The final chapters of Akhil Amar’s *America’s Constitution: A Biography*<sup>52</sup> and *America’s Unwritten Constitution*<sup>53</sup> both engage in this exercise. They look for trends in the amendments, evidence of what *kinds* of clauses have been repealed over the course of American history. This is a historical project (telling the story of America and the Constitution through its amendments), a structural project (revealing, for instance, the ways in which individual rights have expanded, or how the country has shifted from federalism towards nationalism), and an ethical project (trying to understand the American project through the topics “We” keep coming back to). Needless to say, none of this rich material would exist if the Constitution simply edited out the amended parts. While each amended item on its own might not have serious interpretative force, and none of them have any legal force, together they tell an impressive tale: there are significant themes, American leitmotifs, in the collected amended clauses.

Another way to read the amended parts is intertextually, in the same way we look to the Articles of Confederation or colonial constitutions for interpretive guidance. Those charters, just like the amended parts of the Constitution, were rejected. But examining these early drafts in American constitutionalism helps

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50. Jack M. Balkin, *Arguing About the Constitution: The Topics in Constitutional Interpretation*, 33 CONST. COMMENT. 145 (2018) (proposing text, structure, purpose, consequences, judicial precedent, customs, natural law or rights, national ethos, political tradition, and honored authority as the eleven tools of constitutional argumentation).

51. *Id.* at 89.

52. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 458–63 (2005).

53. AMAR, *supra* note 23, at 449–77.

us understand the current document. How can the powers given to the Confederation's Congress help us understand the powers given to the Constitution's Congress? How can the state bills of rights help us understand the scope of the federal Bill of Rights? These are intertextual questions, and they can be asked as fruitfully of the amended clauses as they can of these outside-the-Constitution texts. Should the amendment of the Three-Fifths and Fugitive Slave clauses guide our reading of the Equal Protection Clause? Should the revisions of the election methods for Senators and Presidents guide our understanding of current voting schemes? Should the expanding classes of people who can vote for (and run for) President guide our understanding of current voting rights issues or case law? Perhaps these are really intra- not inter-textual questions.<sup>54</sup> But that hinges on whether you consider the amended parts to be part of our Constitution or not, which citizens, scholars, lawyers, judges, and politicians can and clearly do disagree on.

A final method for reading the amended clauses is through the theory of the anticanon.<sup>55</sup> The anticanon typically describes the constitutional law cases most reviled or rejected today: *Dred Scott*, *Plessy*, *Lochner*, and *Korematsu*, for example.<sup>56</sup> They are "paradigmatic examples of what is not the law . . . . They inhabit the same level of symbolic importance as *Marbury* and *McCulloch*, but are cautionary tales rather than heroic ones."<sup>57</sup> Perhaps, then, the amended portions of the Constitution can be read in a similar way: just as important (symbolically) as the rest of the text, but as paradigmatic examples of what the Constitution *is not*.

Towards the project of a comprehensive list of constitutional irrelevancy, here, then, are the clauses that might fit in this category, with a few notes on how some of them have been or could be interpreted or used:

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54. See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

55. Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243 (1998).

56. Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011).

57. Primus, *supra* note 55, at 245.

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Table 1. The Amended Constitution

<b>Clause</b>	<b>Amended By</b>	<b>Possible Uses</b>
Article I, Section 2, Clause iii: “three fifths of all other Persons”	Indirectly amended by the Thirteenth Amendment, then directly amended by Section Two of the Fourteenth Amendment	Anticanonical force, guided by historical and ethical arguments. The Constitution (and the country) repudiates its slavocratic origins and celebrates its abolitionist reconstruction.
Article IV, Section 2, Clause iii: “No Person held to Service or Labour in one State”	Directly amended by the Thirteenth Amendment	Same as above.
Article I, Section 3, Clause i: “chosen by the Legislature”	Directly amended by the Seventeenth Amendment	Structural and ethical arguments: the Constitution has moved from a more state-focused, federalist structure to a more nationalist self-conception.
Article I, Section 3, Clause ii: “if Vacancies happen . . . during the Recess of the Legislature”	Directly amended by the Seventeenth Amendment	Same as above.
Article I, Section 4, Clause ii: “first Monday in December”	Directly amended by the Twentieth Amendment	
Article I, Section 9, Clause iv: “No Capitation, or other direct, Tax”	Directly amended by the Twentieth Amendment	
Article II, Section 1, Clause iii “The Electors”	Directly amended by the Twelfth Amendment	Structural and historical arguments—the presidential election and succession systems are deeply flawed. They require constant tinkering.

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Article II, Section 1, Clause vi: “In case of the Removal of the President”	Directly amended by the Twenty-Fifth Amendment	Same as above.
The Twelfth Amendment	Directly amended by the Twentieth Amendment	Same as above.
Article III, Section 2, Clause i “between a State and Citizens of another State”	Directly amended by the Eleventh Amendment	
The Fourteenth Amendment, Section 2: “male inhabitants of such State, being twenty-one years of age”	Indirectly amended by the Nineteenth and Twenty-Sixth Amendments	The franchise has only grown throughout American history, representing an expanding American conception of who is included in “We the People.” <sup>58</sup>
The Eighteenth Amendment	Directly amended by the Twenty-First Amendment	

## III. LAPSED

Lapsed clauses are those which had legal force, but do not any longer—though they were never amended or repealed. They come in two types: clauses which have lapsed through time (sunset provisions) or through changed circumstances (the original conditions the clause refers to have disappeared). Sunset provisions are more obvious—when the document refers to a clause only having force until 1808,<sup>59</sup> or requiring ratification “within seven years,”<sup>60</sup> it is clear that in 1809, or seven years after the amendment was proposed, that clause has no more legal force. Changed-circumstance lapsed clauses are more interesting: what conditions in America have changed permanently? An example might be Article VI, Section 1, Clause i: “All Debts contracted

58. See, e.g., AMAR, *supra* note 52, at 461. For the argument that the Nineteenth and Twenty-Sixth Amendments indirectly amended the Fourteenth Amendment, see AMAR, *supra* note 23, at 188. For the argument that the Nineteenth Amendment implicitly amended Article II and the Twelfth Amendment (women could now vote for, serve as an Elector for, and run for President) see *id.* at 287–88.

59. U.S. CONST. art. I, § 9, cl. 1.; U.S. CONST. art. V.

60. U.S. CONST. amends. XVIII, § 3; XX, § 6; XXI, § 3; XXII § 2.

and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.” No amendment ever repealed this clause of the Constitution, and it does not have a time-based sunset provision. But, as the United States paid off its obligations under the Articles of Confederation, the clause eventually lapsed. It refers to a condition—outstanding Confederation debt—that no longer exists, and never will again.

Unlike the amended clauses, lapsed clauses therefore have a vestigial quality to them. Clauses that were amended have been—at least during one other point in American history—on the forefront of political conversation; an Article V supermajority decided to change them. Lapsed clauses simply stopped doing anything (legally) on their own; they petered out. It is hard to imagine a lapsed clause ever becoming a high-salience enough political issue to prompt an Article V amendment. As a result, they pose an interpretive puzzle: these clauses have never been repudiated, but they probably never will be. How much attention should we give them?

The answer is probably more than they have received; the lapsed clauses seem particularly under-theorized in constitutional scholarship. Luckily, there are existing constitutional interpretive theories which seem applicable to the lapsed-clause category. In terms of the constitutional modalities, textual and structural arguments seem best-suited to unpacking lapsed clauses, as does their close cousin, the intratextual method. In addition, the historical modality works well here, especially as applied through Jed Rubenfeld’s “Paradigm Case” model<sup>61</sup> and Jack Balkin’s “Original Expected Application” model.<sup>62</sup>

The intratextualism method allows “the interpreter . . . 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>63</sup> This, at a minimum, seems like a good use for lapsed clauses. They may not be any more Confederation debt,<sup>64</sup> or Confederacy debt,<sup>65</sup> but there is still U.S.

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61. JED RUBENFELD, *REVOLUTION BY JUDICIARY* 16–17 (2005).

62. JACK M. BALKIN, *LIVING ORIGINALISM* 6–20 (2011).

63. Amar, *supra* note 54, at 748.

64. U.S. CONST. art. VI, cl. 1.

65. U.S. CONST. amend. XIV, § 4.

national debt<sup>66</sup>—and it can still be a contested constitutional issue.<sup>67</sup> Why not read the Constitution’s use and understanding of (still legally relevant) debt against its use of the exact same word in other (no longer legally relevant) parts of the document? Intratextualism “takes seriously the document as a whole rather than as a jumbled grab bag of assorted clauses.”<sup>68</sup> A taxonomy of constitutional irrelevancy has the same mission, and the two projects can serve each other.

A more radical use of the lapsed clauses would be to draw from them substantive interpretative conclusions about the Constitution and its principles. The Constitution deals with Confederate soldiers, repudiates Confederate debt, and refuses to compensate slave-owners after emancipation.<sup>69</sup> All of these clauses have lapsed; they do not and cannot apply to anyone alive today. But perhaps we can draw from them a constitutional principle, a commitment to the cause of union and freedom—and a concomitant rejection of all the Confederacy stood for. “The Lost Cause”—and relics of Confederate memory—still haunt this country;<sup>70</sup> is there a constitutional principle specifically rejecting the Southern cause built into these lapsed clauses?<sup>71</sup>

This line of questioning is a sort of reverse-engineered version of Rubinfeld’s Paradigm Cases, or Balkin’s Original Expected Applications. To Rubinfeld, “[t]he point of constitutional law is to hold the nation to its self-given, fundamental commitments over time . . . .”<sup>72</sup> The Constitution often speaks in general principles, or commitments, and one way we elucidate the meaning of those commitments is through the “paradigm cases”—the core examples—underlying the principle.

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66. *Id.*

67. Garrett Epps, *Our National Debt ‘Shall Not Be Questioned,’ the Constitution Says*, ATLANTIC, May 4, 2011, <https://www.theatlantic.com/politics/archive/2011/05/our-national-debt-shall-not-be-questioned-the-constitution-says/238269/> (discussing the “debt ceiling crisis” in terms of constitutional terms).

68. Amar, *supra* note 54, at 795.

69. U.S. CONST. amend. XIV, §§ 3, 4.

70. See, e.g., Sharlene Sinegal Decuir, Opinion, *Good Riddance to Confederate Monuments*, N.Y. Times, Apr. 28, 2017, [https://www.nytimes.com/2017/04/28/opinion/good-riddance-to-confederate-monuments.html?\\_r=0](https://www.nytimes.com/2017/04/28/opinion/good-riddance-to-confederate-monuments.html?_r=0). See generally DAVID W. BLIGHT, *RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY* (2002).

71. See Mark A. Graber, *Teaching the Forgotten Fourteenth Amendment and the Constitution of Memory*, 62 ST. LOUIS L.J. 639, 645 (2019) (“[One] might put Section 3 to creative use in debates over whether to maintain monuments to Confederate notables . . .”).

72. RUBENFELD, *supra* note 61, at 15.



(For instance, the Equal Protection Clause through the Black Codes). Lapsed clauses present us with the reverse situation: a paradigm case, without a general commitment. Jack Balkin also argues that the Constitution often speaks in broad principles, applied to specific concerns. His “Living Originalism” demands fidelity to the Original Meaning, if not to the Original Application.<sup>73</sup> But again, what if we *only* have an original application (Confederate soldiers and debt) but no explicit original principle? Should we infer the principle from the application? Infer the commitment from the paradigm case?

There is a good argument from negative implication that the framers of the Constitution or its amendments deliberately left out the general commitment. Therefore, it would be destructive to the text to infer a principle that was specifically left out. “[A] negative-implication argument,” however, “should never be decisive absent additional, fine-grained reasons to support its application in a given situation.”<sup>74</sup> Unless we have a historical or structural or logical reason to assume that, for instance, the Framers of the Fourteenth Amendment would reject a principle against supporting the debt (read broadly) of a sectional, caste-based cause, we should be able to read that principle into the text. This principle would lend constitutional weight to arguments against Confederate memorials or memorabilia.

This is not a watertight argument; generalizations from paradigm cases never are: “Reasoning from paradigm cases is a variegated business—incorporating considerations of text, policy, and justice . . . . Paradigm cases do not dictate unique answers to most constitutional questions.”<sup>75</sup> Perhaps a less historically and culturally loaded example might help clarify the “lapsed clause as paradigm case” model. The Seventh Amendment requires juries for civil trials when “the value in controversy shall exceed twenty dollars . . . .”<sup>76</sup> The first Judiciary Act, almost contemporaneous with the Seventh Amendment, established a financial minimum for federal diversity jurisdiction at five hundred dollars<sup>77</sup> (today it

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73. BALKIN, *supra* note 62, at 12–14.

74. AMAR, *supra* note 23, at 538 n.1.

75. RUBENFELD, *supra* note 61, at 17.

76. U.S. CONST. amend. VII.

77. Establishment of the Judicial Courts of the United States, 1 Stat. 73, Chap. XX § 11 (1789).

is \$75,000).<sup>78</sup> As a result, the Twenty Dollars Clause has never been invoked, and indeed, it has rarely even been studied.

Not unusually for a lapsed clause, “no writer has analyzed the Amendment’s [Twenty Dollar] clause,” and “many have not even bothered to include the Twenty Dollars Clause when quoting the Amendment . . . .”<sup>79</sup> The *Harvard Law Review* Note that attempted to remedy this situation ended up analyzing the provision in precisely the “lapsed clause as paradigm case” manner. Rather than write off the never-used, hardly-studied clause as irrelevant, the author found a general principal in the lapsed clause: the convergence of property and liberty in the Framers’ philosophy. Twenty dollars represents “a de minimis conception of property.”<sup>80</sup> To the Framers, *some* amount of property must be at stake for liberty to truly be at stake—and to therefore require a liberty-protecting jury. It does not matter that the amount-in-controversy requirement has always been set higher than the constitutional minimum; “what’s important is that the amount is not set at zero.”<sup>81</sup> Whether you accept that author’s conclusion (that the Twenty Dollars Clause constitutionally embodies a Founding property-liberty philosophy), it is a nice demonstration of how to argue with lapsed clauses.

Better, perhaps, than arguing *only* from lapsed clauses would be to use lapsed clauses in support of an argument based in more typically-litigated clauses. Daniel Farber and Suzanna Sherry did something like this in their 1996 defense of *Romer v. Evans*.<sup>82</sup> They use the Bill of Attainder Clause—along with the Cruel and Unusual Punishment Clause—to elaborate a “Pariah Principle” embodied in the Equal Protection Clause. That is, they press two lesser-used clauses into service understanding a more frequently litigated clause. Or, to return to the Twenty Dollar example. Maybe that lapsed clause is not enough to litigate a property-liberty connection embodied in the Constitution. But in an eminent domain or asset-forfeiture case, perhaps an invocation of the Constitution’s liberty-property principle (see the lapsed Twenty Dollar Clause) could be of service.<sup>83</sup>

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78. 28 U.S.C. § 1332(a) (2012).

79. Note, *The Twenty Dollars Clause*, 118 HARV. L. REV. 1665, 1665–66 (2005).

80. *Id.* at 1685.

81. *Id.*

82. Daniel A. Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257 (1996).

83. In this way, lapsed-clause arguments could perhaps work as interpretive

A final question from this category: what about clauses like the Third Amendment, which have never been amended but have also never really been used in court?<sup>84</sup> These clauses may seem vestigial, like lapsed clauses, but they differ significantly. The Third Amendment can and will have legal force if the circumstances it refers to—quartering soldiers—ever arise. (Witness the late-blooming career of the Emoluments Clause, for example.<sup>85</sup>) They are “dormant,” more than they are “lapsed.” Lapsed clauses are those on which time or history has closed the door for good. Some clauses may walk the line between dormant and lapsed: they depend on the interpreter’s predictions about the future. If the interpreter is convinced that soldiers will *never* be quartered in American homes, then the Third Amendment would indeed be lapsed, not dormant. Another edge case might be the convention mechanism of Article V—it has never been used, and maybe it never will be, but could it? A final clause that seems lapsed but is not: Article I, Section 3, Clause ii, dividing the first group of Senators into three classes, two of which did not get six-year terms. While at first it would seem like this clause lapsed after the third Congress, “the Senate has in every instance of a new state’s admission followed a practice . . . [in which] senators from new states have served initial terms of less than six years . . . .”<sup>86</sup>

An attempt at a comprehensive list of clauses that are lapsed might include the following:

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“tiebreakers,” or presumptions, rather than determinative arguments on their own. *See generally* Adam M. Samaha, *On Law’s Tiebreakers*, 77 U. OF CHI. L. REV. 1661 (2010).

84. The closest the Third Amendment has ever gotten to the Supreme Court was *Engblom v. Carey*, 724 F.2d 28 (2d Cir. 1982). *See also* ELLEN ALDERMAN & CAROLINE KENNEDY, *IN OUR DEFENSE* 107 (1991) (“Between one of the most controversial amendments, the Second, and one of the most heavily litigated, the Fourth, is the forgotten amendment.”). *See also* Graber, *supra* note 71, at 20 (describing the Third Amendment—as well as Congress’s power to grant letters of marque and reprisal—as “anachronisms” and part of his “Constitution of Memory”).

85. *D.C. & Maryland v. Trump*, No. 8:17-cv-01596 (pending). In other words, the clauses analyzed in this Article are all without legal force, not just unused. Conventionally, a lawyer or judge *cannot* use an amended clause, a lapsed clause, a minimized clause (without advocating for a change in doctrine), or paratext. Dormant clauses—like the Emoluments Clause—are more like Justice Jackson’s “loaded weapon,” which “lies about” waiting for a “plausible claim” to fit. *Korematsu v. United States*, 323 U.S. 213, 246 (1944) (Jackson, J., concurring).

86. AMAR, *supra* note 23, at 350.

Table 2. The Lapsed Constitution

Clause	Notes
Article 1, Section 2, Clause iii: “The Number of Representatives shall not exceed one for every thirty Thousand”	Is this clause lapsed or dormant? It depends whether you believe it is ever conceivable that the House could swell to its constitutional maximum, which today would be more than 10,000 Representatives.
Article I, Section 2, Clause iii “the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island . . .”	Lapsed after the first census and resulting reapportionment.
Article I, Section 9, Clause i: “prior to the Year one thousand eight hundred and eight”	Illustrating the constitutional use of sunset (lapsed-by-time) provisions. <sup>87</sup>
Article V, Section 1, Clause i: “no Amendment which may be made prior to the Year One thousand eight hundred and eight”	Same as above.
Article II, Section 1, Clause v: “No Person except a natural born Citizen, or a Citizen of the United States at the time of the Adoption of this Constitution, shall be eligible to the Office of President . . .” (emphasis added)	This clause would have lapsed when the last citizen-child from 1789, who had not been a citizen at birth, passed away, perhaps some time in the late 1800s.
The Seventeenth Amendment: “shall not . . . affect the election or term of any Senator chosen before it becomes valid”	Lapsed one full Senate term after ratification.

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87. Sunset provisions being common in legislation, occasional in the Constitution, and rare in judicial doctrine (as in Grutter’s famous “twenty-five year” sunset provision). For more on this topic—especially jurisprudential sunsets, see David Schraub, *DOCTRINAL SUNSETS* (2019), available at <https://ssrn.com/abstract=3317213> (“[T]he United States’ constitutional text contains several sunset provisions . . . [y]et scholars have not systematically explored the utility of incorporating sunset clauses into constitutional or judicial doctrine.”).

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The Twenty-Second Amendment, Section 1: “shall not apply to any person holding the office of President when this Article was proposed”

Lapsed after Harry S. Truman left office. This clause, along with the Seventeenth Amendment and Art. II, § 1, cl. 5, above, all make exceptions for people who may have had or relied on pre-rule expectations of presidential, congressional, or term-limit eligibility. These lapsed clauses are perhaps paradigmatic cases for an unspoken constitutional principle analogous to criminal law’s presumption against retroactivity. Constitutional rules should be read to apply going forward, only. Or: the Constitution is sensitive to reliance interests.

Article VI, Section 1, Clause i: “All Debts contracted . . . before the Adoption of this Constitution”

Article VII, Section 1, Clause i: “The Ratification of the Conventions of nine States”

Lapsed once the Constitution was ratified. Lapsed clauses can signal or highlight especially significant historical political moments or processes.<sup>88</sup> This lapsed clause is a reminder to pay attention to the (remarkable) ratification process to understand the Constitution better.<sup>89</sup>

The Seventh Amendment: “twenty dollars”

The Fourteenth Amendment, Section 3: “engaged in insurrection or rebellion”

Lapsed after the death of the last Confederate veteran or supporter.<sup>90</sup> There is an argument to be made that this section of the Fourteenth Amendment is actually dormant, not lapsed. It refers to “insurrection

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88. See also Graber, *supra* note 71, at 11 (arguing Sections 2 and 3 of the Fourteenth Amendment embodied a temporary political imperative: securing power for the Republican party).

89. See AMAR, *supra* note 23, at 49-94.

90. See, e.g., DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY* (2002) (“The Reconstruction Congress focused not on § 1 of the Fourteenth Amendment — which contains the clauses most relevant today, but on §§ 2 and 3, which essentially expired within a few years.” [*sic*—sections 3 and 4 seem more applicable].).

or rebellion,” not specifically the Confederate rebellion of 1860-65. Theoretically, if there were ever another insurrection or rebellion in the United States, this section could have legal force once more.<sup>91</sup>

The Eighteenth, Twentieth, Twenty-First, and Twenty-Second Amendments: “This article shall be inoperative unless it shall have been ratified . . . within seven years”

Twentieth Amendment, Section 5: “shall take effect on the 15th day of October following the ratification of this article”

#### IV. PARATEXT

The literary theorist Gerard Genette coined the helpful term *paratext* to refer to all the “devices and conventions, both within and outside the book, that form part of the complex mediation between book, author, publisher, and reader: titles, forewords, epigraphs,” and the like.<sup>92</sup> These mechanisms for presenting or explaining the text are not without impact. They are, in fact, “Thresholds of Interpretation”<sup>93</sup>—the first items that shape our understanding of a text. It is common to treat any text—perhaps especially the Constitution— as “essential and unchanging,” unaffected by the “insignificant container” that is its physical

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91. Without seriously getting into the likelihood of this occurring, it is worth noting that civil war is on some scholarly and artistic minds. See Sandy Levinson, *Why Professor Marcus's Arguments Don't Convince Me*, BALKINIZATION, Mar. 30, 2017, <https://balkin.blogspot.com/2017/03/why-professor-marcuss-arguments-dont.html> (“I think we are on the brink of civil war.”); see also Michiko Kakutani, *A Haunting Debut Looks Ahead to a Second American Civil War*, N.Y. TIMES, Mar. 27, 2017, <https://www.nytimes.com/2017/03/27/books/review-american-war-omar-el-akkad.html> (reviewing Omar El Akkad’s debut novel AMERICAN WAR, which “recounts what happened during the Second American Civil War . . . It is a story that extrapolates the deep, partisan divisions that already plague American politics”).

92. GENETTE, *supra* note 33, at front matter.

93. *Id.*, at subtitle.

presentation.<sup>94</sup> But of course, “no text exists outside of the support that enables it to be read; any comprehension of a writing . . . depends on the forms in which it reaches its reader.”<sup>95</sup> To move from literary theory to legal scholarship: Jack Balkin has elucidated the ways in which “the seemingly meaningless and accidental features of a text possess an economy or logic that both troubles and elucidates other features of the text.”<sup>96</sup> His extended treatment of a particular kind of paratext—the legal footnote—demonstrates how the “surface features of the text . . . and the meaning or argument or point of the text are not separable . . . .” They “feed upon and nourish each other in a most uncanny way.”<sup>97</sup>

Paratextual elements of the Constitution can be divided into two groups: those that were included by the framers and ratifiers, and those that are included by later editors and publishers.<sup>98</sup> Examples of the first might include the Attestation and Signature Clauses of the Constitution. Examples of the second might include the footnotes and format (including size) of the Constitution as published. Paratext almost certainly contains no *legal* force—it is constitutionally irrelevant in that regard. “[J]ustice should not be the handmaiden of grammar . . . .”<sup>99</sup> Even less so should justice be the handmaiden of typography. “For almost all legal purposes, the variance of punctuation and capitalization . . . should make no difference . . . . Sensible readers should hesitate to place great weight on syntactical specks and grammatical nits . . . .”<sup>100</sup> Certainly; so why pay attention to the size, the notes, the dates, or the formatting? Because they influence how the document is read, and understood—and ultimately that influences what it means. Unlike a typical statute, the Constitution is a truly public document,<sup>101</sup> and if the paratext

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94. EVELYN B. TRIBBLE, *MARGINS AND MARGINALITY* 1 (1993).

95. Roger Chartier, *Texts, Printing, Readings*, in *THE NEW CULTURAL HISTORY* 161 (Lynn Hunt ed., 1989).

96. J.M. Balkin, *The Footnote*, 83 NW. L. REV. 275, 275 (1989).

97. *Id.*

98. Genette uses the term “official” to refer to the former category, and “unofficial” or “semiofficial” for the latter. GENETTE, *supra* note 33, at 9–10.

99. ESKRIDGE, *supra* note 48, at 458 (quoting *Value Oil Co. v. Irvington*, 377 A.2d 1225, 1231 (N.J. Super. 1977)).

100. AMAR, *supra* note 23, at 68.

101. See, e.g., Franklin D. Roosevelt, *Address on Constitution Day* (Sept. 17, 1937) (“The Constitution of the United States was a layman’s document, not a lawyer’s contract. That cannot be stressed too often.”).

influences how the public interprets the Constitution, then the constitutional paratext is worth studying.

Indeed, the public understanding of the document can trickle into the scholarly and legal understanding of the document. David Cole, legal director of the American Civil Liberties Union, has argued that constitutional change comes “from the ground up” not “from the top down.”<sup>102</sup> That is, from citizen-understandings, not (or not only) from judges. Mark Tushnet, among others,<sup>103</sup> has described how popular understandings of the constitution’s meaning can spread into political coalitions—and from political coalitions to legal actors.<sup>104</sup> Or they can even skip the political parties, as when social movements directly influence legal reasoning.<sup>105</sup> The public encounters the document through the filter of its paratext, and the publicly-encountered document eventually does become the legally-relevant document.

In general, the textual modality is going to be the most appropriate tool for paratextual analysis: what the text means is influenced by what it looks like, what surrounds it. The historical modality will also often be helpful—many of the Constitution’s paratextual elements (the Framers’ signatures, the ratification dates) are the most history-highlighting elements of the document. Indeed, “historical awareness of the period which saw the birth of a work is rarely a matter of indifference when reading it.”<sup>106</sup>

This is especially true of the Constitution, which positions itself as a multi-generational document grounded in American history. When scholars like Akhil Amar examine the significance of how “[e]ach discrete amendment bears a precise date that

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102. David Cole, *Engines of Liberty*, AMERICAN CONSTITUTION SOCIETY BLOG (Mar. 25, 2016), [https://www.acslaw.org/?post\\_type=acsblog&p=11427](https://www.acslaw.org/?post_type=acsblog&p=11427).

103. See, e.g., Jack M. Balkin, *Legal Scholarship Symposium: The Scholarship of Sanford Levinson: Idolatry and Faith: The Jurisprudence of Sanford Levinson*, 38 TULSA L. REV. 553, 567 (2003) (“the practice of politics can shift the boundaries of what is on the wall and off the wall” in constitutional interpretation); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008).

104. Mark V. Tushnet, *Popular Constitutionalism as Political Law*, 81 CHI.-KENT L. REV. 991, 998 (2006).

105. *Id.* at 999 (“Judges observing the social movement . . . change their views about what the Constitution means.”). *But see* Ben Johnson & Logan Strother, *Does the Supreme Court Respond to Public Opinion?* (Oct. 6, 2018), <https://ssrn.com/abstract=3261668>.

106. Gerard Genette, *Introduction to the Paratext*, 22:2 NEW LITERARY HISTORY 261, 256 (Marie Maclean trans., 1991).



locates its message within the broader saga of American history,”<sup>107</sup> they are engaging in paratextual analysis. The ratification dates for every amendment, included in almost every edition of the Constitution, are not literally part of the amendments’ text. (How could they be? The early ratifiers of each amendment had no idea when the ratification would be complete.) And yet that outside-the-text (paratextual) information inevitably shapes one’s reading of the text—often significantly: “[W]e need only see the date 1868 alongside the Fourteenth Amendment to understand its underlying impulse.”<sup>108</sup> The dates of the amendments are what tell the reader to think of the first ten amendments as part of the Founding generation. To see amendments thirteen through fifteen as part of America’s Reconstruction. To recognize the triumphs (women’s suffrage) and failures (Prohibition) or a particular, progressive era.

Arguments about the order, relative length, or placement of clauses are also paratextual. “The textual order of the Constitution’s first three articles made both conceptual and democratic sense,” for instance.<sup>109</sup> In other words, the fact that the legislative article is “first,” or that the judicial article is “third” should be read as democracy-affirming.<sup>110</sup> A similar argument is made by the refrain, “The First Amendment is first for a reason”—repeated by politicians<sup>111</sup> and journalists<sup>112</sup> alike. Of

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107. AMAR, *supra* note 52, at 459.

108. *Id.*

109. *Id.* at 208. See also Akhil Reed Amar, *Architexture*, 77 IND. L.J. 671 (2002) (making extended arguments about the Constitution’s meaning from its “size and shape”).

110. See, e.g., Press Release, Ben Sasse, Sasse on Kavanaugh Hearing: ‘We Can and Should Do Better Than This’ (Sept. 4, 2018) (on file with author), <https://www.sasse.senate.gov/public/index.cfm/2018/9/sasse-on-kavanaugh-hearing-we-can-and-we-should-do-better-than-this> (“The Constitution’s drafters began with the legislature. These are equal branches, but Article I comes first for a reason . . .”). See also AMAR, *supra* note 109, at 693 (drawing meaning from the fact that “the Constitution lists the judiciary *third* among the three great departments”); RICHARD BEEMAN, *THE PENGUIN GUIDE TO THE UNITED STATES CONSTITUTION* 47 (2010) (“Just as the framers of the Constitution considered the Congress to be the most vital branch of the new government and therefore dealt with that branch in the very first article of the Constitution, so too was the placement of the judicial branch in Article III of the Constitution a reflection of their view of the relative importance of that branch.”).

111. UNITED STATES SENATE, 104th Cong., HOUSING FOR OLDER PERSONS ACT 141, S18063 (COMM PRINT 1995) (“the first amendment is first for a reason.”) (statement of Sen. Bumpers); HOUSE OF REPRESENTATIVES, 110th Cong., FREE FLOW OF INFORMATION ACT OF 2007 153, H11593 (“The first amendment is first for a reason.”) (statement of Rep. Poe).

112. Ed Pilkington, *New York Times’s Jill Abramson: ‘The First Amendment is First for a Reason’*, GUARDIAN, Oct. 13, 2013, <https://www.theguardian.com/media/2013/oct/13/>

course, the First Amendment is first rather than third only because two of Madison's proposed amendments were not immediately ratified.<sup>113</sup> Clearly, then, the "Firstness of the First Amendment"<sup>114</sup> argument is purely paratextual—reading significance from an artifact of timing and formatting, not intention or drafting.

The size, price, annotations, and headings in and around the text also influence one's reading—but here we run into a serious problem: which edition of the Constitution should we look at? While the core text does not typically vary from copy to copy, the paratext can significantly. Editions of the Constitution vary in size, in whether or how they include ratification dates, in whether they include other documents around or within the Constitution (the "Preamble" to the Bill of Rights, the Convention Resolution, the Declaration of Independence), in whether they include footnotes or annotations, in whether they include bracketed or italicized text to indicate repeals or amendments, and much more.

To take just one example: the printed LexisNexis edition of the Constitution—handed out free to future lawyers, judges, and legal scholars—is full of content-influencing paratext. Each clause is titled, such as Article I, Section 8, Clause 8: "Patents and copyrights," or Article III, Section 2, Clause 3: "Trial by jury." Those examples are relatively innocuous, but others can significantly alter the text. For example, to call Article IV, Section 2, Clause 3 "Runaway slaves"—in the document—is to specifically add a word to the Constitution that the Framers bent over backwards to avoid. Their avoidance is historically and structurally significant. Casually pulling back the curtain on those efforts adds honesty and clarity to a text that was deliberately being obscure or evasive. Or the Second Amendment, here titled "Right to bear arms." By selecting just that phrase from the amendment to use as its heading, this edition takes sides in an argument over the text's meaning.<sup>115</sup> (Thirty years ago it probably

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new-york-times-jill-abramson-first-amendment.

113. *Proposed Amendments to the Constitution*, 1 JOURNAL OF THE SENATE OF THE UNITED STATES OF AMERICA 96 (1789) (listing what became the First Amendment as "Art. III," after amendments regarding representation and congressional compensation).

114. Edmond Cahn, *The Firstness of the First Amendment*, 65 YALE L.J. 464 (1956).

115. Labelling the Second Amendment as "The Right to Bear Arms" does the same kind of interpretive work as the National Rifle Association's selective quoting of the amendment in its headquarters. See, e.g., *The Second's Missing Half*, MOTHER JONES (Jan./Feb. 1994), available at <https://www.motherjones.com/politics/1994/01/seconds->

would have been titled “Militia rights.”) The Fourteenth Amendment’s Section One is called “Citizens of the United States.” Why not “Privileges or Immunities,” “Equal Protection,” or “Due Process”? But all of these choices—these arguments—are hidden, in paratext. Of course, the point here is not that a lawyer would typically raise, in a constitutional dispute, a claim based on the Second Amendment’s heading in the Lexis-printed Constitution. Instead, by the time of that dispute, the paratext will have already done its subtle work influencing how people read, interpret, and understand the text.<sup>116</sup>

If we took constitutional paratext more seriously, we might be more concerned about the variation across editions. If paratext truly shapes the meaning of text, we might be as interested in a “standardized” paratext for the Constitution as we are in a standardized core text. In any case, a project that commits to scrutinizing every single word of the Constitution as encountered must engage with the document’s paratext.

For the Constitution, a comprehensive list of paratextual elements might include:

Table 3. The Paratextual Constitution

Paratext	Notes
The size and order of each Article, section, or amendment. <sup>117</sup>	
The Preamble.	The Preamble is debatably text and not paratext. (Is it more like the Articles or like the Attestation Clause and signatures? More like the amendments or like the letter from Congress introducing the amendments?) In any case, it

missing-half/ (describing the wall-emblazoned quotation on the N.R.A.’s Washington, D.C. headquarters, which omits the first, militia-related, half of the amendment).

116. Occasionally, however, headings or labels actually do perform dispositive interpretative work in legal disputes. See, e.g., Daniel B. Listwa, Comment, *Uncovering the Codifier’s Canon: How Codification Informs Interpretation*, 127 YALE L.J. 464 (2017) (analyzing the significant weight placed on statute section captions by the Supreme Court in *Yates v. United States*, 574 U.S. \_\_ (2015)).

117. See discussion, *infra*, of arguments made from—for example—the fact that Article I is “first,” and longest, or that the First Amendment is “first for a reason.”

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provides an excellent case study in how to do paratextual analysis. The Supreme Court and scholars have insisted that the Preamble contains no substantive legal force, but have insisted just as forcefully that it carries broad interpretative power.<sup>118</sup>

## Article VII's interlinear notes.

One of the oddest elements of the Congressional reading of the Constitution. The interlinear notes are corrections to the handwritten parchment copy of the Constitution. Since those corrections are inevitably worked into any printed copy of the Constitution, it is not clear why—if actual clauses of the document were going to be cut—these notes were left in.

## The Attestation Clause.

Whether the Attestation Clause is text or paratext matters for the debate over whether the phrase “our Lord” is part of the enacted Constitution or not.<sup>119</sup> But whether or not it is part of the legal text, it is certainly part of the encountered text, and undoubtedly shapes people’s reading of the document (and understanding of the Framers).

The signatures.<sup>120</sup>


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118. See *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905) (“Although the Preamble indicates the general purposes for which the people ordained and established to the Constitution, it has never been regarded as the source of any substantive power.”); *District of Columbia v. Heller* 554 U.S. 570, 578 n.3 (“[I]n America ‘the settled principle of law is that the preamble cannot control the enacting part of the statute . . . .’”) (internal citations omitted) (quoting 2A N. SINGER, *SUTHERLAND ON STATUTORY CONSTRUCTION* 146 (5th ed. 1992)); JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* §§ 218–21 (1833 abridged ed.) (“The importance of examining the preamble . . . has been long felt . . . [but] [t]he preamble never can be resorted to, to enlarge the powers confided to the general government.”); AMAR, *supra* note 47, at 5–53 (2005).

119. See AMAR, *supra* note 23 at 69–73 (2015).

120. Michael Coenen has written a comprehensive analysis of the signatures in the Constitution. Michael Coenen, Note, *The Significance of Signatures: Why the Framers*

Official or unofficial section titles. Section headings like “Article I,” “Article II,” and “Article III” are paratextual elements that have been used to locate the otherwise-unnamed principle of separation of powers in the text.<sup>121</sup> Describing the first ten amendments as the “Bill of Rights” comes more from the Reconstruction era than the Founding.<sup>122</sup> Should that popular bit of Reconstruction-era paratext be used to support arguments for incorporation, or nineteenth-century understandings of the rights of the people?

Editorial footnotes, bracketed information, italicization, or underlining.

Any additional documents included with a given edition of the Constitution.

The Government Printing Office edition, for example, includes the Declaration of Independence in their copy of the Constitution. The best-selling ebook edition on Amazon—to move outside the realm of print-only—also includes the Declaration of Independence, bizarrely inserted between the seven Articles of the Constitution and the amendments.<sup>123</sup>

The dates of ratification.<sup>124</sup>

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*Signed the Constitution and What They Meant by Doing So*, 119 YALE L.J. 966 (2010). He argues that the signatures served a marketing function in the ratification debate, both by advertising the illustrious figures behind its framing, and by binding those same figures into supporting the document. Nevertheless, he argues that the signatures can have interpretative force today, by highlighting the federalist nature of the document (the signatures are organized by state); establishing its connection to the Revolution (the reference to the twelfth year of an independent America); and by historicizing the document, emphasizing (for better and for worse) its Framing and Framers.

121. Amar, *supra* note 109, at 691 (2002) (“What are the words ‘Article I,’ ‘Article II,’ and ‘Article III’ doing if not marking a separation?.”).

122. Akhil Amar has correctly observed “the federal Constitution does not contain a separate section formally captioned as a ‘Bill of Rights’ . . . .” As part of the core, official text, maybe—but the paratext is teeming with references to the “Bill of Rights.” It pops up in almost every edition of the Constitution in print.

123. THE CONSTITUTION OF THE UNITED STATES (2016).

124. See the discussion, *infra*, about the ratification dates historicizing effect on the document.

## V. MINIMIZED

The minimized clauses of the Constitution have been extensively studied, like many of the amended clauses, and unlike the paratext or lapsed clauses. They are the clauses which have been reduced, through constitutional interpretation or action, to near-meaninglessness. They come in two types: minimization through Supreme Court precedent and (perhaps less common) through congressional or presidential action or inaction. Minimized clauses are the bread-and-butter of constitutional law casebooks, which demonstrate how the Constitution's text has been interpreted and reinterpreted over two hundred years of Supreme Court cases.<sup>125</sup> Unlike the other categories of constitutional irrelevancy, minimized clauses are not remotely obvious to the casual reader. In fact, they typically come as a surprise, since the minimization process by definition distorts the facial meaning of the text. "University professors who teach constitutional law often neglect to assign the document itself," Akhil Amar has written. "The running joke is that reading the thing would only confuse students."<sup>126</sup> It is perhaps an American, or at least common-law, phenomenon: "[Civil lawyers] find it hard to understand why constitutional law courses and material begin, not with a study of the language and design of the Constitution, but with a case," Mary Ann Glendon writes. She recounts the story of a student who asked about the role of the constitutional text, to which the professor responded, "Forget about the text!"<sup>127</sup> Amar and Glendon's stories both illustrate the same point: some (most?) of the constitutional clauses are not fully intelligible without knowing the doctrine that surrounds them.

The best methods for analyzing minimized clauses are probably doctrinal arguments (to discover the process of minimization) and historical arguments (to discover what the clause did, or should, mean). But actually finding—or agreeing on—which clauses have been minimized is especially difficult.

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125. See, e.g., MICHAEL STOKES PAULSON ET AL., *THE CONSTITUTION OF THE UNITED STATES* (2017) (including whole index sections for—along with dozens of cases referencing—the Privileges or Immunities Clause, the Contracts Clause, the Guarantee Clause, and the Ninth Amendment, for example).

126. AMAR, *supra* note 52, at xi.

127. Glendon, *supra* note 25, at 107.

Figuring out which clauses have been read out of existence runs into a serious theoretical problem: calling something *minimized* requires a background assumption about what the clause's proper scope should be. That is itself an act of interpretation—and a contestable one at that. For example, until *McDonald* and *Heller*, was the Second Amendment right to bear arms minimized (the Court had been reading the right into irrelevancy), or did those cases unduly *maximize* what until then had been properly read?<sup>128</sup> Tangentially, however, the argument and opinions in *McDonald* do provide us with what is probably the best example of a minimized clause in the Constitution: the Privileges or Immunities clause.<sup>129</sup>

Privileges or Immunities “play hardly any role in judicial decisions interpreting the Constitution . . . .”<sup>130</sup> This has been true since the *Slaughter-House Cases* of 1873.<sup>131</sup> Indeed, “Slaughter-House stands for one simple truth: that the Privileges or Immunities Clause is utterly incapable of performing any real work . . . and that any argument premised on the Clause is therefore a constitutional non-starter.”<sup>132</sup> And yet, thanks to originalist scholarship demonstrating the extent to which the Fourteenth Amendment framers emphasized this clause, it is “enjoying something of a renaissance among constitutional scholars.”<sup>133</sup> What has been minimized can be rehabilitated.<sup>134</sup> Or, as Akhil Amar has put it—quoting Billy Crystal's character in the *Princess Bride*—“There's a big difference between mostly dead

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128. See, e.g., Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989) (arguing that the then-pervasive lack of scholarly attention on the Second Amendment was a mistake, and—in the article's influence—demonstrating how a minimized clause can be un-minimized).

129. U.S. CONST. amend. XIV, § 1.

130. Strauss, *supra* note 47, at 1551.

131. 83 U.S. 36 (1873).

132. Kevin Christopher Newsom, *Setting Incorporation Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L.J. 643, 646 (2000).

133. *Id.*

134. The Equal Protection Clause may be another example of a revival from minimized status. In *Buck v. Bell*, Justice Holmes described the clause as “the usual last resort of constitutional arguments.” See *Buck v. Bell*, 274 U.S. 200, 274 (1927). In the 1940s, scholars were still describing it as a “dubious weapon in the armory of judicial review” after “eighty years of relative desuetude.” Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 341 (1949). The same word was used to describe the clause in *Bakke*: “decades of relative desuetude.” *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 291 (1978). Now, of course, Equal Protection is one of the centerpieces of constitutional law and argumentation.

and all dead.”<sup>135</sup> Because of *Slaughterhouse*, the Privileges or Immunities Clause is mostly dead; can it be revived?

Justice Scalia did not think so. In the *McDonald* oral argument, he asked counsel for the petitioners why they had suggested using Privileges or Immunities, rather than Due Process, to incorporate the Second Amendment against the states. “[W]hy are you asking us to overrule 150, 140 years of prior law . . . when you can reach your result under substantive due—I mean, you know, unless you’re bucking for a . . . place on some law school faculty . . . .”<sup>136</sup> Justice Thomas, however, strongly disagreed. Concurring in the judgment, Justice Thomas wrote that the Second Amendment “applies to the States through the Fourteenth Amendment’s Privileges or Immunities Clause.”<sup>137</sup> He referred to the Court’s “marginalization”<sup>138</sup> of the Clause, and argued that “this case presents an opportunity to . . . begin the process of restoring the meaning of the Fourteenth Amendment . . . .”<sup>139</sup> More recently, Justice Thomas has found an ally on this subject in Justice Gorsuch.<sup>140</sup> But the debate is an old one. In 1935, the Court struck down a Vermont tax law on—among other grounds—the privileges or immunities clause, prompting a strongly-worded dissent from Justice Stone: “Feeble indeed is an attack on a statute,” he wrote, “which can gain any support from the almost forgotten privileges and immunities clause of the Fourteenth Amendment.”<sup>141</sup> He continued: “Since the adoption of the Fourteenth Amendment at least forty-four cases have been brought to this Court in which state statutes have been assailed as infringements of the privileges or immunities clause. Until today, none has held that state legislation infringed that clause.”<sup>142</sup>

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135. Interview with Akhil Amar, Sterling Professor of Law, Yale University (Feb. 20, 2017).

136. Transcript of Oral Argument at 6–7, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (No. 08-1521)

137. *McDonald v. City of Chicago*, 561 U.S. 742, 806 (2010) (Thomas, J., concurring in part and concurring in the judgment).

138. *Id.* at 809.

139. *Id.* at 813.

140. See *Timbs v. Indiana*, 586 U.S. \_\_ (2019) (Gorsuch, J., concurring) (“the appropriate vehicle for incorporation may well be the Fourteenth Amendment’s Privileges or Immunities Clause.”). See also Ilya Shapiro & Josh Blackman, *The Once and Future Privileges or Immunities Clause*, 25 *GEO. MASON L. REV.* (2019) (“a Supreme Court majority willing to take the clause seriously” is “what it will take for a true rebirth of the Privileges or Immunities Clause”).

141. *Colgate v. Harvey*, 296 U.S. 404, 443 (1935).

142. *Id.* at 445–46.



The Fourteenth Amendment is an excellent case study in minimized clauses, since there is now broad agreement that Privileges or Immunities means more than it can be cited for, as a result of judicial action. The disagreement is what to do about it: restore Privileges or Immunities (Thomas, and maybe Gorsuch) or accept Due Process incorporation and move on (the rest of the Court). Indeed, to the extent that the Court recognizes and regrets a “minimization,” it can either choose to restore that minimized clause, or “maximize” another clause in compensation. Perhaps this solves part of the problem, but it also makes the text of the Constitution doubly-unintelligible.<sup>143</sup> In other words, now *two* clauses do not mean what they seem to say. That is arguably what has happened between the Privileges or Immunities Clause (minimized), and the Due Process Clause (maximized).<sup>144</sup>

Other examples of minimization are much more arguable, and no other clause may have been quite so dramatically read out of existence. Different citizens and scholars will feel that their pet clause has been unfairly or unwisely diminished. But, as a provisional gesture towards completing the taxonomy of irrelevancy, which clauses have had good cases made for them as being minimized?

Table 4. The Minimized Constitution

Clause	Arguments about minimization
The Declare War Clause.	Sanford Levinson, for example, has described the way in which—in a single lifetime—Congress’s power to declare war has become “fundamentally irrelevant.” <sup>145</sup>

143. See, e.g. JOSEPH GOLDSTEIN, *THE INTELLIGIBLE CONSTITUTION: THE SUPREME COURT’S OBLIGATION TO MAINTAIN THE CONSTITUTION AS SOMETHING WE THE PEOPLE CAN UNDERSTAND* (1995).

144. See, e.g., CNN Transcript of Kavanaugh Supreme Court Hearing, CNN (Sept. 5, 2018), available at <http://www.cnn.com/TRANSCRIPTS/1809/05/cnr.08.html> (“So I think the Ninth Amendment and the privileges and immunities clause and the Supreme Court’s doctrine of substantive due process are three roads that someone might take that all really lead to the same destination under the precedent of the Supreme Court now . . .”).

145. SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* (2006) (“It is safe to say that no president, of either political party, feels significantly constrained by the Declare War Clause of Article I.”).

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- The Contracts Clause.      James Ely has written that “the contract clause is no longer the subject of much judicial solicitude or academic interest. Since the 1930s the once potent contract clause has been largely relegated to the outer reaches of constitutional law.”<sup>146</sup> Justice Gorsuch agrees—and indeed, may be looking to revive the clause.<sup>147</sup>
- The Guarantee Clause.      Senator Charles Sumner called the Constitution’s guarantee of republican forms of government in the states “the sleeping giant in the Constitution.”<sup>148</sup> It is still unenforced—or minimized—by the Court, largely through justiciability doctrines.<sup>149</sup> As with other minimized clauses, though, the giant may yet wake up.<sup>150</sup>
- The Public Use Clause.      Justice Thomas has argued that decisions like *Kelo v. City of New London*<sup>151</sup> make up “a string of cases construing the *Public Use Clause* to be a virtual nullity, without the slightest nod to its original meaning.”<sup>152</sup>
- The Ninth Amendment.      Mitchell Gordon, in his article *Getting to the Bottom of the Ninth*, has described the ways in which “[f]ew courts have ever used it [the Ninth Amendment] as the basis of a decision; the U.S. Supreme Court has never done so.”<sup>153</sup> Among constitutional litigators, the

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146. James Ely, *Still in Exile? The Current Status of the Contract Clause*, Vanderbilt Law Research Paper No. 19-04 at 1 (2019), available at <https://ssrn.com/abstract=3318590>. See also Citing later to Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 890-91 (1987) (“the clause is now for the most part a dead letter.”); *City of El Paso v. Simmons*, 379 U.S. 497 (1965) (Black, J., dissenting) (accusing the majority of using *Home Building & Loan Assn. v. Blaisdell* to “practically read the Contract Clause out of the Constitution”).

147. *Sveen v. Melin*, 584 U.S. \_\_ (2018) (Gorsuch, J., dissenting) (“For much of its history, this Court construed the Contracts Clause in this [strong] light. . . . More recently, though, the Court has charted a different course. . . . [The modern] test seems hard to square with the Constitution’s original public meaning.”).

148. Cong. Globe, 40th Cong., 1st Sess. 614 (1867) (statement of Sen. Sumner).

149. Ryan C. Williams, *The “Guarantee” Clause*, 132 HARV. L. REV. (2018).

150. *Id.* at 4 (“several scholars have predicted that the eventual demise of the political question barrier to judicial enforcement of the Guarantee Clause is only a matter of time.”).

151. 545 U.S. 469 (2005).

152. *Id.* at 506.

153. Mitchell Gordon, *Getting to the Bottom of the Ninth*, 50 IND. L. REV. 421, 423

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amendment is “all but imaginary,”<sup>154</sup> and in “sophisticated legal circles . . . mentioning the Ninth Amendment is a surefire way to get a laugh.”<sup>155</sup>

The Privileges or Immunities Clause.<sup>156</sup>

The Fourteenth Amendment’s Reapportionment Clause.

Gerard N. Magliocca has argued that “the current reapportionment process violates Section Two of the Fourteenth Amendment,”<sup>157</sup> but acknowledges that it has “never been enforced”<sup>158</sup> in a “century of neglect.”<sup>159</sup>

## VI. THE VALUE OF THE PARTS WE SKIP

We—scholars, lawyers, judges, politicians, and citizens generally—need to stop skipping the parts we skip. We need to take seriously the oft-repeated assumption that every word in our short Constitution matters.<sup>160</sup> That is the fundamental project of this Article. Either to validate that assumption—if every word matters, let’s actually look at every word; or to reveal its inaccuracy—every word doesn’t matter, after all. Having identified and catalogued all the parts we skip, what have we learned? Do all the words in the Constitution matter? Can they all be used? What makes the ignored provisions different from the enforced provisions, and what makes them different from each other?

In the summer of 1787, James Madison worried about what would become a lapsed clause of the Constitution. “So long a

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(2017).

154. *Id.*, at 424 (quoting Randy Barnett).

155. *Id.* (quoting John Hart Ely).

156. See discussion, *supra*.

157. Gerard N. Magliocca, *Our Unconstitutional Reapportionment Process*, 86 GEO. WASH. L. REV. 101, 102 (2018).

158. *Id.* at 110.

159. *Id.* at 105.

160. A sentiment expressed generally *supra* notes 26, 27, 28. This sentiment is also addressed in each of the articles cited above to rehabilitate individual skipped parts of the Constitution. See, e.g., Magliocca, *supra* note 157, at 105. (“[I]t is time to treat Section Two of the Fourteenth Amendment with the respect due to a constitutional provision.”); Gordon, *supra* note 153, at 425 (“[T]he Constitution contains no known exception under which we may ignore provisions on the ground that they are tough to understand.”) (referring to the Ninth Amendment).

term,” he said to the Constitutional Convention, regarding the 1808 clauses, “will be more dishonorable to the National character than to say nothing about it in the Constitution.”<sup>161</sup> What is in the Constitution matters—symbolically, historically—even when those clauses have no legal impact anymore. That much should be obvious from the strong reaction to the congressional reading of the Constitution, and its elision past the inoperative Three-Fifths Clause. To examine the historical and symbolic significance of the parts we skip should be reason enough to study them. But this Article goes further, showing the ways in which sections deemed legally irrelevant might actually be useful for legal argumentation after all. Indeed, while all four kinds of ignored provisions currently lack legal force, they all offer some interpretative force. The amended portions have anticanonical, or intertextual force; the lapsed clauses have intratextual or paradigm case force; the paratext has textual or historical force; and the minimized portions have originalist (and dormant legal) force.

Mark Graber, and others, have lamented the ways in which parts of the Fourteenth Amendment in particular have been “forgotten.”<sup>162</sup> Looking more closely at this amendment as an example—with our specific categories of irrelevancy now in mind—can help us analyze this “forgetting” in much clearer detail. Section One’s Privileges or Immunities Clause has been minimized. But minimized clauses can come back (its neighbor, the Equal Protection Clause, is a case in point<sup>163</sup>). So too with Section Two’s Reapportionment Clause—it was minimized, never used—but it may yet have teeth. That clause’s limitation of the reapportionment penalty, meanwhile, was amended—by the Nineteenth and Twenty-Sixth Amendments. In that amending we can read a structural argument towards an ever-expanding base of suffrage (male becomes male and female; eighteen becomes twenty-one). The clauses of sections two, three, and four that have to do with the Confederacy are lapsed. They specifically apply to circumstances that have permanently changed, and—unlike the minimized clauses—can never be legally enforced on their own. But they can help us interpret other clauses (what the text means by “debt”) or derive structural principles from the whole text

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161. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 at 530 (1987 bicentennial edition).

162. Graber, *supra* note 71 (focusing on sections two through four).

163. *Supra* note 134.

(against, for instance, the legacies of secession and slavery). The whole amendment is the longest in the Constitution—a paratextual argument about its primacy. But it’s also “Fourteenth,” a paratextual argument *against* its significance (if the First Amendment is first for a reason, is the Fourteenth fourteenth for a reason?).<sup>164</sup> Minimized, amended, lapsed, paratext—each part is ignored for a different reason; each part can be put to different use.

Part of this project has been descriptive, part has been prescriptive. How can scholars or lawyers organize the ignored parts of the Constitution—and how should we use them? In terms of organization, the taxonomy can show us the relative frequency of different categories of irrelevancy. Depending on how one counts the paratext, most of the irrelevant clauses are lapsed—even though the legal and political cultures probably focus more on minimized or amended clauses. The taxonomy also reveals *who* or *what* changes the Constitution. Amended clauses have been changed by “We the People,” through Congress and the states. Lapsed clauses have been changed by time or history. Paratext has been changed by publishers and editors of the text. And minimized clauses have been changed by (usually) the judiciary. We may feel differently about each of those actors’ right to tinker with the Constitution; the taxonomy helps us see who has done what to which parts of the document. And the taxonomy assembles and organizes what may have seemed to be disconnected pieces of scholarship: Coenen on the signatures in the Constitution, Amar on the Attestation Clause, Graber on the Fourteenth Amendment, and the student note on the Twenty Dollars Clause, for instance.

Going forward, there is work to be done in each category of irrelevancy. Scholars, lawyers, politicians, and citizens generally need to have a better understanding of which parts of the

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164. Is there a paratextual change that could improve the reading, to highlight the Fourteenth Amendment better? Growing up, I went to a grade school that had been founded in 1628; there was a plaque on a wall listing every head of school since that founding. One’s eyes could glaze over the list of unfamiliar names (Jan Stevensen, William Verstius, Daniel Bratt . . .) until one got to a line break in between two heads of school, and the striking note: “The School was interrupted by the Revolutionary War.” Imagine if the amendments, listed one after another after another, suddenly reached a similarly disruptive, truthful line break between amendments twelve and thirteen: “The United States temporarily broke apart during the Civil War.” Imagine then how striking the rightly-named Reconstruction Amendments would seem.

Constitution truly have been amended—the congressional reading and each of the printed and online editions disagree about the amendments’ direct and indirect impacts. We need to stop ignoring the lapsed clauses, and mine them more thoroughly for meaning and guidance. We need to continue historical research towards understanding—and then perhaps rehabilitating—minimized clauses.<sup>165</sup> And we need to recognize the interpretative impact of paratext, and react accordingly. If the editors and readers of printed and online editions of the Constitution feel like paratext gets in the way, it should generally be minimized. If we think the edition-specific paratext twists or distorts what should be a common-ground document, then the paratext should be standardized (like the text itself). If we think that the paratext is essential to our understanding of this two-century-old document, then we should celebrate and expand its role in editions of the Constitution. We can, for instance, release the paratext from the odd bracket or footnote, and print the Constitution similarly to most modern editions of Shakespeare: with the original (relatively untouched) text on one page, and lots of paratext (notes, definitions, history) on the facing page.

To continue the Shakespeare metaphor for a moment: It is clear that the “irrelevant” clauses are less important than the legally-active clauses in the text, like the Commerce or Equal Protection Clauses. It is similarly clear that *Hamlet*, or *Macbeth* is more important than, say, the *Merry Wives of Windsor* or *Timon of Athens*. But at the margin, do we need another production of *Hamlet*, or can we take at least one look at *Timon*? In discussing the Attestation Clause, a prime example of paratext, Akhil Amar has noted that “the Supreme Court has never quoted this clause . . . and many constitutional experts have literally never given the clause a moment’s thought.”<sup>166</sup> These clauses surely deserve at least a moment’s thought—indeed, they deserve much more.

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165. Much of this textual-historical research is currently being done by originalist scholars, but one need not be an originalist to be interested in minimized clauses. An originalist would feel that the meaning of a given clause is “fixed” at the moment of its ratification, and that current judges are “constrained” by that meaning. *See, e.g.*, Lawrence B. Solum, *The Fixation Thesis*, 91 NOTRE DAME L. REV. 1 (2015); Lawrence B. Solum, *The Constraint Principle* (draft as of Apr. 3, 2019), available at <https://ssrn.com/abstract=2940215>. A non-originalist can still be interested in knowing an earlier, alternative, or enlarged meaning of a phrase. The non-originalist is not bound to this older, larger meaning, but can choose whether or not the law would be better served by that expanded meaning.

166. AMAR, *supra* note 23, at 83.

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So what should Congress have done in 2011? If they really insisted on demonstrating that some parts of the Constitution have been superseded, that some parts are without legal force, that some parts are “constitutionally irrelevant,” then they should have gone a lot further. They should have cut the ratification dates, the interlinear notes, the 1808 clauses, and the ratification instructions. They should have cut the signatories and the preamble to the Bill of Rights. They should have changed “male” and “twenty-one” to “male and female” and “eighteen.” They should have added a caveat to the direct tax clause, explaining that the Sixteenth Amendment allowed for an income tax. Perhaps they should have cut the Preamble—after all, it is not part of the Constitution as it “operates today”—at least not in terms of legally-forceful provisions. Or, even better, they should just have read the document unedited. James Madison lost that debate in 1789. Deciding what is relevant, and what is irrelevant, is a difficult business—even with a taxonomy.