

Constitutional Law: A Language of Expertise?

OR BASSOK*

*In recent years, the community of experts in constitutional law has partly lost its ability to exclude arguments from the constitutional discourse on the basis that they defy the disciplinary rules of constitutional expertise. The most vivid demonstration of this development is the transformation of the “broccoli argument” from a “crazy” claim in the eyes of expert constitutional speakers to the law of the land in the Health Care case. By comparing Christopher G. Tiedeman’s 1890 book, *The Unwritten Constitution of the United States*, to Akhil Reed Amar’s 2012 book, *America’s Unwritten Constitution*, I expose a shift in the understanding of constitutional law in the United States. Rather than a language of expertise in which certain arguments are excluded since they defy the criteria of the discipline, constitutional law is now understood as more similar to a natural language in which there is no expert authority that has control over the language’s borders.*

INTRODUCTION

Is change in constitutional law controlled by disciplinary reason as a language of expertise, or is it more similar to natural language in which change is ultimately controlled by the use of its speakers? In 1890, Christopher G. Tiedeman published *The Unwritten Constitution of the United States*.¹ One hundred twenty-two years later, Akhil Reed Amar published a book with a very similar title: *America’s Unwritten Constitution*.² A comparison of these two books, both of which examine how developments in constitutional law occur, reveals that while for Amar the ultimate ruler in constitutional law is systematic reason, for Tiedeman, public opinion reigns supreme. This gap between the two books captures an entire century of American constitutional thought.

Tiedeman wrote at a time when constitutional adjudication was understood as a domain of expertise in which reason reigned supreme.³ Accordingly, constitutional law was understood as a set of concepts that evolved while adhering to systematic patterns except when the will of the people was expressed in constitutional amendments. At the same time, the adherence of legal professionals to these systematic patterns ensured that they will persist.⁴ Constitutional adjudication was understood as relatively autonomous from the influence of public will.

* Max Weber Postdoctoral Fellow, European University Institute. © 2015, Or Bassok. I am grateful to Akhil Amar, Bruce Ackerman, Jack Balkin, Guyora Binder, Michael Boucai, Shay Levi, Jesse J. Norris, Robert C. Post, Catherine B. Scott, Anna Su, and Patrick Weil for their excellent comments. This paper was presented at the Buffalo Law School Junior Faculty Forum. All errors are my own.

¹ CHRISTOPHER G. TIEDEMAN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES* (1890).

² AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION* (2012).

³ See, e.g., THOMAS GUSTAFSON, *REPRESENTATIVE WORDS: POLITICS, LITERATURE, AND THE AMERICAN LANGUAGE, 1776–1865*, at 54–55 (1992).

⁴ Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940*, 3 RES. L. & SOC. 3, 4, 8–9 (1980).

Tiedeman attempted to destabilize this understanding by showing that constitutional adjudication was very much influenced by public will.

By contrast, Amar made his claim when the genie of public opinion was already out of the bottle. Today, many scholars acknowledge that, at least in visible cases, the will of the people is the supreme ruler of constitutional adjudication. In other words, no shrewd, expert doctrinal argument that runs contrary to public opinion can win a salient constitutional case.⁵ Public opinion, the argument goes, can defeat almost any constitutional argument, even one that was considered correct by constitutional experts. Similarly, public opinion can transform an argument that contrasts current constitutional doctrine into a legitimate constitutional argument.⁶ If more proof was required that public will could defeat doctrinal argument, the Health Care case provided it. According to the “broccoli argument,” Congress did not have power under the Commerce Clause to impose the individual mandate as part of the Patient Protection and Affordable Care Act (ACA).⁷ Upholding the mandate in this manner means, so the claim goes, that Congress could mandate the purchase of broccoli.⁸ This argument was considered a non-starter among almost all speakers of the constitutional language just five years ago.⁹ But, it since has become the law of the land after it acquired enough political support.¹⁰ Public support made it a legitimate constitutional argument.¹¹

Amar’s work is restorative. He tries to put reason back in its privileged place as the true guide to constitutional law. By offering a sophisticated narration of the current state of affairs in the constitutional domain using doctrinal language, he attempts to reassemble the community of constitutional experts under one dialect. His recovery effort includes an innovative attempt to present the parts of constitutional law most affected by public opinion as controlled by expert reason. In essence, he attempts to re-establish a language of expertise in constitutional law. As I explain below, in its current formulation, his chances of success are quite slim.

I begin this Article by comparing the two works, focused mostly on their portrayal of the role of public opinion in constitutional law. I conduct the analysis using the axes of will and reason, “the twin sources of a legitimate legal order.”¹² Based on this comparison, in the second Part, I examine the changes in our understanding of how constitutional law develops and of the nature of the constitutional language. Through this examination, I portray the change in constitutional discourse that enabled the Court to accept an argument that the community of experts rejected.

I. SO MUCH HAS HAPPENED WITH SO LITTLE TO SHOW FOR IT

⁵ See, e.g., BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 370 (2009) (“The accountability of the justices (and thus the Constitution) to the popular will has been established time and time again.”).

⁶ See Or Bassok, *The Supreme Court’s New Source of Legitimacy*, 16 U. PA. J. CONST. L. 153, 185, 188 (2013).

⁷ Pub. L. No. 111-148, 124 Stat. 119 (2010).

⁸ JOSH BLACKMAN, *UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE* 92-95 (2013).

⁹ Mark D. Rosen & Christopher W. Schmidt, *Why Broccoli? Limiting Principles and Popular Constitutionalism in the Health Care Case*, 61 UCLA L. REV. 66, 100-01 (2013).

¹⁰ MARK TUSHNET, *IN THE BALANCE: LAW AND POLITICS ON THE ROBERTS COURT* 6-7 (2013); Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, ATLANTIC (June 4, 2012), <http://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040>.

¹¹ See Rosen & Schmidt, *supra* note 9, at 99.

¹² PAUL W. KAHN, *THE CULTURAL STUDY OF LAW* 7 (1999).

One of the basic problems at the core of both books is identifying what controls the development of constitutional law. Is it reason or will? In his book, Tiedeman explained that the view “that American constitutional law follows and registers all material changes in public opinion, as unerringly as the needle follows the magnetic meridian” receives the “most vigorous opposition.”¹³ As opposed to the general belief in the legal community in “rationalistic ordering of the whole legal universe,”¹⁴ Tiedeman’s endeavor was to show that “the real, living constitutional law . . . is here, as well as elsewhere, unwritten . . . [and is] just as readily [tied] to the mutations of public opinion as the unwritten constitution of Great Britain.”¹⁵ Many constitutional rules are thus the result of “a change in public opinion.”¹⁶

Conversely, Amar views the constitutional domain as controlled by systematic logic, with both the constitutional document and the “unwritten constitution” comprising “America’s working constitutional *system*.”¹⁷ He adheres to the systematic qualities of doctrinairism such as consistency and coherency in his narration of the entire system of constitutional law.¹⁸ He deduces answers to constitutional questions based on these systematic traits.¹⁹ In order to expose these answers, the constitutional expert sometimes has to read “between the lines,”²⁰ or discover the “spirit of the written Constitution.”²¹ When these systematic traits lead him to the conclusion that the Senate could change the filibuster rule by a simple majority vote he notes that while “[t]his conclusion may astonish . . . [i]t is precisely at this point that this book’s general framework proves its worth.”²² The “book’s thesis” is about the systematic logic of constitutional law that ensures “that America’s actual system of government generally coheres with America’s written Constitution.”²³

Amar’s view on the systematic nature of constitutional law is perhaps best captured by his use of QED.²⁴ This abbreviation of a Latin phrase meaning “which . . . was required to show” is used in mathematics or philosophy as showing that the desired proof is necessarily deduced according to the axioms of the system.²⁵ Like these systems, for Amar, the written Constitution is “a single rational document” that “as a whole coheres as a sensible system of rules and principles.”²⁶ Amar attempts to show that the “unwritten constitution” follows the same systematic logic and thus, it should not be surprising to his reviewers that according to his account the unwritten constitution is “securely connected to the written Constitution.”²⁷ He

¹³ TIEDEMAN, *supra* note 1, at 41.

¹⁴ Kennedy, *supra* note 4, at 3.

¹⁵ TIEDEMAN, *supra* note 1, at 43.

¹⁶ *Id.* at 66; *see also id.* at 58 (noting that the Supreme Court has made decisions based on technicalities when “[p]ublic opinion was not yet ripe” for change).

¹⁷ AMAR, *supra* note 2, at ix (emphasis added).

¹⁸ *See, e.g., id.* at 6, 22, 47, 100–01, 120, 335.

¹⁹ *See, e.g., id.* at 117, 283, 340, 351, 357–61.

²⁰ *Id.* at xv.

²¹ *Id.* at 15.

²² *Id.* at 363.

²³ *Id.* at 404.

²⁴ Amar explains why legislative vetoes are unconstitutional in two “formal proofs” and ends both writing “QED.” *See id.* at 370 n.*. Compare to TUSHNET, *supra* note 10, at 100 (describing the legislative veto as “a useful technique for Congress to patrol what executive officials do in the modern state”).

²⁵ ANDREI RODIN, AXIOMATIC METHOD AND CATEGORY THEORY 18 (2014) (emphasis omitted).

²⁶ AMAR, *supra* note 2, at 408.

²⁷ David A. Strauss, *Not Unwritten, After All?*, 126 HARV. L. REV. 1532, 1533 (2013) (noting that contrary to the book’s title, Amar shows that much of the “unwritten constitution” stems from the written document).

believes that “[p]recisely because America’s unwritten Constitution and America’s written Constitution fit together to form a single system, no proper account of the former should ever lose sight of the latter.”²⁸

It is not surprising, then, that Amar views one major contribution of his book as the addition of a new understanding to the current discourse on the “unwritten constitution” that is focused on “tools and techniques of constitutional interpretation.”²⁹ To every believer in the systematic traits of constitutional law, the tools to ensure the coherency and consistency of the system are indeed vital.³⁰ However, for many constitutional scholars today, the systematic qualities of the constitutional domain or the creation of doctrinal tools are much less important.³¹ The current academic discussion of the dominant interpretative methods, such as originalism or living constitutionalism, does not have much to contribute in terms of developing doctrinal tools.³²

Yet, as opposed to doctrinalists who view constitutional law as a field of autonomous expertise relatively untouched by the influence of public opinion, Amar does not deny such influence. Indeed, he cannot.

During the last generation, Yale Law School, where Amar was educated and where he teaches today, has been the cradle of development of the idea that the People’s will has a privileged position over reason in constitutional law.³³ Thus, Amar dedicated an entire chapter, entitled “Hearing the People: America’s Lived Constitution,” to the direct influence of public opinion on constitutional law. For instance, Amar interprets words such as “unusual” in the Eighth Amendment or “unreasonable” in the Fourth Amendment in a manner that corresponds to public opinion.³⁴ Amar further explains that the broad popular support of sex equality since the 1970s was “entitled to interpretative weight as a popular gloss on the Fourteenth Amendment and the Ninth Amendment, in keeping with the principles of America’s lived Constitution.”³⁵ Moreover, his understanding of an unwritten constitution incorporates into constitutional interpretation the spirit of different eras that is very much influenced *indirectly* by public opinion.³⁶ For example, in his view, “[h]ome ownership” became part of “the American Dream and the national narrative” and thus part of constitutional law.³⁷

Thus, Amar would subscribe both to Tiedeman’s claim that the unwritten constitution is the “real” constitution as much as the written Constitution and that the “unwritten constitution is steadily but slowly changing under the pressure of popular opinion and public necessities.”³⁸ But here Amar and Tiedeman part ways.

²⁸ AMAR, *supra* note 2, at 479.

²⁹ *Id.* at 481.

³⁰ *See id.* at 209.

³¹ *See, e.g.,* Sara Aronchick Solow & Barry Friedman, *How to Talk About the Constitution*, 25 YALE J.L. & HUMAN. 69, 69 (2013) (“Since at least the early 1980s, the legal academy has been preoccupied with the question of constitutional interpretation. Not, mind you, the question of what the Constitution actually means. Rather, scholars have been consumed with the question of how the Constitution should be interpreted—what methodology should govern constitutional interpretation.”).

³² *See* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 7, 38–39, 41, 80, 83 (2001).

³³ *See* PAUL W. KAHN, PUTTING LIBERALISM IN ITS PLACE 167 n.44 (2005).

³⁴ AMAR, *supra* note 2, at 95–138; *see also id.* at 303.

³⁵ *Id.* at 295–96.

³⁶ *See id.* at 79, 103, 108.

³⁷ *Id.* at 129–32.

³⁸ TIEDEMAN, *supra* note 1, at 136.

Tiedeman continued the last sentence and argued that the development of the unwritten constitution under “the pressure of popular opinion” is “checked only by the popular reverence for the written word.”³⁹ For Amar, the check is reason in the sense of systematic logic of constitutional law as a whole. According to Amar, public opinion’s effect on the unwritten constitution is harnessed under constitutional reason. When the Constitution “brilliantly” invites “careful consideration of contemporary social meanings and popular understandings with regard to many issues of liberty and equality,” such considerations are allowed.⁴⁰ This is not the victory of the People’s will over reason but reason incorporating the will of the People into the constitutional discourse.

Not so, according to Tiedeman. In his view, “all these rules of interpretation” of the interpretative scheme we today call originalism “are thrown to the winds” in view of the current countervailing public opinion.⁴¹ Tiedeman denied the idea of fixed meaning that stands at the center of originalism.⁴² Since “[n]o people are ruled by dead men, or by the utterances of dead men,” in selecting between the constitutional text’s “shades of meaning” the Court endeavors to discover not the meaning intended by the framers but the meaning that corresponds to public opinion.⁴³ Amar is also not a true originalist, contrary to what some scholars think.⁴⁴ He may at times sound like one in the sense that he investigates and considers the historical understanding of the Constitution,⁴⁵ but his originalism bows to systematic logic.⁴⁶

Tiedeman’s work is “strikingly modern” in its affinity to the modern idea of a “living constitution” and in its understanding that constitutional law “is a matter of power, that it evolves with shifts in the balance of conflicting social forces, and that judicial decision-making is neither autonomous nor static.”⁴⁷ At times Amar may sound like a supporter of the idea of a living constitution that develops in view of public opinion.⁴⁸ Yet the true ruler in Amar’s scheme is systematic logic. Ex post, Amar always finds the choices made by the public to somehow fit the systematic logic of constitutional law thus becoming part of constitutional law.⁴⁹ Moreover, by strange coincidence the evidentiary exclusionary rule that does not fit the systematic logic of constitutional law is also, at least according to Amar, unpopular and thus “should be drastically

³⁹ *Id.* at 136.

⁴⁰ AMAR, *supra* note 2, at 304.

⁴¹ TIEDEMAN, *supra* note 1, at 149.

⁴² Christopher G. Tiedeman, *The Income Tax Decisions as an Object Lesson in Constitutional Construction*, 6 ANNALS AM. ACAD. POL. & SOC. SCI. 72, 72–73 (1895); Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the “Living Constitution” in the Course of American State-Building*, 11 STUD. AM. POL. DEV. 191, 217 (1997).

⁴³ TIEDEMAN, *supra* note 1, at 149–51; *see also id.* at 125; Stephen A. Siegel, *Historism in Late Nineteenth-Century Constitutional Thought*, 1990 WIS. L. REV. 1431, 1536.

⁴⁴ Jeffrey Rosen, *In Defense of the Constitution: The Battle for Obamacare*, NEW REPUBLIC (June 8, 2012), <http://www.newrepublic.com/article/politics/103943/magazine/constitution-avenue-supreme-court>. *But see* JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 6–7 (2013).

⁴⁵ *See, e.g.*, AMAR, *supra* note 2, at 146, 270.

⁴⁶ *See* Akhil Reed Amar, *American Constitutionalism—Written, Unwritten, and Living*, 126 HARV. L. REV. F. 195, 198 (2013).

⁴⁷ Siegel, *supra* note 43, at 1539.

⁴⁸ *See* Randy Barnett, *The Mirage of Progressive Originalism*, WALL ST. J. (Sept. 7, 2012, 5:35 PM), http://online.wsj.com/news/articles/SB10000872396390444914904577619763983330558?mod=googlenews_wsj&mg=reno64-wsj.

⁴⁹ *See, e.g.*, AMAR, *supra* note 2, at 305.

narrowed.”⁵⁰ Continuing this line of thought, an attempt to negate the systematic logic of constitutional law will in all likelihood lead to poor results in real life. Thus, according to Amar, the 1947 presidential succession statute’s “serious and multiple departures from the written Constitution’s letter and spirit make it doubtful that things will actually work smoothly in a future crisis.”⁵¹ Indeed, a statute that departs from the Constitution’s systematic logic will be proven as wrong by reality, just as a bridge designed not according to the rules of engineering will collapse.

In the end for Amar it all fits under systematic logic. Looking at the Constitution, both written and unwritten, as a whole the parts harmoniously fit together and have an entirety.⁵² Thus, in Amar’s picture, the two great rivals—living constitution and originalism—coincide: “America’s written Constitution lives—in America’s unwritten Constitution.”⁵³

While the justices, according to Amar, have over the years made many mistakes in understanding the Constitution’s systematic logic (though less in recent years than in the past),⁵⁴ the expert’s constitutional knowledge remains uncorrupted by judicial interpretation.⁵⁵ Systematic reason is the criterion Amar gives to explain why some of his positions, consistently and explicitly rejected by courts, are still the law of the land. The academic expert, rather than the justices, holds the true knowledge of constitutional law.⁵⁶ He or she is able to detect the “clear and remarkable trajectory” of the Constitution from the founding to the present.⁵⁷ While admitting the existence of indeterminacy in a “certain range,”⁵⁸ Amar presents his narrative as the only correct one because systematic reason dictates it. He views interpretative disagreements not as irreconcilable political disagreement on the vector of the Constitution, but as disagreements in which one side holds the correct answer.

For Tiedeman, judicial opinions express the evolution of the “prevalent sense of right” in society.⁵⁹ The judge is an “impartial expounder of the consensus that emerged from conflicting social forces—in a sense, the ‘conscience’ of the popular will” rather than “a scientific arbitrator.”⁶⁰ Six years after publishing “The Unwritten Constitution,” Tiedeman had partly deserted the notion that judges best state the prevalent idea of right. Instead, like Amar, he placed his trust in the jurist—the treatise writer—as best suited to accurately capture the living constitutionalist principles. According to Tiedeman’s position, the national will is discoverable

⁵⁰ *Id.* at 114–15.

⁵¹ *Id.* at 404–05.

⁵² See *id.* at 386; Akhil Reed Amar, *A Few Thoughts on Constitutionalism, Textualism, and Populism*, 65 *FORDHAM L. REV.* 1657, 1659 (1997).

⁵³ AMAR, *supra* note 2, at 387. See also *id.* at xiii (“We are all textualists; we are all living constitutionalists.”).

⁵⁴ See, e.g., *id.* at 218–23 (describing the Court’s misreading of the Constitution in the realm of religious freedom and in criminal procedure cases); see also Saikrishna Bangalore Prakash, *Guru Dakshina*, 2013 *U. ILL. L. REV.* 1787, 1791 (“If, as the book sometimes suggests, we are living at a constitutional high point where judicial doctrine is uncommonly right, we should enjoy this fleeting moment while it lasts.”).

⁵⁵ AMAR, *supra* note 2, at 236–37.

⁵⁶ Cf. Strauss, *supra* note 27, at 1533 (noting that many of Amar’s interpretations “would surprise someone who, for example, learned constitutional law from Supreme Court opinions”).

⁵⁷ AMAR, *supra* note 2, at 452.

⁵⁸ *Id.* at 231.

⁵⁹ Siegel, *supra* note 43, at 1522 (“By ‘prevalent sense of right,’ Tiedeman means the tenets of the vast majority of the people. These tenets cannot be changed by legislatures and courts; on the contrary, legislatures and courts can only serve and effectuate them.”).

⁶⁰ David N. Mayer, *The Jurisprudence of Christopher G. Tiedeman: A Study in the Failure of Laissez-Faire Constitutionalism*, 55 *MO. L. REV.* 93, 125 (1990).

through induction of the principles stemming from judicial decisions.⁶¹ Thus, Amar views the scholar as best able to distill reason, whereas Tiedeman views the scholar as best able to distill the people's will out of judicial decisional patterns.

II. THE DIFFICULTIES IN PUTTING REASON BACK IN ITS PRIVILEGED PLACE

Though the difference between Tiedeman's conclusions and Amar's suddenly seems less sharp, a comparison of the two books exposes a change in understanding the nature of constitutional law as a language and in our understanding of how constitutional law develops. As elaborated below, both changes are connected.

A. HOW DOES CONSTITUTIONAL LAW DEVELOP?

Tiedeman challenges the conventional view of his era, which holds that constitutional law is a relatively autonomous discipline controlled by reason. Amar attempts to re-establish this belief in the control of reason over constitutional law.

In 2005, Paul Kahn wrote of the "'New Haven School' of constitutional thought," characterized by privileging the People's will over reason.⁶² Kahn includes himself in this school with Bruce Ackerman and Jed Rubenfeld. Ackerman is the father of the idea that constitutional amendments occur not only according to the textually prescribed procedure as laid out in Article V, but also through social mobilization that represents the will of the People.⁶³

Robert Post and Reva Siegel's "democratic constitutionalism," Jack Balkin and Sanford Levinson's "partisan entrenchment," and William Eskridge and John Ferejohn's "superstatutes" are all part of this family of attempts to provide a depiction of the mechanisms through which popular will is incorporated into constitutional law even when it is expressed outside the mechanism of formal constitutional amendments.⁶⁴ As Mark Rosen and Christopher Schmidt have recently shown, the broccoli argument went through mechanisms such as these and became part of constitutional law.⁶⁵

It is important to stress that the belief of the New Haven School theorists that at times popular will is the driving force of constitutional law does not necessarily entail a rejection of the belief in a community of constitutional experts that vets arguments based on reason. For example, according to Ackerman, in order to have legitimate constitutional changes that transgress the constraints of the formal procedure for amending the Constitution, constitutional law must be understood as a relatively autonomous discipline that is entrusted in the hands of people trained in constitutional law.⁶⁶ In other words, an amendment outside of Article V cannot

⁶¹ Christopher G. Tiedeman, *The Doctrine of Stare Decisis, and a Proposed Modification of Its Practical Application, in the Evolution of the Law*, 3 U. L. REV. 11, 19–20 (1896); see also Siegel, *supra* note 43, at 1524.

⁶² KAHN, *supra* note 33, at 167 n.44.

⁶³ 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 10–17, 19, 27–31, 115, 261 (1998).

⁶⁴ See generally, WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 8 (2010); Robert C. Post & Reva Siegel, *Democratic Constitutionalism*, in *THE CONSTITUTION IN 2020*, 25 (Jack M. Balkin & Reva B. Siegel eds., 2009); Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 *FORDHAM L. REV.* 489 (2006).

⁶⁵ Rosen & Schmidt, *supra* note 9, at 128–29.

⁶⁶ ACKERMAN, *supra* note 63, at 60.

occur without a rupture in legality, and in order to have a rupture, there must be a community of experts that determines that a change represents a break in legality.⁶⁷ Otherwise, “We the People” cannot break through legality, which is what endows constitutional changes outside of Article V with public legitimacy. It was for this reason that Ackerman was so adamant in insisting that the New Deal Court was doctrinally correct in resisting the New Deal reforms.⁶⁸ If the New Deal Court could just as easily change its decisions without a true notion of legality restricting its rulings, then the involvement of “We the People” that brought the “New Deal Amendment” would have been meaningless.⁶⁹

With regard to the issue of the driving force in constitutional law, like the New Haven School, Tiedeman argued that although the Supreme Court is designed to counter popular will, “the judges themselves fall under the influence of the prevalent sense of right, and ordinarily give in their decisions an accurate expression of it.”⁷⁰ Courts are thus representatives of the democratic will.

For Amar, a decision by the Court is a legal error if it cannot be explained in terms of consistency and coherency with the systematic reading of constitutional law. With regards to the question of legality, the support of the people for the decision is immaterial as is the morality of the decision.⁷¹ Many developments in constitutional law that his colleagues at Yale Law School identify as breaches of constitutional law’s systematic reason yet legitimized by public will, seem only as breaches according to Amar. His narrative shows that through the eyes of the expert almost all of these “breaches” hew to the true systematic logic of America’s written and unwritten Constitution.

B. THE NATURE OF CONSTITUTIONAL LAW AS A LANGUAGE

The comparison of the two books exposes a shift that occurred in the controlling understanding of the *nature* of the constitutional language. Tiedeman wrote in the post-Civil War era, a period when the community of legal scholars viewed constitutional law as a language of expertise. In order to function as a language of expertise, like the language of medicine or engineering, legal language requires a viable community of experts. This community of experts is a group of professionals who practice according to a shared discipline. Their role as the exclusive arbiter of professional controversies is generally undisputed.⁷² Amar writes in a period when the community of expert constitutional speakers has partly dissolved as its shared practice has disappeared. This enabled the rise of the broccoli argument.

⁶⁷ See *id.* at 4–5, 10, 19, 27.

⁶⁸ See *id.* at 100–03.

⁶⁹ See JED RUBENFELD, *REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW* 11 (2005).

⁷⁰ TIEDEMAN, *supra* note 1, at 164.

⁷¹ Of course, New Haven School theorists may find a constitutional change driven by a social movement morally mistaken even if the Court adopts it as part of constitutional law. See, e.g., Jack M. Balkin, *Nine Perspectives on Living Originalism*, 2012 U. ILL. L. REV. 815, 842.

⁷² See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 169–70, 182 (2d ed., 1970).

During the 1930s, 40s, and 50s, the Court was very much engaged in a conversation with legal academia.⁷³ In recent decades, however, the Court has partly lost interest in the scrutiny of the professional academic community.⁷⁴ More recently, many in the legal academy lost interest in maintaining the craft of constitutional doctrinal scholarship. In the past, academic study of law produced doctrinal legal arguments for legal practice and, at the same time, such arguments were the very object of the academic study of law. Doctrinal work was “the highest form of American legal scholarship.”⁷⁵ Scholars understood their task as that of the judge: they wrote in the same doctrinal form as the courts.⁷⁶ However, in recent decades, the mastery of the internal demands of legal practice and the production of doctrinal work have become less important for constitutional scholars.⁷⁷

Indications of the dissolution of the community of expert speakers in the field of constitutional law are numerous.⁷⁸ For example, Laurence Tribe, whose *American Constitutional Law* treatise is the closest Americans ever had to an attempt to give a full systematic expertise-based account of constitutional law,⁷⁹ found no doctrinal logic in the current disarray of the Court’s adjudication, and thus decided not to complete the second volume of his third edition.⁸⁰ The constitutional academic community lost its pretension to speak in the name of apolitical doctrinal expertise.⁸¹ The Court, in turn, stopped treating it as a source of such expertise.⁸²

For Amar, the idea that political positions affect the expert’s constitutional views is a form of heresy. Amar, “a child, grandchild, and spouse of immigrant Americans,” was invited to testify at the 2004 Senate hearing that considered a proposed constitutional amendment that would allow long-standing naturalized citizens to run for president. Amar emphasizes that “I was being asked to testify not as a second-generation American but as a constitutional scholar,” and the views of the expert were not tainted by his personal background and preferences.⁸³

⁷³ See, e.g., Lani Guinier, *Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 22 (2008) (“Some Justices [during this period] explicitly acknowledged that legal academics were leaders in legal thought and constituted their audience [T]he Court began an external conversation with legal scholars.”).

⁷⁴ See, e.g., Brent E. Newton, *Law Review Scholarship in the Eyes of the Twenty-First-Century Supreme Court Justices: An Empirical Analysis*, 4 DREXEL L. REV. 399, 407 (2012); Adam Liptak, *The Lackluster Reviews That Lawyers Love to Hate*, N.Y. TIMES (Oct. 21, 2013), http://www.nytimes.com/2013/10/22/us/law-scholarships-lackluster-reviews.html?_r=0 (“The leading Supreme Court advocates know that law review articles carry almost no weight with the justices.”).

⁷⁵ See John H. Langbein, *Scholarly and Professional Objectives in Legal Education: American Trends and English Comparisons*, in 2 PRESSING PROBLEMS IN THE LAW: WHAT ARE LAW SCHOOLS FOR? 1, 2 (P. B. H. Birks ed., 1996).

⁷⁶ KAHN, *supra* note 12, at 18–19.

⁷⁷ See Richard A. Posner, *The Future of the Student-Edited Law Review*, 47 STAN. L. REV. 1131, 1132–33 (1995).

⁷⁸ See Or Bassok, *Showing Germans the Light*, I-CONNECT BLOG (May 22, 2013), <http://www.iconnectblog.com/2013/05/showing-germans-the-light>.

⁷⁹ LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES, at x (1985) (“*American Constitutional Law* . . . was an attempt to roll the constitutional universe into a ball and show it as a unified whole.”).

⁸⁰ Laurence H. Tribe, *The Treatise Power*, 8 GREEN BAG 2d 291, 294 (2005); see also Alice Ristroph, *Is Law? Constitutional Crisis and Existential Anxiety*, 25 CONST. COMMENT. 431, 431–32 (2009) (noting that the current doctrinal disarray in constitutional law “is so bad that” Laurence Tribe “does not think it is possible to clean it up”).

⁸¹ TUSHNET, *supra* note 10, at 177 n.*.

⁸² See Jess Bravin, *Chief Justice Roberts on Obama, Justice Stevens, Law Reviews, More*, WALL ST. J. L. BLOG (Apr. 7, 2010, 7:20 PM), <http://blogs.wsj.com/law/2010/04/07/chief-justiceroberts-on-obama-justice-stevens-law-reviews-more> (“Roberts said he doesn’t pay much attention to academic legal writing. Law review articles are ‘more abstract’ than practical, and aren’t ‘particularly helpful for practitioners and judges.’”).

⁸³ AMAR, *supra* note 2, at 453.

Disciplines require the relevant community to follow disciplinary rules.⁸⁴ Yet the American legal community has partly stopped following its own method of producing expert knowledge in constitutional law. Public opinion endows arguments with legitimacy as proper constitutional arguments irrespective of their “truth-value” in terms of the language of constitutional expertise. In salient cases, legal persuasiveness is measured in terms of the strength of public opinion.⁸⁵

This shift toward the primacy of public opinion is not merely a change in the “legal grammar that we all share and that we have all mastered.”⁸⁶ It is not merely a rise in the power of one sort of constitutional argument or even the creation of a new modality. The shift represents an incorporation of a new contrasting logic to the constitutional language. Even Philip Bobbitt, who equated constitutional law with the practice of constitutional discourse,⁸⁷ explained that in constitutional language “[n]ot just any argument will do, and a political argument *per se* will never do . . . and the standards of legal argument – neutrality, generality, consistency – are not the standards of the political operative.”⁸⁸ Indeed, law has a “bite” because “doctrine is not entirely elastic,” thus necessitating the exclusion of certain arguments that overstep doctrinal boundaries.⁸⁹ Yet, the process of vetting legal arguments through an exchange between the Court and academia has partly ceased. The disciplining rules of constitutional law, according to which the correctness of an interpretation is judged, lost their power at least in salient cases. In many ways, the acceptance of the broccoli argument as the law of the land in the Health Care case demonstrated that there is no authoritative “professional grammar” that can effectively ensure that the rules of the discipline are duly followed.⁹⁰ One may argue for the existence of a non-professional community that speaks the Constitutional language,⁹¹ yet this reading of reality implies that constitutional law has ceased to be a language of expertise that can exclude from constitutional discourse arguments even though they enjoy public support.

Amar does not offer a way to revive the community of constitutional experts. His disregard of this theoretical problem is most evident when he does not confront the case that is arguably the most challenging for his narrative prior to the Health Care case: *Bush v. Gore*.⁹² In *Bush v. Gore* the Court adopted arguments that “only a few weeks before the case made it to the Supreme Court, most election law specialists thought [are] close to frivolous.”⁹³ *Bush v. Gore* presents a deep challenge to the idea of a community of judges and academics who speak the same language of expertise. Amar himself admitted in the *Washington Post* that *Bush v. Gore* was the only “big Supreme Court case in the last 20 years” that he “mispredicted.” Yet he

⁸⁴ ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM* xi-xii, 8, 29–32 (2012) (discussing the production of expert knowledge).

⁸⁵ See Richard Primus, *Double-Consciousness in Constitutional Adjudication*, 13 *REV. CONST. STUD.* 1, 11, 19–20 (2007).

⁸⁶ PHILIP BOBBITT, *CONSTITUTIONAL FATE* 6 (1982).

⁸⁷ See generally Dennis Patterson, *Wittgenstein and Constitutional Theory*, 72 *TEX. L. REV.* 1837 (1994).

⁸⁸ PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 41 (1991).

⁸⁹ Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 *COLUM. L. REV.* 1137, 1190 (2011).

⁹⁰ See Owen M. Fiss, *Objectivity and Interpretation*, 34 *STAN. L. REV.* 739, 745 (1982) (“Rules are not rules unless they are authoritative, and that authority can only be conferred by a community.”).

⁹¹ See, e.g., Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 *NW. U. L. REV.* 719, 729 (2006) (raising the possibility of positing citizens as “the recognitional group,” that is, the group whose practice determines the boundaries of the constitutional language).

⁹² 531 U.S. 98 (2000).

⁹³ Balkin, *supra* note 10.

explained the he “was able to internalize that by saying they only had a few minutes to think about it and they leapt to the wrong conclusion.”⁹⁴ Thus, in his book he wrote only one short comment on the case.⁹⁵ But, Amar could not dismiss the Health Care case in the same manner. Before the decision, Amar told a reporter that “[i]f they decide this by 5-4, then yes, it’s disheartening to me, because my life was a fraud. Here I was, in my silly little office, thinking law mattered, and it really didn’t. What mattered was politics, money, party, and party loyalty.”⁹⁶

The simple answer to the challenge of *Sebelius* that Amar can give is that if almost the entire community of experts rejected a certain constitutional argument and the Court adopted it, then the Court is just wrong. The Constitution-in-exile will continue to live in purity in experts’ books like the one Amar wrote until it is vindicated some day, as Amar’s position regarding the Senate filibuster was vindicated.⁹⁷ However, as more and more scholars reject systematic narratives of constitutional law of the kind Amar presents, incorporate cases such as *Bush v. Gore* into their “expert” narrative of constitutional law, and embrace these cases as examples of how the rule of law works rather than as its exception, Amar’s constitutional language becomes a language of expertise without any experts using it.

CONCLUSION

While the Constitution currently serves as the focal point of American national identity,⁹⁸ in Tiedeman’s time its identity function was very much in decline. This difference may explain the difficulty in fulfilling Amar’s vision to restore constitutional law’s character as a language of expertise, as it had been in Tiedeman’s era. As Amar acknowledges, he writes in a time when the people cannot be alienated from the Constitution because in recent decades, the American national identity has been dependent, to a large extent, on the Constitution.⁹⁹ Hence, in order to fulfill its role in the identity domain, the will of the people must have some role in determining constitutional law. In contrast, Tiedeman wrote only a few decades after constitutional law failed during the Civil War to provide a unifying identity.¹⁰⁰ It is not surprising that, in his time, the understanding of constitutional law as a domain of expertise was ascendant.¹⁰¹ As long as the Constitution serves as the focal point of American identity, jurists cannot have the last word on its meaning and determine it according to disciplinary criteria.¹⁰² Amar’s bold book that aims to restore constitutional law to its status as a language of expertise is thus currently an unrealistic endeavor.

⁹⁴ Ezra Klein, *Of Course the Supreme Court is Political*, WONKBLOG WASH. POST (June 21, 2012), <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/06/21/of-course-the-supreme-court-is-political>.

⁹⁵ AMAR, *supra* note 2, at 195–96.

⁹⁶ Klein, *supra* note 94.

⁹⁷ Jeremy W. Peters, *In Landmark Vote, Senate Limits Use of the Filibuster*, N.Y. TIMES (Nov. 21, 2013) <http://www.nytimes.com/2013/11/22/us/politics/reid-sets-in-motion-steps-to-limit-use-of-filibuster.html?pagewanted=all>.

⁹⁸ MICHEL ROSENFELD, *THE IDENTITY OF THE CONSTITUTIONAL SUBJECT: SELFHOOD, CITIZENSHIP, CULTURE, AND COMMUNITY* 76 (2010).

⁹⁹ See AMAR, *supra* note 2, at 405, 480.

¹⁰⁰ See GUYORA BINDER & ROBERT WEISBERG, *LITERARY CRITICISMS OF LAW* 56–57 (2000).

¹⁰¹ See GUSTAFSON, *supra* note 3, at 57.

¹⁰² Or Bassok, *The Court Cannot Hold*, 30 J.L. & POL. 1, 3 (2014) (arguing that in the current state of affairs the Supreme Court cannot both play a leading role in constructing American identity and simultaneously serve as a forum of legal expertise).