COMMENTARY

A PENUMBRA TOO FAR

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Akhil Amar has done it again. With his characteristic vigor and creativity, he's taken a familiar problem and looked at it from a new and fascinating angle; legal thinking as original and compelling as his is rare indeed. His *Comment: The Case of the Missing Amendments*[1] is a thoughtful disquisition on one possible interpretation of the First, Thirteenth and Fourteenth Amendments, and probably the best justification we've seen for restricting some forms of bigoted speech.[2]

But, much as we admire Professor Amar's work, we feel the need to sound a note of caution, in large part because of the very originality of his proposal. Of course, not every problem can be tackled through precedent; the precedents themselves have to be made some time, occasionally more or less from whole cloth. But the fact that the Supreme Court can create new doctrines — and at times must create them — tells us nothing about whether the Court *should* create a particular new doctrine. Given that precedent is, by hypothesis, no longer a reliable guide in such situations, it becomes especially important to think about what will take its place as the benchmark for judging the soundness of new theories.

It's easy enough to come up with a plausible argument that would allow the Court to reach a result we like. But unless this is all we expect of constitutional doctrine — that it lead to the desired result in the case in which it's formulated — there are some hard questions we must ask: Why is the new doctrine superior to the existing doctrine, or to others we can come up with? Will it be judicially manageable? How will it transfigure the legal landscape, and what might be some of its unintended consequences? Because Professor Amar doesn't deal with these questions, and because we have our doubts about whether his suggested doctrines would survive such scrutiny, we, as they say in the judicial biz, respectfully dissent.

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** Nobody particularly important.

[1] 106 HARV. L. REV. 124 (1992).

[2] *See id.* at 160 n.187 (outlining his proposal). Professor Amar disclaims any purpose "to resolve definitively the issues raised by *R.A.V.*," *id.* at 160, and says he has "lingering uncertainty," *id.* at 161 n.189, about the extent to which restrictions on bigoted speech can be justified. Nonetheless, his proposal makes clear that he would approve of at least some anti-bigoted-speech laws, and that he disagrees with *R.A.V.*'s conclusion that bans on hate speech are impermissible. *See* R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2547–48 (1992).

I. PATRIOTISM WITH RELIGIOUS FERVOR: THE CASE OF THE ENIGMATIC EMANATION

One of the first things that caught our eyes about Professor Amar's paper was a remarkable footnote. Flag desecration laws, says footnote 62, implicate not only the Free Speech Clause but also the Establishment Clause:

> [I believe] flag-burning laws raise serious Establishment Clause concerns. To speak of flag "desecration," as did many laws, is to blur the sacred and the profane, the spiritual and the secular. For the ultimate good of both church and state, government must not be allowed to drape itself in religious imagery. The word "desecrate" is a red flag that a dangerous establishment of religion is afoot.[3]

Now, there's a great deal of controversy about the meaning of the word "establishment" in the Establishment Clause, which provides that "Congress shall make no law respecting an establishment of religion."[4] There's some controversy about "respecting" and "Congress,"[5] and even some about the absence of an "a" before "religion."[6] But the one thing that has seemed clear up to now is that the Establishment Clause is about establishing *religion*.[7] Not about establishing symbols (even symbols to be venerated), or restricting symbolic speech, but about establishing religion.

Of course, Professor Amar is talking about what Establishment Clause doctrine should be, not about what it is. Saying that his proposal is inconsistent with the current understanding of the clause

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[3] Amar, *supra* note 1, at 133 n.62.

[4] U.S. CONST. amend. 1. *Compare, e.g.*, Lee v. Weisman, 112 S. Ct. 2649, 2655, 2658 (1992) (holding that the Establishment Clause bars government coercion of religious practice, which includes "subtle coercive pressure") *with id.* at 2665 (Blackmun, J., concurring) (maintaining that the Establishment Clause bars both government coercion of religious practice and government involvement in religious matters) *and id.* at 2686 (Scalia, J., dissenting) (arguing that the Establishment Clause bars only government coercion "by force of law and threat of penalty") (emphasis omitted); Everson v. Board of Educ., 330 U.S. 1, 15–16 (1947) (holding that the bar on "establishment" prohibits only state-established churches and tithes to support churches) *with id.* at 33 (Rutledge, J., dissenting) (asserting that the bar on "establishment" forbids "all use of public funds for religious purposes").

[5] *Compare Lee*, 112 S. Ct. at 2683 (Scalia, J., dissenting) (arguing that the Establishment Clause was intended "to protect state establishments of religion from federal interference") *and* Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1157–60 (1991) (making a similar point) *with* Abington School Dist. v. Schempp, 374 U.S. 203, 255 (1963) (Brennan, J., concurring) (maintaining that the Fourteenth Amendment applies the Establishment Clause to the states, so that the "respecting" prohibition applies to state laws as well).

[6] *See Lee*, 112 S. Ct. at 2669–70 (Souter, J., concurring) (noting that this omission "forbids support for religion in general no less than support for one religion or some").

[7] *But see* Smith v. Board of School Comm'rs, 655 F. Supp. 939, 988 (S.D. Ala.) (banning certain textbooks from public schools because they advance a "religion of secular humanism"), *roundly squash'd*, 827 F.2d 684, 695 (11th Cir. 1987).

is in a sense beside the point: Perhaps the current understanding is wrong and he is right. And his reading can be quite appealing from a normative point of a view — if flag protection laws are bad, Professor Amar provides yet another lever for overturning them.

But is that enough? There are a thousand and one plausible readings of the Establishment Clause and the other parts of the Constitution. How do we go about deciding which readings to adopt, which to reject? What separates a genuine advance in constitutional thinking from a flight of fancy? What criteria do we apply in judging whether a new approach to a constitutional issue deserves serious consideration?

Remembering our law school days, we want to answer these questions with a question, or rather with three questions. These are three questions all of us — as commentators, as judges, as citizens — should ask about every proposed constitutional reading. First, what we call the Preference Question: Setting aside one's attitude toward the result, is the proposed reading not merely *a* plausible interpretation but *the most* plausible interpretation? Second, the Concreteness Question: Is the doctrine precise enough to separate what's permitted from what's forbidden? And third, the Unintended Consequences Question: Will the rationale for the doctrine, if accepted, sweep far more broadly than we might like?

A. The Preference Question

Is Professor Amar's interpretation of the Establishment Clause the most plausible one? There are many sources one can look to in answering this question. The first is the text: For instance, while the Free Speech Clause doesn't protect all speech, its broad wording makes speech-protective arguments much more credible. Another is the original understanding: To take the least controversial example, the Seventh Amendment's guarantee of jury trial in "suits at common law"[8] could be read as applying only to judicially created, rather than statutory, causes of action. However, because the Framers meant to draw the distinction not between common law and statute but between common law and equity, that's how we interpret the Amendment.[9]

One can also argue based on precedent, which, though not dispositive, is nonetheless relevant.[10] The Free Speech and Free Press

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[8] "In suits at common law . . . the right of trial by jury shall be preserved . . . ." U.S. CONST. amend. VII.

[9] *See* Shields v. Thomas, 59 U.S. (18 How.) 253, 262 (1856).

[10] Precedent matters for a number of reasons, not the least of which is practical: The Court can't rethink all of constitutional doctrine in every constitutional case. *But see* Gary S. Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y (forthcoming 1994) (arguing that extensive reliance on constitutional precedent rather than on the Constitution itself is improper); Akhil R. Amar, *On Lawson on Precedent*, 17 HARV. J.L & PUB. POL'Y (forthcoming 1994) (disagreeing with Lawson).

Clauses, for instance, might have been meant only to protect against prior restraints,[11] but after fifty years of contrary case law the broader reading has acquired a plausibility that would be hard to dislodge. Some arguments can be based on logic: As Professor Amar points out, it makes little sense to read the Free Speech Clause as applying only to speech and not to writing or to symbolic expression, which generate precisely the same benefits and harms.[12]

Other plausibility arguments may be based on the need to prevent a constitutionally guaranteed right from being circumvented by an obvious end run. The privilege against self-incrimination,[13] for instance, could be literally read as applying only in criminal cases, but we let people assert it to some extent in civil cases as well;[14] this may be in part because otherwise the government could too easily evade it.[15] Still other arguments look to the principle behind the constitutional provision, the background values the provision seeks to protect: If certain government conduct endangers those values, these arguments contend, it should be barred even if it's not literally within the provision's scope. The right of political association, for instance, has been justified this way.[16]

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[11] Or might not. *Compare* Patterson v. Colorado, 205 U.S. 454, 462 (1907) (Holmes, J.) (stating that the main purpose of First Amendment is "to prevent . . . previous restraints upon publication . . . and . . . not [to] prevent the subsequent punishment") (emphasis omitted) *with* Schenck v. United States, 249 U.S. 47, 51–52 (1919) (Holmes, J.) ("[I]t well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose . . . .").

[12] *See* Amar, *supra* note 1, at 133–37. We agree with Professor Amar's logical argument for protecting flag-burning far more than with his literalist argument. Professor Amar argues that flags are *literally* protected by the phrase "freedom of the press" because "the unique ink marks *printed and pressed* upon a cloth are what make the cloth a *flag* in exactly the same way that the unique ink marks *printed and pressed* upon a sheet of paper make it the *New York Times*." *Id.* at 134. As it happens, many flags are made by stitching together pieces of dyed cloth, with no ink or printing or pressing; moreover, even if making a flag qualifies as a "press" act, burning a flag would not be any more a "press" act than would using a newspaper to wrap fish.

[13] "[N]or shall any person . . . be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

[14] *See* McCarthy v. Arndstein, 266 U.S. 34, 40 (1924).

[15] This is a good example of how one approach can be a tie-breaker when another yields inconclusive results. One could argue textually that "be[ing] compelled in any criminal case to be a witness against [your]self," U.S. CONST. amend. V, covers any use of compelled testimony in a criminal case, regardless of where it was compelled; but one could argue equally well that it covers only testimony that was actually compelled in a criminal case. The fact that the latter reading would make it easy for the government to extract damaging evidence in a civil suit or in a grand jury investigation and thus eviscerate the privilege is a good argument for the former reading. *Cf.* Guinn v. United States, 238 U.S. 347, 360, 364–65 (1915) (striking down a grandfather clause that was a clear attempt to evade the Fifteenth Amendment).

[16] *See* NAACP v. Alabama, 357 U.S. 449, 460–61 (1958); *see also* Pennsylvania v. Union Gas Co., 491 U.S. 1, 31–32 (1989) (Scalia, J., concurring in part and dissenting in part) (discussing the Eleventh Amendment's background values).

There are other possible rationales for a particular constitutional reading: For instance, one

There's a lively debate about which of these arguments is more persuasive or more legitimate; we need not, however, reach it here, because none of the arguments lends more support to Professor Amar's reading of the Establishment Clause than to the conventional reading. Textually, it's hard to argue that a ban on nonreligious conduct, justified by a nonreligious reason, is an "establishment of religion."[17] Neither is there any evidence that the drafters of the Establishment Clause and the Fourteenth Amendment meant them to prohibit the protection of purely nonreligious symbols.[18] Likewise, neither the precedents nor the end run argument nor the logical argument bolster Professor Amar's proposal.

The one approach that might support Professor Amar's theory is that based on background values. The Establishment Clause, the argument would go, is less about religion per se and more about separating "the spiritual [from] the secular."[19] Any government action that blurs the two, then, even if it doesn't involve religion, is unconstitutional.

But again, the question must be not whether this is a plausible background value, but whether it's more plausible than the alternatives.[20] For example, what we know about the original intent behind the First Amendment makes it more plausible to see the Amendment as being about self-government as well as speech, rather than about speech alone; this is what justifies extending First Amendment protection to the right of association.[21] Likewise, our understanding of what makes "unreasonable searches and seizures" obnoxious leads us to conclude that it's more plausible to read the Fourth Amendment as protecting privacy, not just property; this is why electronic eavesdropping is seen as a "search" though literally it's not.[22]

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could appeal to the underlying structure of the Constitution, *see* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176–80 (1803), or to the perceived necessities of government, *see* United States v. Nixon, 418 U.S. 683, 705 & n.16 (1974), or to other established tools of statutory interpretation.

[17] Professor Amar's stress on the word "desecrate" — which comes from the same root as "sacred" — is probably an attempt at textualism, but we have doubts about this Law and Etymology approach. Secular language borrows religious words all the time, especially when talking about moral matters. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (Douglas, J.) (condemning government intrusion into the "sacred precincts of marital bedrooms"); *see also* statutes described *infra* in notes 32–34, which use "desecrate," "crusade," "blessed," "sacrifice," and "sanctity" in their secular senses.

[18] *See* Lee v. Weisman, 112 S. Ct. 2649, 2668–70 (1992) (Souter, J., concurring) (summarizing the history of the Establishment Clause).

[19] Amar, *supra* note 1, at 133 n.62.

[20] Or, to be more precise, whether a proposed set of background values is the most plausible such set; a constitutional provision may have more than one background value.

[21] *See* NAACP v. Alabama, 357 U.S. 449, 460 (1958).

[22] *See* Katz v. United States, 389 U.S. 347, 353 (1967); *see also* Warden v. Hayden, 387 U.S. 294, 304 (1967) ("We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property.").

Professor Amar, we believe, hasn't borne the burden of proof on this point. We see nothing that makes the desire to separate the spiritual from the secular a more plausible background value for the Establishment Clause than, say, the desire to prevent social tension caused by government support for particular religious groups, or to prevent government entanglement in religious doctrine. Perhaps given more of an opportunity, Professor Amar could convince us of the contrary, but as things stand, the latter two theories seem a good deal more plausible to us.

B. The Concreteness Question

We believe, then, that Professor Amar's proposed reading of the Establishment Clause is a nonstarter: It sounds pretty good, but not as good — except insofar as one prefers its result — as the reading we have today. But, even if this weren't so, there's another question that must be asked about the suggested doctrine: Is it shadow or substance? Does it clearly separate what's permitted from what's forbidden? Or does it turn on broad generalities that look fine on the printed page but are too vague for real-life application?

Few doctrines can reasonably aspire to produce mechanical answers for every case. But they *are* supposed to make finding the answer easier, not harder. A constitutional test that relies on abstract and ill-defined terms only changes the focus of the inquiry from the meaning of the constitutional provision to the meaning of the test's Delphic language. For example, the Court has correctly rejected the notion that the First Amendment protects only speech relevant to self-government. The notion is reasonable; it's not immediately obvious that the First Amendment's core values require protecting *The Rocky Horror Picture Show* or 2 Live Crew. But figuring out whether speech is "relevant to self-government" is such a difficult — perhaps impossible — matter that we have by and large rejected it as a First Amendment test.[23]

Moreover, the vaguer the doctrine, the easier it is to squeeze out of it by manipulating its terms. Constitutional law is meaningful only to the extent it forces government officials — including judges — to do things they would otherwise rather not: protect unpopular speakers,

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[23] *Cf.* Kingsley Pictures Corp. v. Regents of the Univ., 360 U.S. 684, 689 (1959) (announcing that social commentary is entitled to same protection as political commentary); Winters v. New York, 333 U.S. 507, 510 (1948) (holding that entertainment is entitled to same protection as political speech). The Court has drawn a distinction between political and non-political speech, but only in extremely limited contexts. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 760 (1985) (as applied to false statements of fact, which are already of low constitutional value); Connick v. Myers, 461 U.S. 138 (1983) (as applied to speech by government employees, which is generally more regulable).

uphold the rights of criminals, and the like. It's much easier to quietly remold a vague, malleable rule than to explicitly overrule a more rigorous one; if liberty "finds no refuge in a jurisprudence of doubt,"[24] it similarly finds none in a jurisprudence that any court can read to mean anything it pleases. The Court's test for the validity of commercial speech regulations, adopted in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[25] is a good example: It was so vague and elastic that *Posadas de Puerto Rico Associates v. Tourism Co.*,[26] while purporting to use it, reached a result that was virtually impossible to square with *Central Hudson* itself.[27] Likewise, we've always admired Justice Stevens's incisive critiques of the First Amendment content-neutral/content-based distinction,[28] but the "multi-faceted analysis" he proposes in its place is too amorphous to serve as a reliable protector of unpopular ideas.[29]

Professor Amar's proposed Establishment Clause principle doesn't pass the concreteness test. True, if you describe flag desecration laws as "blur[ring] . . . the spiritual and the secular," as letting the government "drape itself in religious imagery," as enshrining "near-worshipful attitude[s]," as banning "blasphemy," or as being based on "mystical reverence,"[30] it becomes tempting to find some Establishment Clause violation. But what do these phrases really mean? Are laws that bar the *desecration* of the environment[31] unconstitutional

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[24] Planned Parenthood v. Casey, 112 S. Ct. 2791, 2803 (1992) (O'Connor, Kennedy & Souter, JJ.).

[25] 447 U.S. 557, 571–72 (1980).

[26] 478 U.S. 328 (1986).

[27] *See id.* at 344–46; Philip B. Kurland, *'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wondrous Pitiful*, 1986 SUP. CT. REV. 1, 12 (arguing that *Posadas* "patently" misapplied prior doctrine). *Central Hudson* struck down a ban on utility advertising because it wasn't "narrowly tailored" to the state's interest in promoting energy conservation. 447 U.S. at 569–72. *Posadas* upheld Puerto Rico's ban on casino advertising aimed at residents, holding that it was narrowly tailored to the Commonwealth's interest in decreasing gambling by residents. 478 U.S. at 343–44. As Justice Brennan convincingly demonstrated, *see id.* at 356–58 (Brennan, J., dissenting), the casino advertising ban was, by *Central Hudson* standards, not narrowly tailored at all; but the slipperiness of the phrase "narrowly tailored" allowed the Court to uphold the ban nonetheless.

[28] *See, e.g.*, Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 544–48 (1980) (Stevens, J., concurring).

[29] *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 742–51 (1978) (Stevens, J.) (upholding an FCC order that informally sanctioned a broadcaster for airing George Carlin's "Filthy Words" monologue).

[30] Amar, *supra* note 1, at 133 n.62.

[31] *See, e.g.*, ALASKA STAT. § 41.35.010 (1992) ("It is the policy of the state to preserve and protect the historic, prehistoric and archeological resources of Alaska from loss, *desecration* and destruction . . . ."); N.H. REV. STAT. ANN. § 163-B:1 (1990) ("It is the intention of the legislature by this chapter to provide for [prohibition of littering] and to curb thereby the *desecration* of the beauty of the state . . . ."); *see also* ARK. CODE ANN. § 23-3-402 (Michie 1992) (noting

because they're based on our "mystical reverence" for the Earth and its natural beauty? Is teaching schoolchildren that racism or Communism is evil and urging people to take up a *crusade* against hatred an attempt to drape the concepts of tolerance or democracy "in religious imagery"?[32] Is a *holiday* that commemorates the *sacrifices* made by a person or a group of people an attempt to impose "near-worshipful attitude[s]" toward them by characterizing the causes they fought for as sacred?[33]

We say all this not because we're afraid that, if Professor Amar's theory were implemented, such laws would be struck down. We're pretty sure they wouldn't be. But that very fact should give one pause, should make one ask what exactly Professor Amar's doctrine means. If "[t]he word 'desecrate' is a red flag that a dangerous establishment of religion is afoot,"[34] but the words "crusade," "holiday," and "sacrifice" are not, then what's the substance of Professor Amar's doctrine? All the doctrine would likely do is give judges a license to strike down the uses of religious imagery they dislike and uphold those they like.

The weakness of Professor Amar's proposal comes from the same source as its rhetorical power. Using terms such as "religious imag-

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presidential call for Americans to make "*sacrifices*" for the sake of energy conservation); COLO. REV. STAT. § 25-16.5-102(1) (West Supp. 1992) ("The general assembly hereby finds . . . Colorado is *blessed* by natural beauty . . . which should be maintained . . . ."); IOWA CODE ANN. § 455E.8 (1990) (prescribing public education that "call[s] for *sacrifice*" in order to protect groundwater reserves); UTAH CODE ANN. § 65A-8-1.1 (1992 Supp.) (establishing a "Leaf-It-To-Us Children's *Crusade* for Trees") (all emphases added).

To some, the environment is as sacred as the flag is to others. *See, e.g.*, Richard E. Cohen, *Along the Campaign Trail*, NAT'L J., Sept. 26, 1992, at 2201 (mentioning Vice-President Gore's "'religious fervor' on environmental protection").

[32] *See, e.g.*, N.M. STAT. ANN. § 1-14-13 (Michie 1992) (election precinct boards shall "protect the secrecy and *sanctity* of the ballot"); 1989 P.R. LAWS Act No. 14 (setting up "'Neighborhood Security Councils' . . . that join efforts with the Police in a *crusade* against crime"); *Doctors Begin Campaign to Help Battered Women*, L.A. TIMES, Jan. 4, 1989, § 1, at 17 (attributing to Surgeon General C. Everett Koop the belief that "doctors must become part of the *crusade* against [domestic] violence") (all emphases added).

[33] *See, e.g.*, ARK. CODE ANN. § 1-5-109 (Michie Supp. 1991) (declaring April 9 to be a day "to commemorate the *sacrifices*" of prisoners of war); NEB. REV. STAT. § 84-104.02 (1987) (declaring January 15 to be a holiday "in recognition of the *sacrifices* of the late Martin Luther King, Jr."); N.C. GEN. STAT. § 165-19 (1992) (setting up scholarships for children of war veterans "in appreciation [of their] service and *sacrifices*") (all emphases added); 1992 PA. LAWS 50 (declaring the third Friday of September to be a day "to commemorate the *sacrifices* and patriotism" of POWs and MIAs). *See also* N.C. GEN. STAT. § 20-183.1 (1992) (justifying highway safety laws by saying that "preservation of human life is a *sacred* duty"); WASH. REV. CODE ANN. § 9.68A.001 (West 1988) (banning child pornography because "[t]he care of children is a *sacred* trust") (all emphases added). LEXIS® and WESTLAW® jockeys can come up with many more examples; the authors offer a small but prestigious prize to the person who comes up with the best example within one year of publication.

[34] Amar, *supra* note 1, at 133 n.62.

ery," "spiritual" and "blasphemy" in their figurative rather than their literal senses makes for an eloquent argument, but also for an infinitely malleable test. Used figuratively, those phrases can mean almost anything, but when it comes to constitutional doctrine something that can mean almost anything means nothing at all.

C. The Unintended Consequences Question

Finally, there's a third question to be asked about every proposed new doctrine: What are the unintended consequences of adopting not only the doctrine, but also its rationale? How broadly will the rationale sweep once it's accepted? Will it protect the things we value today only to be used by others to destroy them tomorrow? The vagueness of the proposed "religious imagery" doctrine makes it hard to guess at its intended consequences, much less the unintended ones, so we'll leave this question aside for now. But, as we'll discuss shortly, it returns with a vengeance in the context of Professor Amar's Thirteenth Amendment argument.

II. Free Speech and Badges of Slavery: The Case of the Perilous Penumbra

Of course, the reason for this commentary is not footnote 62. Whether flag-burning laws, already prohibited by the Free Speech Clause, might also run afoul of the Establishment Clause is a relatively minor issue. But the points we raise in discussing the footnote also cast light on Professor Amar's principal argument, which is a major one indeed.

The Thirteenth Amendment, Professor Amar contends, to a certain — limited — extent trumps the First.[35] Some speech that would otherwise be protected by the First Amendment could under this theory be prohibited in order to further the Thirteenth Amendment's antislavery principle. Because the Thirteenth Amendment prohibits private conduct, not only state action, and because it prohibits not just forced labor but also "badge[s] of servitude,"[36] the government can ban speech that imposes such badges. Specifically, the government may outlaw speech "targeted at captive members of historic

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[35] Professor Amar asserts that under his argument "[n]either Amendment 'trumps' the other; rather they must be synthesized into a coherent doctrinal whole." *Id.* at 151 n.180. But what does this mean? There can be no synthesis between yes and no, never and always (or even never and sometimes). It's clear that, under Professor Amar's proposal, the Thirteenth Amendment would justify some speech restrictions. *See id.* at 160 n.187. Sounds like trumping to us.

[36] *Id.* at 158 (quoting The Civil Rights Cases, 109 U.S. 3, 35–36 (1883) (Harlan, J., dissenting)).

racial outgroups . . . designed to degrade and dehumanize them, or suggest their untouchability."[37]

Interesting as this thesis is, we remain unconvinced, for the same reasons we weren't convinced by the Establishment Clause argument. We therefore challenge Professor Amar's proposed reading of the Thirteenth Amendment by asking the same three questions. First, is it more plausible than the opposite reading? Second, is "badges and incidents" a concrete enough term to build a doctrine on? And, third, does it give us a very great deal more than we bargained for?

A. Pursuing Pareto Plausibility

The Thirteenth Amendment says:

> 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> 2. Congress shall have power to enforce this article by appropriate legislation.[38]

At first glance — and at second and third glance, too — this seems to have nothing at all to do with cross-burning. Cross-burning is neither slavery nor involuntary servitude. Perhaps burning a cross in front of someone's house does hold them captive in a sense,[39] but this is only a figure of speech: the captivity here is psychological, not physical.[40] Moreover, the Amendment says nothing about race.[41] If burning a cross in front of a captive audience "enslaves" them, then so does picketing or parading outside anybody's house (or workplace), whether related to the captives' race or not.

It's possible, of course, to read the Thirteenth Amendment more broadly, which Professor Amar does: The Thirteenth Amendment, he contends, is aimed not only at physical enslavement but also at the "badges and incidents" of slavery, including racial discrimination and harassment.[42] Moreover, because the Amendment — while never

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[37] *Id.* at 160 n.187.

[38] U.S. CONST. amend. XIII.

[39] *See* Amar, *supra* note 1, at 156.

[40] Of course, the cross-burners might stick around, menacing the inhabitants of the house and holding them literally captive (though we probably wouldn't call this "slavery" or "servitude"). But in such cases, it would be the threatening conduct that effects the captivity, and such conduct is punishable without regard to the First Amendment.

[41] *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 72 (1873) (holding that the Thirteenth Amendment, though directed primarily at the enslavement of African-Americans, bans all forms of slavery); *see also* Bailey v. Alabama, 219 U.S. 219, 240–41 (1911) ("While the immediate concern was with African Slavery, the Amendment was not limited to that. It was a charter of universal civil freedom for all persons, of whatever race, color, or estate."); Amar, *supra* note 1, at 156; Akhil R. Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to* DeShaney, 105 HARV. L. REV. 1359, 1360 (1992).

[42] *See* Amar, *supra* note 1, at 155.

mentioning race — was created in response to race-based slavery, it extends only to race-based "badges and incidents."[43] And, because the amendment was aimed at freeing the black race, it might justify even "openly asymmetric regulation of racial hate speech" — bans of hate speech that is aimed at blacks but not of hate speech that is directed at whites.[44]

But possible as this reading may be, it is undoubtedly a stretch. It might be a legitimate stretch, but a stretch it is. Moreover, it's a stretch that should be particularly worrisome, because it not merely justifies broadened congressional power (something we've gotten used to in the half century since the New Deal[45]) but cuts an inroad into another constitutional right. So we turn to our first question, which is not "Is Professor Amar's reading of the Thirteenth Amendment plausible?" — we suppose it is — or "Does it reach a morally justifiable result?" — a question we'll leave to the reader — but rather: Is it more plausible than the opposite reading, the reading that the Thirteenth Amendment provides no independent justification for abridging the rights guaranteed by the First? The answer, we think, is a resounding no.

The argument Professor Amar makes to support his reading is a mixture of the precedential and background values arguments.[46] The word "slavery" in the Thirteenth Amendment, he contends, is about more than just physical captivity or forced labor: In *Jones v. Alfred H. Mayer Co.*,[47] the Supreme Court held that Section 2 of the amendment allows Congress to abolish not only slavery itself, but also the "badges and incidents of slavery," for instance, race discrimination.[48] Cross-burning, he argues, is such a badge.[49]

But even if Section 2 of the Thirteenth Amendment is read so broadly, does it make sense to construe this grant of congressional power as exempt from First Amendment scrutiny? In exercising its other powers — for example, its Federal District Clause power,[50] Election Clause power,[51] and Post Office Clause power,[52] — the government is entirely bound by the Bill of Rights.[53] Why would it

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[43] *Id.* at 156.

[44] *Id.* at 160.

[45] *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (permitting federal regulation of intrastate commerce); Wickard v. Filburn, 317 U.S. 111, 132–33 (1942) (permitting the regulation of wheat grown for home consumption under the Agricultural Adjustment Act of 1938); *see also* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556 (1985) (permitting federal regulation of state government employment practices).

[46] *See* Amar, *supra* note 1, at 155–58.

[47] 392 U.S. 409 (1968).

[48] *Id.* at 439.

[49] *See* Amar, *supra* note 1, at 126, 155.

[50] *See* U.S. CONST art. I, § 8, cl. 17.

[51] *See id.* art. I, § 4, cl. 1.

[52] *See id.* art. I, § 8, cl. 7.

[53] *See* United States v. Grace, 461 U.S. 171, 179–80 (1983) (Federal District Clause); Buckley

be any less bound in exercising its Thirteenth Amendment Enforcement Clause power?[54]

One could try to distinguish Congress's Article I powers from its Thirteenth Amendment powers. For instance, one could argue that, because the Thirteenth Amendment was enacted after the first eight amendments, it should be permitted to trump them in a way Article I can't. But while the chronology might mean the Thirteenth Amendment *could* alter the First, this doesn't mean it *does* alter it.[55] The notion that every constitutional amendment is a partial repeal of every previously-enacted constitutional provision has hair-raising implications.[56] Does the Sixteenth Amendment, which grants Congress the power to "lay and collect taxes on incomes, from whatever source derived,"[57] authorize a tax levied only on income derived from sale of antigovernment literature, or a tax only on blacks?[58] Does it allow collection techniques that violate the Fourth Amendment? Does the Fourteenth Amendment's Enforcement Clause authorize ex post facto laws, or the suspension of habeas corpus?[59]

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v. Valeo, 424 U.S. 1, 13–14 (1976) (Election Clause); Lamont v. Postmaster Gen., 381 U.S. 301, 307 (1965) (Post Office Clause).

[54] Of course, the Enforcement Clause, as interpreted by *Jones*, makes clear that abolishing the badges and incidents of slavery is a legitimate government interest, perhaps even a compelling one. But this is a similarity to Congress's Article I powers, not a difference — the Article I powers, which also serve legitimate, perhaps compelling, government interests, are clearly limited by the First Amendment.

[55] *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 42 (1989) (Scalia, J., concurring in part and dissenting in part) ("We do not dispute that [it] is possible [for one constitutional provision to supersede another], but only that it happened.").

[56] In some circumstances, the Twenty-First Amendment, which grants states broad powers to regulate liquor, has been recognized as trumping the First. *See* California v. LaRue, 409 U.S. 109, 116-19 (1972); *see also id.* at 134-35 (Marshall, J., dissenting) ("I submit that the framers of the [Twenty-First] Amendment would be astonished to discover that they had inadvertently enacted a *pro tanto* repealer of the rest of the Constitution."). Fortunately, this has remained a limited (one hopes a moribund) doctrine. *But see* Larkin v. Grendel's Den, Inc., 459 U.S. 116, 128 (1982) (Rehnquist, J., dissenting) (citing *LaRue* in arguing against an Establishment Clause challenge to a liquor-regulation law).

Compare Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976), which held (correctly) that, despite the Eleventh Amendment, § 5 of the Fourteenth Amendment allows Congress to impose damage awards against states in civil rights actions. It makes sense to read the Fourteenth Amendment as trumping the Eleventh, because the point of the Fourteenth Amendment was to increase the power of the federal government over the states, while the point of the Eleventh was to cut back on it. The question isn't which amendment came later; it is whether one amendment was meant to partly supersede the other.

[57] U.S. CONST. amend. XVI.

[58] Justice Brennan once opined that "[i]t would be a fragile Constitution indeed if subsequent amendments could, without express reference, be interpreted to wipe out the original understanding of congressional power." *Union Gas Co.*, 491 U.S. at 18 (plurality opinion) (concluding that the Eleventh Amendment doesn't trump the Commerce Clause).

[59] *See* U.S. CONST. art. I, § 9, cls. 2, 3.

Likewise, one could argue that the Thirteenth Amendment should be read more broadly than Article I, because it is unique in banning private conduct, not merely state action.[60] But it is only the first Section of the Amendment that applies to private conduct, and Professor Amar doesn't contend that the first Section, standing alone, bars private racist harassment. His argument is based on the Amendment's enforcement clause,[61] which is no different from the Article I powers in allowing congressional regulation of private conduct.

But the question ultimately isn't whether you can theoretically distinguish one clause from another, whether you can find a justification for ascribing to the Thirteenth Amendment a potency no other grants of power possess. Everything is distinguishable, if you're willing to stretch far enough. The question is whether, setting aside your desire to achieve a particular result, interpreting the Thirteenth Amendment as trumping the First makes more sense than interpreting it as leaving the First Amendment alone.

Professor Amar hits the nail on the head in criticizing the *Johnson* dissenters for trying to create a special First Amendment exception for the flag: One could argue the flag is different; one could point to its unique history; one could urge that it be protected while denying that any other symbol should be. But if you put aside the desire to justify the flag desecration laws, and ask which is the most sensible reading of the First Amendment, the *Johnson* majority's reading wins hands down.[62] So it is with the argument that the Thirteenth Amendment authorizes the government to abridge speech: It's plausible; it's colorable; it's the sort of argument a skilled advocate ought to make. But unless achieving a certain result is all you're after, you'll go with the opposite reading every time.

B. Menacing Metaphors

But say you disagree. You think a neutral observer would find that Professor Amar's reading is the more plausible. Or say you refuse to be a neutral observer. In any event, let's say you're tempted to accept the notion that the Thirteenth Amendment empowers the government to limit First Amendment rights in order to abolish "badges of slavery."

What exactly is it that you'd be accepting? The phrase "badges and incidents of slavery" has a nice ring to it, but it's hard to tell just

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[60] *See* United States v. Kozminski (no relation), 487 U.S. 931, 942 (1988); The Civil Rights Cases, 109 U.S. 3, 20 (1883); Amar, *supra* note 1, at 155.

[61] "The Thirteenth Amendment . . . authorizes governmental regulation in order to abolish all of the vestiges, 'badges[,] and incidents' of the slavery system. The White Four could well have argued that the burning cross erected by R.A.V. was such a badge." Amar, *supra* note 1, at 155 (citation omitted).

[62] *See id.* at 133–37, 144–46.

what it means. That's fine so long as it only augments Congress's enumerated powers: The federal government is, in practice, no longer a government of limited powers,[63] so it doesn't much matter whether additional grants of power are precise or vague.

But when such a vague phrase is used to limit individual rights, precision starts to matter a lot. Is there any principled way for judges to determine when speech imposes a "badge or incident of slavery" and can therefore be prohibited? Can we be confident that judges with whose outlook we disagree will make these decisions wisely?

Professor Amar's discussion isn't particularly reassuring. "[I]f mere refusal to deal with another on the basis of race can constitute a badge of servitude," he argues, "surely the intentional racial harassment of blacks can constitute a badge of servitude as well."[64] Under this theory, he says, "the intentional trapping of a captive audience of blacks" can be "temporary involuntary servitude," which in turn is "a sliver of slavery."[65] But why then does he conclude that "speech that does not involve an unwilling captive audience, especially if part of political discourse, is absolutely protected"?[66] One could just as easily say that racist propaganda leads people to pay less to black employees, which in turn creates "[partially] involuntary servitude";[67] or advocacy of pseudo-scientific race disparity theories sets up a caste system which is itself "a sliver of slavery";[68] or the very candidacy of a David Duke "degrade[s] and dehumanize[s]" and "suggest[s] [the] untouchability"[69] of blacks or Jews.

Likewise, Professor Amar suggests — somewhat ambivalently — that "gender subordination" could also be prohibited as a "badge of slavery."[70] Does this mean Congress can prohibit hard-to-avoid posters that urge women to stay home and serve their families? What about the most captive audience of all, children being reared by their

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[63] *See supra* note 46.

[64] Amar, *supra* note 1, at 158.

[65] *Id.*

[66] *Id.* at 160 n.187.

Amar's term "captive audience" has its own ambiguity. *Compare, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 748–49 (1978) (suggesting that householders are captive to radio broadcasts) *and* Lehman v. City of Shaker Heights, 418 U.S. 298, 306–08 (1974) (Douglas, J., concurring) (maintaining that bus passengers are captive to advertisements inside the bus) *with* Erznoznik v. City of Jacksonville, 422 U.S. 205, 212 (1975) (holding that passers-by are not captive to a drive-in theater screen). So, for that matter, does "harassment," which has been defined to cover everything from personal insults to gender-based job descriptions (like "foreman" or "draftsman") to unwanted religious propaganda to paintings by Francisco de Goya. *See* Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1800–07, 1814–15, 1860 n.306 (1992).

[67] Amar, *supra* note 1, at 158.

[68] *Id.*

[69] *Id.* at 160 n.187.

[70] *Id.*

parents: Could Congress try to keep young girls from being "degrade[d], dehumanize[d], and subjugate[d]"[71] by barring parents from teaching their daughters to treat their future husbands as their masters?

This is what you get if you sign on to a jurisprudence of metaphor.[72] Of course all laws are to some extent vague; of course we can't expect "mathematical precision"[73] in constitutional doctrine. But when we contemplate creating a new constitutional rule — especially a rule that lets the government cut back on constitutional rights — its vagueness and unpredictability should be pretty big strikes against it.

C. The Runaway Rationale

There lurks an even greater danger in Professor Amar's proposal than the possibility that it may lead to suppression of more bigoted speech than one would first think. When we accept a constitutional argument, we accept more than just the specific rule it proposes; we also accept the rationale that drives it. Professor Amar's argument effectively holds that the Thirteenth Amendment can trump the First Amendment, but his rationale goes far beyond that. Its application in no way depends on which constitutional right is being sacrificed to the Thirteenth Amendment's "authoriz[ation of] governmental regulation in order to abolish all of the vestiges, 'badges[,] and incidents' of the slavery system."[74] Once the Thirteenth Amendment is held to trump one constitutional right, there's nothing in Amar's reasoning to keep it from trumping them all.[75]

Suppose the government concludes it's not getting enough convictions in hate-crime cases because of racist juries — does the Thirteenth Amendment allow it to pass a law authorizing trial without a jury in

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[71] *Id.*

[72]

> Metaphor has its uses . . . . It creates memorable images that enable us to conjure up complex ideas, or even entire systems of thought, with a single word or phrase. . . .
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> [But metaphor] is a mixed blessing. It is useful because it is evocative, but it may evoke different ideas in different readers. It liberates the author from some of the rigidity of exposition, but also from the demands of precision and clarity. The subtlety that makes metaphor the poet's boon can be the lawyer's bane . . . .

David A. Anderson, *Metaphorical Scholarship*, 79 CAL. L. REV. 1205, 1214–15 (1991) (book review).

[73] Springer v. Government of the Philippine Islands, 277 U.S. 189, 211 (1928) (Holmes, J., dissenting).

[74] Amar, *supra* note 1, at 155.

[75] *See id.* at 145 (arguing that, had the *Johnson* dissenters succeeded in creating a special First Amendment exception for the flag, their "implicit and explicit arguments . . . might indeed have spilled over into non-flag" cases); *id.* at 146 (conceding the need to "cabin" speech-restrictive principles).

such cases?[76] Say the government decides that minority defendants are being disproportionately convicted because whites are more likely to be able to afford good lawyers — can it prohibit defendants from hiring their own counsel?[77] Say it finds that wealth is inequitably distributed among different racial groups — can it even things out by confiscating property with no compensation?[78] All these actions would normally be banned by the Bill of Rights, but they're all aimed at "abolish[ing] all of the vestiges, 'badges[,] and incidents' of the slavery system"; under Professor Amar's reasoning, that may well be enough to justify them. If the Free Speech Clause, which is about as close to absolute as the Constitution gets, can be trumped by the Thirteenth Amendment, are any of our rights safe?[79]

Moreover, just as Professor Amar's model could let other amendments get trumped by the Thirteenth, it could let other provisions be the trumps. Abolition of the badges of slavery is indeed a high constitutional value. But so is defense of the nation;[80] so is democracy;[81] so is private property.[82] Pacifist advocacy can interfere with the power to wage war, as Presidents from Lincoln to Nixon learned. The teachings of Ho Chi Minh could jeopardize the states' republican form of government. Political boycotts can interfere with interstate commerce.[83] Does this mean we should let the government ban these kinds of speech?

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[76] *See* U.S. CONST. art. III, § 2, cl. 3; *id.* amend. VI.

[77] *See id.* amend. VI.

[78] Perhaps the government might try to argue that "the Thirteenth Amendment should loom large" in property rights discussions because of "the radical redefinition — indeed, the redistribution — of property that Emancipation effected." Amar & Widawsky, *supra* note 42, at 1383. *But see* U.S. CONST. amend. V.

[79] The careful reader will notice that this is partly an appeal to personal policy preferences, the very things we urged people to set aside when asking the first question we discussed. *See supra* p. 1651. And, indeed, if you're committed to leaving your policy judgments at the door, you might go with what you think is the most plausible interpretation even if you don't like the possible consequences. But if you do let policy considerations sway you — as most people do — you need to consider the implications not only of the rule you propose, but also of the rationale on which you rest it.

[80] *See, e.g.*, U.S. CONST. art. I, § 8, cls. 11, 12, 13 (enumerating Congress's power to declare war, raise armies, and maintain a navy); *id.* art. II, § 2, cl. 1 (setting forth the President's power as commander-in-chief).

[81] *See, e.g.*, *id.* art. I, § 2, cl. 1 (requiring that Representatives be democratically elected); *id.* amend. XVII (requiring that Senators be democratically elected); *id.* art. IV, § 4 (guaranteeing every state "a Republican form of Government").

[82] *See, e.g.*, *id.* amends. V, XIV (protecting against takings of property without compensation and against deprivations of property without due process of law).

[83] Professor Amar says that the Thirteenth Amendment exception he proposes "would not provide a general springboard for other First Amendment modifications," Amar, *supra* note 1, at 146, but we're not so sure. We see no way of distinguishing congressional power under § 2 of the Thirteenth Amendment from congressional power under the other clauses we've mentioned. *See supra* pp. 1650–51.

Of course, it's entirely possible this parade of horribles wouldn't come to pass. The Supreme Court might well not take Professor Amar's rationale to its logical extreme, but use it only to uphold his model ordinance and not the hypothetical laws we outlined. But the more one has criticized the Supreme Court's judgment,[84] the less comfort one ought to draw from this possibility. Partisans of the Rehnquist Court might trust it to limit Professor Amar's broad principle to the right cases, but partisans of the Rehnquist Court presumably like *R.A.V.* just fine. Those who generally don't approve of the Rehnquist Court's moral sensibilities[85] — or those apprehensive about the direction the Tribe Court will take — should be wary of giving it a tool as powerful as the one Professor Amar offers. Perhaps a Court filled with nine Justice Amars would apply the principle only to racial harassment and not to anything else. But a different Court — a Court that might think street crime, advocacy of drug use, incitement to violence against police officers, and cigarette advertising are as dangerous as racial harassment — may read the invitation much more broadly.

In fact, a Court that accepted Professor Amar's proposal might feel *compelled* to read it broadly. Imagine for a moment that *Texas v. Johnson*[86] had come out the other way — that the Court created a special First Amendment category for the flag. We doubt the Court could then have decided *R.A.V.* the way it did; we doubt it could have explained to the American people how the Constitution permits a ban on flag-burning but forbids a ban on cross-burning. Theoretically such a result might be tenable, but practically we're sure it wouldn't be.[87] Likewise, a Court willing to allow prohibitions of "intentional racial harassment" would face a clamor from a dozen other groups who think the speech they dislike is equally worth sup-

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[84] *See, e.g.*, Amar, *supra* note 1, at 151–61; Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1466–92 (1987).

[85] And we think this would include people who say things like "[i]f the doctrine means anything more than this, it is likely to do far more harm than good in the hands of the Rehnquist Court." Mystery Author, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1536 (1990).

[86] 491 U.S. 397 (1989).

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> Bad as a constitutional amendment [prohibiting flag-burning] would be, . . . it might be worse to have a judicial decision trying to explain to Jews in Skokie why they must put up with marching Nazis, to blacks in the ghetto why they must put up with racist speech . . . while patriots with enough political clout to get a statute enacted need not tolerate abuse of the flag.

Constitutional Law Conference, 59 U.S.L.W. 2272, 2282 (Nov. 6, 1990) (paraphrasing Prof. Laurence H. Tribe); *see also Statutory and Constitutional Responses to the Supreme Court Decision in* Texas v. Johnson*: Hearings Before the Civil and Constitutional Rights Subcomm. of the House Judiciary Comm.*, 101st Cong., 1st Sess. 53–54 (1989) (testimony of Prof. Walter E. Dellinger, III) (making the same argument about the proposed anti-flag-burning constitutional amendment).

pressing.[88] Perhaps those people would in some abstract sense be "wrong"; perhaps cross-burning is objectively different from other forms of nasty, evil, abusive speech. But many thought flag-burning was different, too, different enough to prompt a serious push for a constitutional amendment.[89] Once the censorship ball starts rolling, it can be hard to stop.

III. CONCLUSION: THE CASE OF THE FIRST, THIRD, FOURTH, FIFTH, AND NINTH AMENDMENTS[90]

Like it or not, our constitutional law is the law of penumbras and emanations. Few constitutional decisions, from *Marbury v. Madison*[91] onward, are unambiguously dictated by the constitutional text. There are always uncertainties to resolve, gaps to fill, whether it be by

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[88] It's hard enough to tolerate speech you dislike; it's harder still when others are getting away with censoring speech they dislike. *See, e.g.*, Lucinda M. Finley, *The Nature of Domination and the Nature of Women*, 82 NW. U.L. REV. 352, 372 (1988) (reviewing CATHERINE A. MACKINNON, FEMINISM UNMODIFIED (1987)) ("[O]ne has to ask why women who are harmed by pornography can't bring a damages action against producers and traffickers in pornography — when victims of racial epithets, or statements portraying blacks as a group as subordinate or contemptible, can bring damages actions . . . ."); *see also* Martin Karo & Marcia McBrian, *The Lessons of* Miller *and* Hudnut: *On Proposing a Pornography Ordinance that Passes Constitutional Muster*, 23 U. MICH. J.L. REF. 179, 195 n.99 (1989) ("The courts allow restrictions on speech when it presents a 'clear and present danger' or 'incites to lawless action.' This indicates that they consider the harm to women from pornography less important than the harm to society that might result from many other types of speech.").

Even aside from the power of censorship envy, people tend to reason by analogy; accepting broad speech restrictions will in turn fuel proposals for yet broader restrictions. *See, e.g.*, Irving Kristol, *quoted in Sex and God in American Politics; What Conservatives Really Think*, POL'Y REV., Summer 1984, at 12, 24 ("I don't think the advocacy of homosexuality really falls under the First Amendment any more than the advocacy or publication of pornography does."); Thomas D. Elias, *TV and Radio Stations Should Be Stripped of Their Licenses If They Aren't More Responsible in Covering Civil Unrest*, L.A. DAILY. J., Jan. 26, 1993, at 6 (analogizing "irresponsible" coverage of the L.A. riot to "shouting 'fire' in a crowded theater"); John Hartsock, STATES NEWS SERVICE, Mar. 21, 1988, *available in* LEXIS, Nexis Library ("Just as you can't do certain things over the television and radio airwaves, you shouldn't be able to do them over the phone.") (quoting a spokesman for Rep. Thomas Bliley (discussing the anti-phone-sex-service law ultimately struck down in Sable Communications, Inc. v. FCC, 492 U.S. 115 (1989))); Murray J. Laulicht & Eileen A. Lindsay Laulicht, *First Amendment Protections Don't Extend to Genocide*, N.J. L.J., Dec. 9, 1991, at 15 ("There is no principled reason to permit the banning of material that appeals to a depraved interest in sex but not the banning of material that appeals to a depraved interest in violence and mass murder.").

[89] The proposed constitutional amendment got majorities, but not the required two-thirds majorities, in both the House and the Senate. *See Senate Joins House in Rejecting Flag Amendment*, CHI. TRIB., June 27, 1990, at 5. More than two thirds of Americans supported the amendment. *See Poll: Most Want Constitutional Amendment on Flag-Burning*, UPI, June 16, 1990, *available in* LEXIS, Nexis Library, UPI File.

[90] *See* 381 U.S. 479, 484 (1965).

[91] 5 U.S. (1 Cranch) 137, 176–80 (1803).

reference to history, logic, natural law, background principles, or what have you.

But this can't mean anything goes. Every proposed constitutional doctrine must be, to borrow a phrase, strictly scrutinized. Is it supported by something other than our own policy desires? Is it too heavy on the metaphor and too light on the substance? Can its rationale be turned against us by those who don't share our goals? The doctrine needn't pass each of these tests with flying colors: Sometimes, for instance, we might have to settle for a vague, fluffy test because the text so clearly demands it; sometimes we might have to reject the most plausible reading of the text because it's too indeterminate to be practicable. But the less satisfactory the answers to these three questions, the more suspicious we ought to be of the constitutional proposal.

Which brings us, having asked a hundred questions ourselves, to the questions Professor Amar implicitly asked. Why were the Thirteenth and the Fourteenth Amendments missing from *R.A.V.*? Why didn't at least the concurring Justices — those who were the most sympathetic to regulation of racial harassment — point to "the strong antisubordination ethic of the Thirteenth Amendment" for support?[92]

We think it might have been because the Justices realized that penumbras and emanations are dangerous business. As Justice Black pointed out in *Griswold v. Connecticut*,[93] penumbral thinking cuts both ways: It can be used to expand individual rights (at the expense of our right to self-government), but it can also be used to expand the powers of government (sacrificing personal rights).[94] Following the lengthening shadows of constitutional provisions as they recede ever further from the source is something to be undertaken cautiously, with a constant regard to the consequences. No matter how tempting or righteous the desired result may be, one must always be ready to recognize when the reading has become too tenuous, the proposed doctrine too vague, the implications too risky. And if, as Professor Amar suggests, there were issues the *R.A.V.* Court didn't talk about but should have — if there were constitutional lessons to be "pondered by the Justices, and communicated to the people"[95] — this one would be our candidate to head the list.

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[92] Amar, *supra* note 1, at 161 n.189.

[93] 381 U.S. 479 (1965).

[94] *See id.* at 509–10 (Black, J., dissenting).

[95] Amar, *supra* note 1, at 161.