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Constitutional rights are always in flux — and that's a good thing

Do you believe in strictly following the letter of the law? Then try this. Back in the 1970s, Vice President Spiro Agnew resigned after he was accused of various financial improprieties dating back to his stint as governor of Maryland. But let's assume he had refused to resign. Agnew is then impeached by the House and his case goes to the Senate for trial.

Who presides at the impeachment trial?

Article I, Section 3 of the U.S. Constitution provides that "The Vice President of the United States shall be President of the Senate." And in the section that gives the Senate "sole Power to try all Impeachments," it further provides that "When the President of the United States is tried, the Chief Justice shall preside." There is no other exception.

So clearly Agnew should preside at his own impeachment trial. We are just following the letter of the law.

If you think this makes no sense, you need to read Akhil Reed Amar's new book "America's Unwritten Constitution" (Basic, 2012). Amar is a professor at Yale Law School and one of our most provocative constitutional law theorists. He begins his book with this vice presidential conundrum. And he uses it to make this point: "There are times when the [Constitution] read holistically ... means almost the opposite of what a specific clause, read in autistic isolation, at first seems to say."

Amar notes that Coke and Blackstone — not to mention common sense — hold that a man cannot be a judge in his own case. Moreover, the preamble to the Constitution says that the purpose of the document is "to establish Justice." So obviously Agnew cannot preside over his own prosecution. The reason is not the written Constitution; it is because of the unwritten Constitution.

Isn't the "unwritten Constitu-

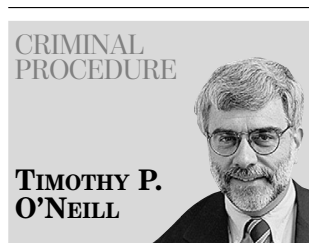
tion" a contradiction in terms? Amar disagrees. True, the Constitution contains enacted rights such as the right against double jeopardy. But his vice presidential example illustrates that rights can be implied as well as enacted. And Amar cites the Ninth Amendment as textual support for this: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The concept that a person should not be the judge of his own case is so fundamental that it cannot be denied.

But Amar goes beyond this. He reminds us that the Constitution today may recognize something as a constitutional right that was actually forbidden when the Constitution was adopted.

Consider the right of a criminal defendant to testify on his own behalf. Quick — where is that found in the Constitution? The answer, of course, is nowhere. In fact, at the founding criminal defendants were barred from testifying in the new federal court and in every state court. The traditional common-law view was that it was unfair to put a burden on a criminal defendant to testify under oath. The temptation to lie would be too great. And it was widely believed that those who lied under oath would be condemned in the afterlife. As Amar notes, the fear was that "a liar might lose his soul even if he saved his skin."

So what happened? American legal culture changed. Gradually society began to believe that the value of hearing the defendant's story outweighed the danger of perjury. In 1864, Maine was the first state to allow all criminal defendants to testify under oath at trial.

The federal courts followed suit in 1878. And by the turn of the 20th century, only Georgia was a holdout. Finally, the U.S. Supreme Court in 1987 in *Rock v. Arkansas* explicitly held that the Constitution now guaranteed that criminal defendants in every American



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court had the right to testify. 483 U.S. 44 (1987).

To summarize: Something that was forbidden at the founding has now been found actually guaranteed in the Constitution — without a single word of that document changed. And, as far as I know, no one in America has criticized this exercise of judicial power.

Why? Amar cites several reasons. First, nothing in the Constitution explicitly prohibits a criminal defendant from testifying. Second, long before the Supreme Court recognized this unenumerated right in 1987, it had gradually become established both

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in American legal practice and in the expectations of the American people.

As Amar notes, "One of the core unenumerated rights of the people under the Ninth Amendment is the people's right to discover and embrace new rights and to have these new rights respected by government." This is what Amar calls the "lived Constitution." New constitutional rights can come into being by "the people" changing their practices and expectations.

For another example, consider this bedrock principle of American criminal law: A person can be convicted of a crime only if the prosecution presents proof beyond a reasonable doubt. When the U.S. Supreme Court recognized this as a constitutional right in 1970, the court admitted that the specific phrase "beyond a reasonable doubt" did not occur in American law until 1798 — a decade after the ratification of the Constitution and seven years after the adoption of the Bill of Rights. Amar cites this as another example of the "lived Constitution": another example of "an uncontroversial, unenumerated, post-founding fundamental right."

The idea that constitutional rights are in flux should give us a deeper appreciation of the whole concept of the federal system. Although the Bill of Rights sets a floor, states are always free to raise the ceiling on rights. Experimentation is not just allowed — it is meant to be an integral part of the American federal system.

A good example of how not to act is provided by Illinois courts in the area of search and seizure: They follow whatever the U.S. Supreme Court says in a "lockstep fashion." If states had followed Illinois' "lockstep" example for all constitutional issues starting in the 1790s, we might still be barring defendants from testifying and finding them guilty on less than proof beyond a reasonable doubt. Rights need to evolve, not be frozen in amber.