

All quotes for Essay 3 Option 3 from: Professor Amar's "Unwritten Constitution" book, videos, discussions, and from reading other's essay 2 option 1:

America's unwritten Constitution encompasses not only rules specifying the substantive content of the nation's supreme law but also rules clarifying the methods for determining the meaning of this supreme law. Since the unwritten constitution does not come with a complete set of instructions about how it should be construed, we must go beyond the text to make sense of the text.

The first example of America's unwritten Constitution is the Ninth Amendment. It affirms the reality of various rights that are not textually enumerated, the rights that are concededly not listed in the document itself. To take this amendment seriously, Americans must go beneath and beyond the Constitution's textually enumerated rights. An example is when the text fails to specify a criminal defendant's entitlement to introduce reliable physical evidence of his innocence, surely this textual omission should not doom a defendant's claim of this right.

A second example is America's preeminent right of the freedom of speech. Textually, this freedom appears in the First Amendment, but if everything depended solely on this explicit patch of constitutional text, which became part of the Constitution in 1791, then the First Congress in 1789 and 1790 would have been free to pass censorship laws had it so chosen. But surely the First Congress had no such power, and surely states have never had proper authority to shut down political discourse, even though the First Amendment does not expressly limit states. The robust, wide-open, and uninhibited freedom of American citizens to express their political opinions is a basic feature of America's unwritten Constitution that predates and outshines the First Amendment.

A third example is when Article II of the Constitution addresses the powers and responsibilities of the Presidency, but provides considerable less insight into the Vice Presidency. The legal precedent from Sir William Blackstone's *Commentaries on the Laws of England* forms the basic principles of British and American laws can help us to address that question. Blackstone's *Commentaries* make the argument that it would be absurd for people to sit in judgment or in positions of power when their own fate is in jeopardy.

Other examples include the United States Supreme Court landmark case that went beyond the textual limits of the Constitution, *McCulloch v. Maryland*, when the Supreme Court found the Bank of the United States to be Constitutional even though the power for Congress to incorporate a bank is not found in Article I or anywhere else in the Constitution for that matter. The Bank of the United States served several purposes for the government such as holding federal deposits, paying soldiers and strengthening the national economy.

Even more examples of contemporary Constitutional conflicts that I learned from reading others essays, such as freedom to marry will rely on extra textual sources such as State Law and legal precedent to fully frame the Constitutionality of the debate and to help Court and other public policy officials in making decisions about this issue. The Constitution itself does not address the issue of marriage directly, but courts have consulted state laws and precedent when ruling on marriage issues of polygamy, inter-racial marriage and most recently same-sex marriage. Examples include *Reynolds v. United States* the Supreme Court upheld a Utah law banning polygamy on the basis that the 1st Amendment protected Freedom of Religion, but did not protect religious practices that are viewed as criminal. The Supreme Court was asked to address another marital limitation, this time striking down Virginia's ban on interracial marriage in *Loving v. Virginia*. The Supreme Court found that Virginia's anti-miscegenation, a ban on interracial marriage, law had violated Richard and Mildred Loving's 14th Amendment Equal Protection rights, and also, only 16 states still had bans on interracial marriage. The

Supreme Court does not want to force social or legal changes on the nation until a majority of states have addressed the issue in one direction.

A vision of the nature of constitutional interpretation are the tools and techniques for going beyond the written Constitution while remaining faithful to it. The terse text of the Constitution has always pointed beyond itself, inviting readers to fill in its gaps by consulting extratextual sources such as judicial opinions, executive practices, legislative enactments, and American traditions. America's written Constitution thus bids us to heed her unwritten Constitution, which in turn refers us back, in various ways, to its written counterpart.