Review Essay

THE AKHIL REED AMAR BILL OF RIGHTS

THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION. By Akhil Reed Amar.[1] New Haven, CT: Yale University Press. 1998. Pp. xv, 412. Cloth, $30.00.

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Akhil Reed Amar has been called many things, including an elitist,[3] a deconstructionist,[4] a progressive,[5] a fox,[6] and even a protector of Dirty Harry.[7] Naturally, his newest book, *The Bill of Rights: Creation and Reconstruction*, defies easy categorization. Cass Sunstein has dubbed the book "originalism for liberals,"[8] even though Amar himself resists being labeled an originalist.[9]

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3. Robert C. Palmer, *Akhil Amar: Elitist Populist and Anti-textual Textualist*, 16 S. Ill. U. L.J. 397 (1992).

4. Raoul Berger, *Incorporation of the Bill of Rights: Akhil Amar's Wishing Well*, 62 U. Cin. L. Rev. 1, 36 (1993).

5. Louis Michael Seidman, *Akhil Amar and the (Premature?) Demise of Criminal Procedure Liberalism*, 107 Yale L.J. 2281, 2281 (1998) (reviewing Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles*).

6. Jack N. Rakove, *Two Foxes in the Forest of History*, 11 Yale L.J. & Human. 191, 213 (1999) (reviewing Bruce Ackerman, 2 *We the People: Transformations* (Harvard U. Press, 1998) and Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (Yale U. Press, 1998) (noting "as a hedgehog, I have always found much to admire in the legal foxes who come tramping (or occasionally trampling) through the neighborhood.").

7. Michael Stokes Paulsen, *Dirty Harry and the Real Constitution*, 64 U. Chi. L. Rev. 1457, 1463 (1997) ("Dirty Harry's basic instinct was right. He just needed the constitutional scholarship of Akhil Amar to cover his back.").

8. Cass R. Sunstein, *Originalism for Liberals*, The New Republic 31 (Sept. 28, 1998).

9. Amar calls himself "a constitutionalist, a textualist, and a populist." Akhil Reed Amar, *A Few Thoughts on Constitutionalism, Textualism, and Populism*, 65 Ford. L. Rev.

As I hope to show, Amar is right to resist: *The Bill of Rights: Creation and Reconstruction* is more about transforming than recapturing original meaning.

One of the book's striking features is its religious tone and imagery. For example, Amar writes about "words made flesh," (p. 27) "original sin," (p. 293) and "renounc[ing] the Slave Power and all its works." (p. 294) Indeed, the overall structure of the book is itself almost biblical. As the subtitle suggests, part one of the book is called "Creation," and part two is called "Reconstruction." I suspect that part two might well have been called "Redemption" if that term had not become so associated with the violent overthrow of Reconstruction state governments by ex-confederates and their sympathizers.[10]

Although the two parts draw heavily from two articles previously published in the Yale Law Journal,[11] the overall project is far clearer in the book with the two parts conjoined. Amar's thesis is that the Bill of Rights at its creation was largely concerned with issues of governmental structure and popular sovereignty, but that the Fourteenth Amendment changed the Bill of Rights into a protector of individual liberties. Amar contends that today we unselfconsciously see the creation through the lens of the reconstruction. In part one of the book, he attempts to show us the Bill of Rights without that distortion. In part two, he strives to explain how the Fourteenth Amendment transformed the Bill of Rights. The major difference in content between the book and the articles is that the article on the Fourteenth Amendment only addressed how the First Amendment's rights of expression were transformed, while the book adds a discussion of the transformation of the rest of the Bill of Rights.[12]

This essay follows the same organizational scheme as the book. Part I of the essay describes Amar's view of the creation of the Bill of Rights, while Part II describes Amar's view of the

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1657, 1657 (1997).

10. See, e.g., Eric Foner, *Reconstruction: America's Unfinished Revolution 1863-1877* at 564-601 (Harper & Row, 1988).

11. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131 (1991); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193 (1992).

12. Compare Amar, 101 Yale L.J. at 1272-73 (cited in note 11) ("A full demonstration of the model's application to each and every clause of the original Bill must await another day; but the speech, press, petition, and assembly clauses of the First Amendment provide a handy testing ground . . .") (footnote omitted) with Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 246-83 (*"Creation and Reconstruction"*) (Yale U. Press, 1998) (applying his model to the rest of the Bill of Rights).

Bill's reconstruction. Readers who want to gain a passing familiarity with Amar's arguments should start with these parts; readers already familiar with the articles on which the book is based might want to skim ahead to part II-B, where I discuss Amar's claims regarding the transformation of the Bill of Rights, or even cut to the chase in Part III, where I offer some criticisms. Most significantly, I suggest in Part III that there is a gap between Amar's methodology and his conclusions: while he provides a persuasive account of what the Bill of Rights meant in 1868, he has not, on his own methodology, provided an account of what the Bill of Rights means today.

I

Amar asks us to remove "modern blinders" that lead us to take nationalism for granted and look to the national government (and especially the national courts) to protect individuals and minorities against state government. (pp. 3-4) He reminds us that in 1760, "'Virginia' was, legally speaking, an obvious fait accompli—its House of Burgesses had been meeting since the 1620's—but 'America,' as a legal entity, was still waiting to be born." (p. 5) One of the functions of colonial legislatures, Amar notes, was to monitor the central government in England, publicizing its oppression, and organizing opposition to its evils. (p. 5) Although Amar acknowledges that Federalists sought to strengthen the national government and limit abusive state government, he emphasizes the continuity of the tradition of local governments acting to "protect citizens against abuses by central authority." (p. 4) For Amar, among Madison's crucial insights was that "localism and liberty can sometimes work together." (p. 7)

With this perspective, Amar takes us to the Bill of Rights. Amar, however, does not start with *our* First Amendment, but rather with *their* first amendment—that is, the first amendment proposed by the first Congress. That amendment, which was never ratified, would have changed the original constitution's requirement that the number of representatives in the House of Representatives *not exceed* one for every thirty thousand, and instead required that the number *equal* one for every thirty thousand until there were one hundred representatives. (The proposed amendment provided a second set of rules once that size was reached, and a third set of rules once the size of the House of Representatives reached two hundred.) The point of

the amendment was to respond to Anti-Federalist critiques that Congress would be too small, elite, and subject to cabal. Some targeted the size of the Senate, noting that in a body with twenty-six members, a majority of a quorum would consist of but eight Senators. (p. 11) Patrick Henry pointed out that the House of Representatives might even be worse: since each state was only guaranteed one representative and no minimum size or ratio to population was mandated in the original constitution, the House of Representatives could be as small as thirteen. (p. 12) For Amar, although their first amendment failed of ratification (by one state), it reveals the extent to which those at the creation of the Bill of Rights were concerned about ensuring that the new national government not be run by elites disdainful of their lowly constituents. (p. 11)

Before turning to our First Amendment, Amar makes a similar point about their second (our Twenty-Seventh) amendment. That amendment prevents changes in Congressional pay from taking effect without an intervening election. As Amar notes, this amendment was designed to limit the ability of Congressmen to "line their own pockets at public expense." (p. 18) Both amendments "shared a fundamentally similar outlook; both addressed the 'agency cost' problem of government—possible self-dealing among government 'servants' who may be tempted to plunder their 'masters,' the people—rather than the analytically distinct problem of protecting minorities of ordinary citizens from tyrannical majorities." (p. 18) Having primed the reader with the first two provisions of their bill of rights, provisions that sound in governmental structure and the protection of majoritarian power against self-interested government elites, Amar then turns to the task of finding similar concerns in our Bill of Rights.

For Amar, the "historical and structural core" of our First Amendment's protection of the freedom of speech and of the press was, like their first two amendments, "to safeguard the rights of popular majorities . . . against a possibly unrepresentative and self-interested Congress." (p. 21) He describes the Sedition Act as a "textbook example of attempted self-dealing among the people's agents" that was not invalidated by any court. Instead, prompted by the free speech within state legislatures, it was "adjudicated" to violate the First Amendment by a popular majority, working with and through those legislatures, in the election of 1800. (p. 23) Amar similarly links the idea of protecting popular speech criticizing the government to the long-

standing rule against prior restraint, observing that prior restraints would be enforced by permanent government officials, while subsequent civil and criminal prosecutions would involve ordinary citizens, empowered as jurors to protect such a publisher. (pp. 23-24)

In this view, the rights of assembly and petition are also at their core "collective and popular" rights of the people as a whole. (p. 30) Thus the most basic way in which "the right of the people [peaceably] to assemble" can be exercised is in a constitutional convention empowered to alter or abolish government. (p. 26) Here, Amar links the right of the people to assemble with the Constitution's preamble (which might be better described as the Constitution's "ordination" clause, or even, if the name were not already taken, the "establishment" clause):

> The Preamble's dramatic opening words . . . trumpeted the Constitution's underlying theory of popular sovereignty. Those words and that theory implied a right of the "people" . . . to alter or abolish their government whenever they deemed proper: what "the People" had "ordain[ed] and established]" . . . , they or their "posterity" could disestablish at will . . . . To good lawyers of the late 1780s, [these were] first principles—words made flesh by the Constitution itself. The Constitution, after all, was not just a text, but an act—a doing, a constitut*ing*. In the Preamble's performative utterance, "We the people . . . *do*" alter the old and ordain and establish the new. (p. 27)

When Amar turns to the religion clauses of the First Amendment, he emphasizes that the establishment clause not only prevents Congress from establishing a national church, but also prevents it from disestablishing state establishments. (p. 32) The clause is "agnostic on the substantive issue of establishment versus nonestablishment and simply calls for the issue to be decided locally." (p. 34) One function of the eighteenth century established churches, as Amar notes, was "imparting community values and promoting moral conduct among ordinary citizens, upon whose virtue republican government ultimately rests." (p. 44) National control over such a powerful intermediate association "obviously struck fear in the hearts of Anti-Federalists" while state and local establishments "would encourage participation and community spirit among ordinary citizens at the grass roots." (p. 45) Again, the right protected is a collective one of local majorities against a central government. More generally, Amar uses the religion clauses as an occasion to suggest that the entire First Amendment, beginning as it does with the phrase

"Congress shall make no law," is a declaration of the lack of enumerated Congressional power "to regulate religion in the states or restrict speech," serving, in effect, as "a kind of reverse 'necessary and proper' clause." (pp. 36-37)

Determined not to ignore parts of the bill of rights that many find embarrassing today, Amar devotes a chapter to the military amendments, our Second and Third Amendments. Again, he finds the core concern to be protection of the collective people against an abusive federal government. Here, though, the focus is the fear that federal military power could be used to render meaningless the right of the people to assemble in convention and reassert their sovereignty. (pp. 46-47) For Amar, the "people" in our Second Amendment and the "people" in the preamble are the same: the ones who ordained and established the constitution are the ones whom Congress cannot disarm. (pp. 48-49) Although he acknowledges the importance of state governments in responding to central tyranny by organizing and mobilizing their citizens into an "effective fighting force capable of besting even a large standing army," (p. 50) Amar insists that our Second Amendment is not only a right of state governments. Instead, he emphasizes that the word "militia" in 1789 "referred to all citizens capable of bearing arms—that is, the 'militia' is identical to 'the people.'" (p. 51)

Still more strikingly, Amar uses our Second Amendment as the capstone to an argument that a national draft is unconstitutional. Here, Amar argues that Article I, section 8, distinguishes between "Armies"—which Congress has the power to "raise and support"—and "the Militia"—where Congressional power is more tightly constrained. Congress has the power to "provide for calling forth the Militia to execute the Law of the Union, suppress Insurrection and repel Invasion." (p. 53) It also has the power to provide for organizing, arming, and disciplining the militia, subject to state power to appoint officers and the conduct of training. Amar observes that in 1789, while the word "militia" was equivalent to "the people," the word "army" meant a mercenary force of hired guns, "typically considered the dregs of society—men without land, homes, families, or principles." (p. 53) While Congress has authority to federalize the militia, it can only do so for particular purposes and remains subject to the state power to appoint the officers and conduct the training. These restrictions would "become trivial" if Congress could simply "relabel[] militiamen as army 'soldiers' conscriptable at will." (p. 54) Amar explains the importance of the distinction between

the army and the militia and the restrictions on Congressional power over the militia:

> Wretches miserable enough to volunteer as hired guns might deserve whatever treatment they got at the hands of army officers, but citizens wrenched by conscription from their land, their homes, and their families deserved better. They were entitled to be placed in units with fellow citizens from their own locality, and officered by local leaders . . . men whom they were likely to know directly or indirectly from civilian society and who were likely to know them. The ordinary harshness of military discipline would be tempered by the many social, economic, and political linkages that predated military service and that would be renewed thereafter. Officers would know that, in a variety of ways, they could be called to account back home after the fighting was over. (pp. 54-55)

For Amar, if the Second Amendment "is not about the critical difference between the vaunted 'well regulated Militia' of 'the people' and the disfavored standing army, it is about nothing." (p. 56)

Here, Amar calls to his aid Daniel Webster, who argued against the constitutionality of a proposed national draft during the War of 1812. Webster called the proposal an attempt to raise "a standing army out of the militia by draft," and a number of New England states denounced as unconstitutional any national attempt to "to subject[] the militia . . . to forcible drafts, conscriptions, or impressment." (pp. 57-58) Amar notes that none of the proposed draft bills passed and suggests that the "eventual republican triumph on this issue . . . should be as central a precedent for our Second Amendment as the 1800 triumph over the Sedition Act is for our First." (p. 58)

As Amar sees it, the Third Amendment, which outlaws the forced quartering of soldiers in time of peace, and requires that wartime quartering be done as prescribed by law, guards against "military threats too subtle and stealthy for the Second's 'well regulated Militia.'" (p. 59) Citing the English Bill of Rights of 1689, the Declaration of Independence, and various state constitutions, Amar observes that opposition to standing armies, maintaining civilian control of the military, and restricting the quartering of soldiers have long been linked. Once again, the focus for Amar is on maintaining effective democratic control over those who wield power.

For Amar, the Fourth, Fifth, Sixth, Seventh, and Eighth amendments, all use the jury as a method of local popular con-

trol over government officials. Indeed, Amar declares that juries are "at the heart of the Bill of Rights." (p. 83) "The dominant strategy to keep agents of the central government under control was to use the populist and local institution of the jury." (p. 83)

It was juries who were empowered to enforce the Fourth Amendment by determining the reasonableness of searches and seizures in tort claims against individual officers. To illustrate the point with a foundational story, Amar recounts the trespass action by House of Commons Member John Wilkes, who successfully challenged searches that were designed to suppress his communication to constituents that was critical of George III. (p. 67) Warrants were *dis*favored—hence the requirement that no warrants issue but upon probable cause—because they operated to shift power over searches from jurors to judges. (p. 69) Similarly, Amar treats the Fifth Amendment's protection of the grand jury indictment, the Sixth Amendment's protection of the local criminal jury, and the Seventh Amendment's protection of the civil jury trial, as akin to the Second Amendment's protection of the militia: "Just as the militia could check a paid professional standing army, the jury could thwart overreaching by powerful and ambitious prosecutors and judges." (p. 84) Here, Amar recounts the refusal of New York grand juries to indict John Peter Zenger and (when the government proceeded by information), his acquittal by the petit jury. (pp. 84-85) Even the Fifth Amendment's taking clause and the Eighth Amendment reflect the centrality of jury power: a jury determines what compensation is "due," while the Eighth Amendment (like the Fourth Amendment's warrant clause) constrains the functions performed by judges without juries: setting bail and imposing sentence. (pp. 80, 87)

Amar draws further links between the militia and the jury: both are local institutions, "composed of citizens from the same community [and] expected to be informed by community values." (pp. 88-89) The Sixth Amendment is explicit in its localism, further particularizing Article III's guarantee of a local criminal jury, but Amar—in an argument new to the book[13]—suggests that the best reading of the Seventh Amendment is localist in a somewhat different way: federal courts must use a civil jury if the local state courts would. (p. 89) Moreover, both militia and jury are "intermediate association[s] designed to

13. Compare Amar, 100 Yale L.J. at 1186 (cited in note 11) (one paragraph section concerning "jurors as provincials") with Amar, *"Creation and Reconstruction"* at 88-93 (cited in note 12) (five page section concerning "jurors as provincials" making the state-law-incorporation argument).

and jury are "intermediate association[s] designed to educate and socialize [their] members into virtuous thinking and conduct." (p. 93) Here, Amar relies on Tocqueville, who described the civil jury as "*a gratuitous public school*, ever open, in which every juror learns his rights, enters into daily communication with the most learned and enlightened members of the upper classes, and becomes practically acquainted with the laws, which are brought within his capacity by the efforts of the bar, the advice of the judge, and even the passions of the parties. . . . " (p. 93)

A jury, however, is not simply to sit quietly and listen as obedient schoolchildren. Instead, a jury sits as a political body, the "lower house" of the judiciary (p. 95), no more waivable than the House of Representatives (pp. 104-08) and (maybe) armed with the power of "jury review"—that is, the power to refuse to enforce a statute that the jury concludes is unconstitutional. (pp. 98-104)

Amar dubs the Ninth and Tenth Amendments the "popular sovereignty amendments" because of their "invocations of 'the people.'" (p. 119) The Tenth Amendment echoes the preamble: we the people have delegated some powers to the federal government, permit others to be exercised by state governments, and have withheld some from both. (pp. 119-20) Similarly, Amar contends that the Ninth Amendment is about retained collective rights of the people, most significantly, the right of the people to alter or abolish government. (p. 122) Moreover, these two amendments "elegantly integrate popular sovereignty with federalism. All government power derives from the people, but these grants of power are limited." (p. 123) The Ninth Amendment warns readers not to infer implicit federal power from the enumeration of rights; the Tenth textually reaffirms the structural scheme of the people conquering government power by dividing it between two rival governments. (pp. 123-24)

In sum, Amar urges us to see the Bill of Rights at its creation as "attentive to structure, focused on the agency problem of government, and rooted in the sovereignty of We the People of the United States." (p. 127) It protects three intermediate associations—church, militia, and jury—all of which educate the people about their rights and duties, thus enabling their sovereignty. (p. 133) He hopes we notice that "no phrase appears in more of the first ten amendments than 'the people.'" (p. 133)

If Amar had stopped here—as his 1991 article did—it might seem that he was calling for radical changes in our current interpretation of the Bill of Rights. Indeed, he admits that his point in part one is to "contest conventional wisdom." (p. xv) But, in part two, he argues that the Fourteenth Amendment—particularly its privileges or immunities clause—transformed the Bill of Rights from one focused on republican, collective, public rights designed to control the agency costs of government into one focused on liberal, individual, private rights designed to protect minorities. (p. 133) To understand Amar's larger project, we must consider his account of the "reconstruction" of the Bill of Rights.

II

A

Just as Amar does not start his account of the creation of the Bill of Rights with our First Amendment, but instead with the failed first amendment from the first Congress, so too Amar does not start his account of the Fourteenth Amendment with the text or with the debates in Congress or its Joint Committee on Reconstruction. Instead, he devotes a chapter to "Antebellum Ideas," including, most prominently, the ideas of those he calls "*Barron* contrarians." (p. 145)

Amar acknowledges the correctness of the Supreme Court's decision in *Barron v. Baltimore*[14] that the Bill of Rights only limited the national government, not the states. For Amar, *Barron* "kept faith with both the letter and the spirit of the original Bill of Rights." (p. 144) Nevertheless, Amar recounts and explains the view of those, both before and after *Barron*, who rejected its view of the Bill of Rights.

Prior to *Barron*, "a considerable number of considerable lawyers" —including Justices Johnson and Baldwin of the Supreme Court of the United States, the New York Supreme Court, the Mississippi Supreme Court, and treatise author William Rawle—"implied in passing or stated explicitly that various provisions in the Bill did limit states." (p. 145) And *Barron* was "hardly the last word, and the contrary view persisted over the next thirty-three years." (p. 146) Amar acknowledges that sometimes, as in an 1845 opinion of the Illinois Supreme Court

14. 32 U.S. (7 Pet.) 243 (1833).

and the 1847 oral argument of the Attorney General of Ohio before the Supreme Court of the United States, the point may have been a casual assumption or a glib concession. (p. 146) But Amar also points to the frontal attack on *Barron* launched by the former Governor of New Hampshire in oral argument before the Supreme Court in 1840, and the self-conscious decisions rejecting *Barron* by the Supreme Court of Georgia in 1846 and 1852. (pp. 153-56)[15]

Amar insists that we not "dismiss all these folks as dolts," but rather understand how such a view of the Bill of Rights fit in with basic assumption of legal thought at the time. In particular, Amar reminds us that judges at the time did not conceive of themselves as making up common law, but rather as finding it in authoritative sources. (p. 147) On this view, then, the Bill of Rights was, like Magna Charta and the English Bill of Rights of 1689, "at least declaratory of certain fundamental common-law rights." (p. 147) This declaratory view, especially when combined with an emphasis on natural rights, "insisted that rights were different from structure." (p. 152) "To a nineteenth-century believer in natural rights, the Bill was not simply an enactment of We the People as the Sovereign Legislature bringing new legal rights into existence, but rather a declaratory judgment by We the People as the Sovereign High Court that certain natural or fundamental rights already existed." (p. 148)

The *Barron* contrarians, Amar concedes, were "a distinct minority among antebellum lawyers." But, he contends, "time was on their side." (p. 156) Technology linked the national government to the hinterlands, reducing the fear of a distant national government. (pp. 156-57) Geographic expansion "worked ideological inversions" by raising puzzling questions about why a territory should be bound by the Bill of Rights yet free from such constraints upon achieving statehood. (p. 157) Indeed, Congressman John Bingham—the father of the fourteenth amendment—contended in 1859 that Oregon, upon admission to the Union, would (like all other states) be limited by the rights guaranteed in the federal constitution. (p. 158) Amar makes the geographic point by contrasting the biographies of Madison, Jefferson, and Henry with that of Bingham:

15. The family of the Chief Justice Joseph Lumpkin of the Georgia Supreme Court taught at least one of his slaves to read: William Finch later became an Atlanta City Councilman. Foner, *Reconstruction: America's Unfinished Revolution* at 359 (cited in note 10).

> As white, male, propertied Virginians, Madison, Jefferson, and Henry belonged to an ongoing republic that had been practicing self-government for 150 years before the Constitution came along. Thus the Virginia House of Burgesses was already older for them than the Fourteenth Amendment is for us today. In a deep sense, the Virginia Declaration of Rights was for them prior to the federal Bill of Rights. Chronologically and perhaps emotionally, Virginia came first, before the Union. But not for Bingham, or for an entire generation of later Americans growing up in places like Ohio. Before Ohio was even a state, it was a federal territory, governed by the federal Constitution and the Union's Northwest Ordinance. For Bingham, *these* documents came first, framing the state and constraining its lawful powers. (p. 158)

Most importantly, slavery both led the slave states "to violate virtually every right and freedom declared in the Bill," and led abolitionist lawyers to develop "increasingly elaborate theories of natural rights, individual liberty, and higher law, theories far more compatible with a declaratory reading of the federal Bill" than with *Barron*. (pp. 160-61) Here, Amar observes that "Ohioan [and later Chief Justice] Salmon P. Chase's famous oral argument" in a 1847 fugitive slave case described the Bill of Rights as provisions that "announce restrictions upon the legislative power, imposed by the very nature of society and government, [rather] than create restrictions, which were they erased from the constitution, the Legislature would be at liberty to disregard." (p. 162) Eventually, the Civil War, by demonstrating that "states required constitutional constraints as well," made *Barron* seem "plainly anachronistic." (p. 162)

Only after acquainting us with the mindset of the *Barron* contrarian does Amar turn to the text and history of the Fourteenth Amendment. For Amar, the key to incorporation is not the due process clause; instead, the crucial language of the amendment is the first clause of the second sentence of section 1: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The opening phrase ("No State shall") was consciously designed to provide precisely what the Supreme Court had found missing from the Bill of Rights in *Barron*. (pp. 164-65) Relying on sources ranging from the Oxford English Dictionary and Blackstone to various treaties of territorial accession, Amar agrees with Michael Kent Curtis[16] that the words "*rights, liberties, privi-*

16. See generally Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (Duke U. Press, 1986).

leges, and *immunities*, seem to have been used interchangeably." (pp. 166-68) Moreover, in "ordinary, everyday language we often speak of the United States Constitution and Bill of Rights as declaring and defining the rights of Americans as Americans." (p. 170) Indeed, Amar notes, the Supreme Court in *Dred Scott*[17] "labeled the entitlements in the federal Bill, 'rights and privileges of the citizen' and described 'liberty of speech,' the right 'to hold public meetings upon political affairs,' and the freedom to 'keep and carry arms' as 'privileges and immunities of citizens,'" even as it denied that non-citizens were entitled to any of these rights, privileges, or immunities. (p. 169)

Amar recounts statements by Congressman John Bingham, Congressman James Wilson, Senator Jacob Howard—most from 1866, but one from Bingham as early as 1859—describing the rights and freedoms protected by the Bill of Rights as among the privileges and immunities of citizens of the United States. (pp. 181-86) He notes that the New York Times described one of Bingham's major 1866 speeches as "a proposition to arm the Congress . . . with the power to enforce the Bill of Rights as it stood," and that Bingham published the speech with the subtitle, "in support of the proposed amendment to enforce the bill of rights." (p. 187) Amar emphasizes that "the vast majority of Republican leaders in 1866 were contrarian." (p. 204) While some such as Bingham were "highly conscious" of the *Barron* decision, "others had apparently never heard of the case." (p. 204) For this reason, the "biggest section 1 debate among Republicans was not what the words meant, but whether the words were necessary, given that the rights they protected already existed." (pp. 204-05) In addition, Amar points to numerous post-1866 statements by figures such as Senator John Sherman, Judge (later Justice) William Woods, Justice Joseph Bradley, U.S. Attorney Daniel Corbin, and the authors of three major contemporaneous constitutional treatises, reflecting the view that the rights and freedoms protected by the Bill of Rights are among the privileges and immunities of citizens of the United States protected by section one of the Fourteenth Amendment. (pp. 208-11)

Amar rejects the common argument that incorporation via the privileges or immunities clause renders the due process clause of the Fourteenth Amendment redundant, noting that the due process clause is broader—protecting "persons," including

17. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

aliens—not only citizens. (p. 172) He notes that Congressman Bingham and Senator Howard both distinguished between safeguarding the privileges and immunities of citizens and providing due process and equal protection to all persons, whether citizen or stranger. (pp. 172-73)

Significantly, Amar also has a response to the common objection that if incorporation were truly intended, "other language could have been used that would have expressed the purpose more clearly." (p. 174) For Amar, the privileges and immunities of citizens are both broader and narrower than the Bill of Rights. (p. 175) The Fourteenth Amendment, in Amar's view, does not use the words "first eight amendments" or "Bill of Rights" for a double reason: "not just because these words would have meant too little, but also because they would have meant too much." (p. 180)

The privileges and immunities of citizens are broader than the Bill of Rights in two ways. First, they encompass such privileges as the writ of habeas corpus described in the unamended constitution. Second, they encompass common law rights as well. As Justice Washington put it in *Corfield v. Coryell*,[18] the leading case interpreting the privileges and immunities clause of Article IV, they include all rights that

> are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union [including] . . . [p]rotection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety. (p. 177)

The privileges and immunities of citizens are also narrower than the Bill of Rights, because, as Amar argues in part one, the Bill of Rights embodies structural concerns and "intertwine[s] rights and structure." (p. 180) The relevant question for incorporation, then, is "whether a given provision of the Constitution or Bill really does declare a privilege or immunity *of citizens* rather than, for example, a right of states." (p. 180) In other words, "[i]nstead of asking whether a given provision is fundamental . . . , we must ask whether it is a personal privilege—that is, a private right—of individuals citizens, rather than a right of

18. 6 F. Cas. 546, 551 (Cir. Ct. E.D. Pa. 1823).

states or the public at large." (p. 221) Amar dubs this approach "refined incorporation." (p. 180)

Amar also posits a striking corollary to his theory of "refined incorporation": Not only does the meaning of the provisions of the Bill of Rights change as those provisions are filtered through the privileges or immunities clause, but the Fourteenth Amendment also has a "feedback effect" that works to alter their meaning as applied to the national government. (pp. 243-44, 281) In other words, according to Amar, the Fourteenth Amendment not only limited the states in a more libertarian and individualistic way than the original Bill of Rights had limited the national government, it also transformed those original limits on the national government into more libertarian and individualistic restrictions.

B

Amar then applies his theory of refined incorporation to each of the specific provisions in the Bill of Rights. He argues that the First Amendment's speech, press, assembly, and petition clauses are privileges of citizens; indeed, "these freedoms and rights are . . . easy cases for full application against states." (p. 234) So, too, is the free exercise of religion, particularly in light of the religious roots of abolitionism (p. 237) and Republican outrage over "decades of religious persecution in the antebellum South." (p. 254) Amar contends, however, that "the very meaning of freedom of speech, press, petition, and assembly was subtly refined in the process of being incorporated," because the paradigm case was no longer "a relatively popular publisher saying relatively popular things critical of less popular government officials," but instead unpopular outsiders—Unionists, abolitionists, and freedmen such as Samuel Hoar, Harriet Beecher Stowe, and Frederick Douglass—"who were critical of dominant social institutions and opinions." (pp. 236-37) As a result, the institutional protector shifted from jury to life-tenured judge. (pp. 242-43) Similarly, the Fourteenth Amendment's emphasis on minority liberty might have altered the meaning of free exercise and thereby justify "special judicial accommodation of minority sects" under the free exercise clause. (p. 256)

The establishment clause proves far more difficult for Amar. Pointing to clauses in state and territorial constitutions in the 1840's through 60's that bar state laws "respecting an establishment of religion," he notes that the meaning of this phrase

was shifting from its original meaning as a federalism-based, local option provision in the federal constitution to a more anti-establishment meaning. (pp. 249-52) Yet he remains reluctant to say that the establishment clause can really be viewed as a "private right of discrete individuals." (p. 252) Ultimately, he ducks the issue of whether the establishment clause should be incorporated, contenting himself with the observation that "principles of religious liberty and equality could be vindicated via the free-exercise clause . . . and the equal-protection clause." (p. 254)

Amar is less coy when he turns to the Second Amendment. He views the right to keep and bear arms as a "paradigmatic" privilege of citizens of the United States. (p. 257) He notes that prior to the Civil War, antislavery theorists argued that citizens had a personal right to own guns for self-protection, and Chief Justice Taney, in *Dred Scott*, agreed that if free blacks were citizens, they would have the privilege "to keep and carry arms wherever they went." (pp. 262-63) While at the founding, arms bearing in militias was a political right like voting, office holding, and jury service, Reconstruction Republicans recast the right into an individual civil right of citizens—including not-yet enfranchised freedmen and women—to self-protection. (pp. 258-59) Here, Amar points not only to statements by numerous members of Congress, but also to the Freedman's Bureau Act which stated that "laws . . . concerning *personal* liberty, *personal* security, and the acquisition, enjoyment, and disposition of estate, real and *personal, including the constitutional right to bear arms*, shall be secured to and enjoyed by all the citizens." (p. 260) In short, the paradigm case shifted from the "the Concord minutemen" fighting the central government to "the Carolina freedman" defending himself, his home, and his family from the Klan. (p. 266) He advises the NRA to pay less attention to 1775-91 and more attention to 1830-68. (p. 266)

Amar suggests that the Third Amendment, like the Second Amendment, was "privatized and domesticated" by the privileges or immunities clause. Originally it reflected "classic republican skepticism of peacetime armies," but, as a privilege of citizens, is better understood as protecting the privacy of the homestead. (p. 267) The Fourth Amendment, which "was from the beginning protective of the private domain," is a "rather easy case for incorporation." (p. 267) So, too, is the Fifth Amendment's just compensation clause, the most individualistic item in the Bill of Rights and the subject of *Barron* itself. Not only did

Representative Bingham and Senator Howard both specifically discuss *Barron* and just compensation, but "virtually all mid-nineteenth-century jurists deemed just compensation a fundamental principle of justice." (pp. 268-69)

As for the jury provisions of the Fifth, Sixth, and Seventh Amendments, Amar contends that "the story is far more complicated than has been understood by courts and commentators thus far." (p. 269) He notes that in 1866, all juries—grand, petit, and civil—had long been considered both "privileges" and basic components of due process. (p. 269) In Amar's view, while "the Founders emphasized Americans' rights to participate in government by serving in juries, Reconstructors . . . emphasized the right to be tried by juries." (271) In thus mutating a political right to be a juror into a civil right to be tried by a jury,[19] they built on the experience of abolitionists who "had repeatedly stressed the fundamentality of jury trials" in protecting those claimed to be fugitive slaves. (p. 269) Salmon P. Chase, for example, unsuccessfully argued on behalf of a black women named Matilda Lawrence that she was entitled to a jury trial before being snatched away from Ohio as a slave. (p. 270) Some northern states enacted laws requiring a jury trial in such cases, but the Supreme Court found such laws beyond state authority in *Prigg v. Pennsylvania*.[20] (p. 270) Similarly, opponents of the 1850 Fugitive Slave Act, such as Senator Charles Sumner, argued that it unconstitutionally deprived the claimed slave of the right to a jury trial. (p. 270) Thus it would seem, all of the jury rights should be considered privileges of citizens of the United States, protected against state infringement by the Fourteenth Amendment.

Amar observes, however, that the "Founder's jury right was not merely political and collective; it was also localist." (p. 274) As a result, the aspects of the Sixth and Seventh Amendments

19. Amar also claims that "the Fifteenth Amendment rightly read, affirms blacks' political rights—to vote, serve on juries, and hold office—just as the Fourteenth Amendment had affirmed blacks' civil rights to do virtually everything but." (p. 273) He does not attempt to reconcile this claims with the explicit decision by the Fortieth Congress—well aware of the Georgia legislature's refusal to seat duly elected black members—to limit the proposed Fifteenth Amendment to voting and to delete any protection of office holding. See Earl M. Maltz, *Civil Rights, the Constitution, and Congress, 1863-69* at 147-55 (U. Press of Kansas, 1990). He does, however, cite his brother's article which has made the attempt. See Vikram David Amar, *Jury Service as Political Participation Akin to* Voting, 80 Cornell L. Rev. 203, 228-34 (1995) (suggesting that Members of Congress believed that the right to vote included the right to hold office and did not want to appear to endorse Georgia's distinction between voting rights and office holding).

20. 41 U.S. (16 Pet.) 539 (1842).

that sound in federalism "should be filtered out" when incorporated by the Fourteenth Amendment. (p. 275) For example, the vicinage and district requirements of the Sixth Amendment do not sensibly apply to the states. (p. 275) The entire Seventh Amendment might even be filtered out, in light of Amar's argument that the "best reading of the original amendment" was to require federal courts to provide a civil jury trial whenever local state courts would do so. (p. 276)

As for the remaining provisions of the Fifth, Sixth, Seventh, and Eighth Amendments—e.g., double jeopardy, self-incrimination, confrontation, compulsory process, right to counsel, bail, cruel and unusual punishment—Amar finds that these are "rather easy candidates for incorporation." (p. 278) Amar notes that the infamous Fugitive Slave Act of 1850 had "deprived blacks of some of the most basic fair-trial rights" and that the "Slave Power had also filled the law books with outrageous punishments." (pp. 278-79) Even here, however, he finds a slight change in meaning as the Bill of Rights is filtered through the Fourteenth Amendment. In particular, Amar notes that while the original ban on cruel and unusual punishment was focused on restraining judges, it "might have more judicially-enforceable bite against state legislatures" because a state or region's cruel punishments can more readily be compared to a national baseline and judged "unusual" than can an Act of Congress. (pp. 279-80)

Finally, Amar turns to the Ninth and Tenth Amendments—amendments that he earlier dubbed the popular sovereignty amendments. He largely dodges the question of whether these amendments sensibly incorporate, concluding that it "does not much matter." (p. 280) To the extent that the Tenth Amendment is about federalism and enumerated federal power, incorporation "obviously makes little sense," while to the extent that it reaffirms popular sovereignty, "it adds little to the Article IV republican-government clause." (p. 280) Similarly, to the extent that the Ninth Amendment is a "federalism-based companion to the Tenth," incorporation is not sensible, but to the extent if "affirms unenumerated rights other than federalism," these rights "add little to the privileges-or-immunities clause itself, because . . . that clause is itself obviously open-ended." (p. 280)

III

Amar provides not only a powerful and insightful way to view the Bill of Rights at its creation, but also a significant and persuasive way to approach the incorporation question. There are, nevertheless, important difficulties.

First, in his efforts to contrast the protection-of-popular-control-over-government-agents Bill of Rights at its creation with how it was incorporated as a protection-of-minorities-and-individuals-from-popular-government by the privileges or immunities clause at Reconstruction, Amar washes out shades of grey.[21] Some of this is mostly a matter of stylistic emphasis: Amar, for example, repeatedly talks about the "core" of the Bill of Rights at its creation as majoritarian, thereby suggesting that any protection of individual or minority rights was peripheral.[22] But Amar goes so far as to suggest that a primary reason that the takings clause, which he acknowledges "seems primarily designed to protect individuals and minority groups," made it into the Constitution was that Madison "manage[d] to slip the takings clause through" by "clever bundling" of the clause with other more popular clauses. (pp. 77-78) As Professor Finkelman has pointed out in response to Amar's earlier work, however, there were significant concerns among Anti-Federalists, who now found themselves a minority, with protection of minority rights.[23] More generally, "the historical fraternity appears to be on the way to concluding that the early history of our republic can best be understood by considering Republicanism as only one of at least three important civic ideologies—the other two being . . . Lockean Liberalism and . . . Protestant Christianity."[24]

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21. Cf. Rakove, 11 Yale J.L. & Human. at 202 (cited in note 6) (noting that Amar's account is missing "texture, by which I mean a willingness to tolerate nuance and ambiguity and to provide the measure of descriptive detail that gives historical narrative its veracity.").

22. Cf. Akhil Reed Amar, *Some Comments on "The Bill of Rights As a Constitution,"* 15 Harv. J.L. & Pub. Pol. 99, 109-10 (1992) ("I agree that it is an oversimplification to say that the only rights in the Bill of Rights are majoritarian or collective. I do want, however, to remind us of a tradition that a conventional account has basically made all but invisible.")

23. Paul Finkelman, *The Ten Amendments As a Declaration of Rights*, 16 S. Ill. U. L.J. 351, 379-89 (1992).

24. Stephen B. Presser, *To Secure These Rights: The Declaration of Independence and Constitutional Interpretation, by Scott Douglas Berger*, 14 Const. Comm. 229, 230 (1997) (book review); see also James T. Kloppenberg, *The Virtues of Liberalism: Christianity, Republicanism and Ethics in Early American Political Discourse*, 74 J. Am. Hist 9 (1987).

In addition, Amar relies rather heavily on the first two amendments proposed by the first Congress and the jury trial amendments to shape the meaning of the entire Bill of Rights. But the first two proposed amendments failed of ratification at the time. Moreover, while the bulk of what came to be called the Bill of Rights were originally proposed to join the incomplete bill of rights in Article I, section 9, the first two proposed amendments and the jury amendments were originally proposed to be located elsewhere in the constitution.[25]

Similarly, the view that the Bill of Rights serves to guard against the agency problems of government persisted at least into the middle part of this century. Indeed, when Justice Black argued in dissent in *Adamson* that the Bill of Rights was "designed to meet ancient evils," he described those evils as "the same kind of human evils that have emerged from century to century wherever excessive power is sought by the *few* at the expense of the *many*."[26] Although Amar calls Black's *Adamson* dissent an "heroic reexamination and resurrection" of the privileges or immunities clause and labels the U.S. Reports between Justice Bradley's dissenting opinion in *Slaughter-House*[27] and it a "vast wasteland," he fails to note the majoritarian flavor of this passage. (p. 213)

This omission is significant, and not only because Hugo Black stands out as the closest thing to judge-hero in a book in which, as Amar notes, "judges are not exactly the heroes and heroines." (p. 305) It is also significant because, as we have seen, Amar relies heavily on the natural law thought of *Barron* contrarians to understand the privileges or immunities clause. For such thinkers, the lines between natural law, common law, and constitutional law were hardly distinct. Indeed, Amar specifically suggests that in deciding whether a provision of the Constitution is a personal privilege of citizens, "English common law may be of great help here, for it featured expositions of many privileges and immunities with counterparts in the Bill of Rights, but without the Bill's federalism, majoritarian, and public-rights glosses." (p. 225) As Amar well knows, we have been down the road of constitutionalizing common law rights before. And as Amar also well knows, the legacy of this journey is pre-

25. See Edward A. Hartnett, *A "Uniform and Entire" Constitution; or, What if Madison Had Won?*, 15 Const. Comm. 251, 252-53 (1998).

26. *Adamson v. California*, 332 U.S. 46, 89 (1947) (Black, J., dissenting) (emphasis added).

27. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872).

cisely why Justice Black—unlike the members of the Thirty-Ninth Congress—did not rely on what Amar calls Justice Washington's "ode" to fundamental common law rights in *Corfield. v. Coryell.* In Amar's words: "The specter haunting Justice Black has a name. Its name is *Lochner.*" (p. 178)

But the ghost does not seem to frighten Amar as much as it frightened his hero.[28] Amar does not rush to deny that revival of the privileges or immunities clause might lead to *Lochner.* Instead, he merely notes that "the understanding that the privileges-or-immunities clause applied to various common law rights may not necessarily lead us to *Lochner.*"[29] (p. 178) With a nod to John Harrison,[30] Amar observes that the clause might only protect a citizen from discrimination with regard to the exercise of common law rights rather than protect the exercise of the rights themselves. (p. 178) Thus Amar is rather non-committal in addressing the extent to which the privileges or immunities clause protects common law rights.[31]

Although Amar does not insist on keeping *Lochner* in the grave, he does—despite his well-deserved reputation as an iconoclast—pull many punches. He persuasively argues that current constitutional doctrine regarding incorporation asks the wrong question: Instead of asking whether a given provision is "fundamental" under "(substantive) due process," we should ask whether it is a personal "privilege or immunity" of individual "citizens," rather than a right of states or the public at large. But even though current doctrine asks the wrong question, Amar nevertheless tells "a tale that, at the end of the day, ends up supporting most of today's precedent about the Bill of Rights." (p. 307) Indeed, he describes part two of the book as "confirm[ing]

28. See Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. Davis L. Rev. 1169, 1176 (1995) ("My own hero is the great Hugo Black, who had an abiding faith in the Constitution, the jury, and the people. (And for all this, he was mocked by sophisticated cynics in the academy—wise fools!)").

29. *Lochner v. New York*, 198 U.S. 45 (1905). For a decision that might be the harbinger of a revival of the privileges or immunities clause, see *Saenz v. Roe*, 119 S. Ct. 1518 (1999).

30. John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385 (1992). Harrison, in turn, describes Amar's approach as "by far the best argument in favor of incorporation under the Privileges or Immunities Clause." Id. at 1466 n.309.

31. This non-committal view regarding the proper interpretation of the privileges or immunities clause also underscores the significance of Amar's dodge regarding the incorporation of the Ninth Amendment. Amar asserts that incorporation of the Ninth Amendment "does not much matter" because any unenumerated rights that it affirms (other than federalism) add little to the privilege or immunities clause. (p. 280) Thus Amar punts the Ninth Amendment question to the privileges or immunities clause, and then punts on an important question regarding the privileges or immunities clause.

conventional wisdom," (p. xv) and notes that "[f]rom start to finish this book has aimed to explain how today's judges . . . have often gotten it right without quite realizing why." (p. 307)

Most surprising from a self-proclaimed populist[32] is that Amar never addresses what is potentially the most significant result of a doctrinal shift from substantive due process to privileges or immunities: the constitutional protection of corporations. The Supreme Court decided early on, without hearing oral argument or providing an explanation, that corporations are "persons" protected by the due process clause.[33] It has adhered, however, to the longstanding view that corporations are not "citizens" protected by the privileges and immunities clause of Article IV,[34] or by the privileges or immunities clause of the Fourteenth Amendment.[35] And there is an especially stark textual reason to insist that corporations are not "citizens" within the meaning of the Fourteenth Amendment: the first sentence of that amendment defines citizens to be persons "born or naturalized in the United States." Thus a shift of the substantive protections of the Bill of Rights from due process to privileges or immunities should mean that corporations lack such substantive protection against the states—a result that populists have long sought. But Amar says not a word about it.

Moving to areas that he does discuss, Amar's strongest critique of the results of current doctrine is his suggestion that it is "hard to justify" the judicial failure to incorporate the right to bear arms and the grand jury. (p. 307) But although his analysis

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32. Amar, 65 Ford. L. Rev. at 1657 (cited in note 9) ("I might say that I am a constitutionalist, a textualist, and a populist."). Amar reports that he has asked many nonlawyers, "What are the privileges and immunities of citizens of the United States?" and that they "often say 'freedom of the press,' 'the right to keep and bear arms,' 'jury trial,' and 'habeas corpus.' Every once in a while, someone throws in 'freedom of contract,' or 'property.'" Akhil Reed Amar, *Did the Fourteenth Amendment Incorporate the Bill of Rights Against States?*, 19 Harv. J.L. & Pub. Pol. 443, 444 (1996).

33. The Court made the announcement before hearing argument in *Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 394 (1886). "[T]he popular literature marks this as the year that the corporation 'stole' the fourteenth amendment." Carl Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 Hast. L.J. 578, 581 (1990) (citation omitted). Interestingly, Chief Justice Waite left it up to the Reporter "to determine whether anything need be said about it in the report inasmuch as we avoided meeting the constitutional question in the decision." C. Peter Magrath, *Morrison R. Waite: The Triumph of Character* 223-24 (Macmillan, 1963) (quoting letter from Waite, May 31, 1886). See generally Howard Jay Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 Yale. L.J. 371 (1938).

34. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 179-85 (1868).

35. *Asbury Hospital v. Cass County*, 326 U.S. 207 (1945); *Selover, Bates and Co. v. Walsh*, 226 U.S. 112 (1912); *Western Turf Ass'n v. Greenberg*, 204 U.S. 359 (1907); *Orient Ins. Co. v. Daggs*, 172 U.S. 557 (1899).

strongly suggests that the judiciary was wrong to incorporate the establishment clause, he backs away from announcing that conclusion. Moreover, having persuasively explained how the majoritarian and federalistic right to free speech and bear arms were transformed into an individualistic privileges, he never explains why the majoritarian and federalistic civil jury right was not similarly transformed. The proceedings under the Fugitive Slave Act were, after all, civil actions.

Perhaps more dramatically, Amar marshals powerful arguments in favor of jury review, but is unwilling to endorse it. He notes the widespread belief in the late-eighteenth century that juries have the power to decide both law and fact. (pp. 100-01) He recounts the story of "perhaps the most famous of all federal Sedition Act prosecutions, *United States v. Callender*."[36] (p. 98) There, William Wirt argued in favor of the jury determining the constitutionality of the Sedition Act, but was repulsed by Circuit Justice Samuel Chase. Amar describes Wirt as "'one of the greatest Supreme Court advocates of all time and the man who holds the record for years of service as Attorney General,'" (quoting Rex Lee), and notes that Chase was impeached for his overall handling of the case and for "refusing to allow defense counsel in another criminal case to argue law to the jury." (pp. 98-99) Amar nevertheless states that he is not "wholly convinced" that juries have the power to refuse to enforce laws that they consider unconstitutional. (p. 103)

Amar's reason for balking at jury review leads us to the most troubling aspect of the book. As we have already seen, Amar contends that the Fourteenth Amendment has a "feedback effect" that works to alter the meaning of prior limitations on the national government. Although Amar usually deploys the notion of a feedback effect to justify applying the Fourteenth Amendment's more libertarian and individualistic restrictions to the national government as well as the states, here he uses it to *reduce* pre-existing restrictions on the national government. He states that the strongest argument against jury review is that Civil War Amendments (he doesn't specify which one) implicitly "qualified" the power of the jury. (p. 103)

Amar is certainly right that earlier constitutional provisions must be read in light of later ones. Some amendments are plainly designed to supersede earlier provisions, and I have sug-

36. 25 F. Cases 239 (C.C.D. Va. 1800) (No. 14,709).

gested in an earlier article what our constitution might look like if (as Madison had desired) we actually removed the superseded provisions and inserted the new ones where they belonged in the body of the constitution rather than tacking them onto the end.[37] But as Amar's treatment of jury review reveals, the notion that amendments implicitly change the meaning of seemingly-unrelated earlier provisions can be a rather expansive one. For example, consider Amar's sustained argument, based on the original constitution and the Bill of Rights, that a national draft is unconstitutional. Does the Fourteenth Amendment, as it transforms the right to keep and bear arms into a personal right, also eliminate the distinction between the feared national "army" and the trusted state "militia," thereby permitting a national draft? Elsewhere, Amar has suggested that the Thirteenth Amendment authorizes restrictions on speech that would otherwise be prohibited by the First Amendment.[38] As Judge Kozinski and Professor Volokh have pointed out, why doesn't this reasoning also allow the Thirteenth Amendment to trump the Sixth Amendment's right to a jury trial, or the Sixteenth Amendment to trump the Fourth?[39] Indeed, why doesn't the Fourteenth Amendment, embodying as it does for Amar a shift from republican popular sovereignty to libertarian individualism, implicitly alter the popular sovereignty reading of not only the jury and militia clauses, but also of Amar's treasured popular sovereignty preamble, guaranty clause, and Tenth Amendment?

Amar's argument that amendments implicitly change the meaning of seemingly-unrelated earlier provisions opens a gap between Amar's methodology and his conclusions. His methodology relies on a claim that the same words can mean different things in different contexts, that later amendments can affect the meaning of earlier words, and that an understanding of the full

37. See Hartnett, 15 Const. Comm. at 281-99 (cited in note 25).

38. Akhil Reed Amar, *Comment: The Case of the Missing Amendments, R.A.V. v. City of St. Paul*, 106 Harv. L. Rev. 124, 155-60 (1992).

39. Alex Kozinski and Eugene Volokh, Commentary, *A Penumbra Too Far*, 106 Harv. L. Rev. 1639, 1650-53 (1993). Professor Herman has made a similar point about Amar's argument for a Fourteenth Amendment-based exception to the double jeopardy clause. See Susan N. Herman, *Reconstructing the Bill of Rights: A Reply to Amar and Marcus's Triple Play on Double Jeopardy*, 95 Colum. L. Rev. 1090, 1104 (1995) (commenting on Akhil Reed Amar and Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 Colum. L. Rev. 1 (1995)). Cf. Michael Stokes Paulsen, *Double Jeopardy Law After Akhil Amar: Some Civil Procedure Analogies and Inquiries*, 26 Cumb. L. Rev. 23, 29 & n.23 (objecting that it is "just a little too slick" for Amar to use incorporation to "fundamentally change the nature of an individual right against the federal government").

historical context is necessary to understand a word's meaning. (p. 301) But while his history stops with Reconstruction, he projects his conclusions forward to today. On Amar's methodological premises, however, he has provided a compelling account of what the privileges or immunities clause meant in the 1860's, but—absent an account of constitutional history since then—not an account of what it means today.

This may seem an unfairly harsh criticism. After all, Amar has written a wonderful legal and historical account covering the Framing and Reconstruction. How can someone complain that he *only* did that, and left out later history? If Amar truly were an originalist, claiming that the original understanding of a constitutional provision binds later generations, it would be an unfair criticism—although then Amar would be subject to all of the standard criticisms of originalists.

But Amar is not an originalist.[40] He does not contend that we are bound by the original understanding of the Bill of Rights. Instead, he contends that the *Barron* contrarians and Reconstruction Republicans transformed the original meaning of the Bill of Rights without altering the text of the Bill itself. But if they could do that, then subsequent generations could have made their own transformations. For example, the *Lochner* contrarians and positivist Progressives who attacked the link between common law and constitutional law might have (among other things) transformed the original meaning of the Fourteenth Amendment's due process and privileges or immunities clauses. Under Amar's methodology, it is impossible to know the current meaning of a constitutional provision without considering the thinking behind all subsequent amendments.

Amar, then, may be far closer to his Yale colleague Bruce Ackerman than appears at first blush.[41] Ackerman famously argues that the Constitution can be amended without compliance with the formalities of Article V and without any textual change whatsoever—and that the New Deal represents just such a nontextual, extra-constitutional "amendment."[42] Amar agrees that the Constitution can be amended without compliance with the

40. Cf. Rakove, 11 Yale J.L. & Human. at 200 (cited in note 6) (noting that Amar is "not really interested in documenting intentions.").

41. Cf. id. at 192 (referring to the "Yale Law School tag-team of Amar and Ackerman. . . .").

42. See Bruce Ackerman, 1 *We the People: Foundations* 58-67 (Harvard U. Press, 1991); Bruce Ackerman, 2 *We the People: Transformations* at 10-31, 279-311 (cited in note 6).

formalities of Article V;[43] he is, however, too much of a textualist to accept the idea of an amendment without a text. But once he finds a text, he is willing to interpret that text to broadly transform the meaning of prior text.

In the book's afterword, Amar does make some brief comments about this century's constitutional amendments. There, he suggests that perhaps the New Deal was the predictable outgrowth of the Sixteenth, Seventeenth, and Nineteenth Amendments, which—by authorizing a progressive national income tax, eliminating state legislative selection of U.S. Senators, and providing for female suffrage in both national and state elections—increased national power and invited redistributive economic intervention. (p. 300) Amar may be on to something here. With a constitution that was framed to rely on structure rather than parchment barriers to limit the power of the national government, we should not be surprised that major structural changes affected the power of that government. Indeed, in opposing the Seventeenth Amendment, Senator Elihu Root predicted that direct election of Senators would lead the national government to "extend its functions into the internal affairs of the states," producing a "concentration of power at the center while the states dwindle into insignificance. . . ."[44] Although other factors were obviously at work as well, Root's prediction largely came to pass with the demise of enumerated power limits on Congress at mid-century.[45]

But if Amar's methodology is correct, twentieth century amendments may be important to constitutional issues other

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43. Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043 (1988); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 Colum. L. Rev. 457 (1994). The argument, of course, has not gone unanswered. See, e.g., Henry P. Monaghan, *We the People(s), Original Understanding, and Constitutional Amendment*, 96 Colum. L. Rev. 121 (1996).

44. See Elihu Root, *Address in the Senate of the United States: The Direct Election of United States Senators* (Feb. 10, 1911), cited in Robert Bacon and James Brown Scott, eds., *Addresses on Government and Citizenship* 267-69 (1916). Note, however, that by "1912, when the Senate finally approved the Seventeenth Amendment, about 60% of the Senators were already chosen by virtual elections" with state legislators pledged to support the winner of a popular vote. Ronald D. Rotunda, *The Aftermath of Thornton*, 13 Const. Comm. 201, 209 (1996).

45. See generally Barry Cushman, *Rethinking The New Deal Court: The Structure of a Constitutional Revolution* 208-25 (Oxford U. Press, 1998) (arguing that the transformation of commerce clause jurisprudence was not brought about by a "switch in time" in 1937, but rather by Roosevelt's second term appointments to the Court, and demonstrating that the Court in 1942 was well aware that it was abandoning judicially-enforceable limitations on Congressional commerce power).

than the scope of Congressional power. That is, under Amar's account of the transformation of the Bill of Rights by the Reconstruction Republicans, amendments can transform the meaning of prior text in all kinds of non-obvious ways that are consonant with the legal-political assumptions of the victors of the amending generation. If this is right, then the twentieth century amendments might well have transformed the meaning of the privileges or immunities clause or even the meaning of the Bill of Rights itself.

Similarly, the sub-constitutional shift in the early twentieth century to permit the Supreme Court to exercise discretionary control over its own docket may have had crucial significance for judicial interpretation of the Bill of Rights and indeed may have made the incorporation doctrine a practical possibility. Under a jurisdictional regime requiring the Supreme Court to review, at the losing party's request, every state court decision denying a federal right, incorporation of the Bill of Rights would have been enormously difficult, if not practically impossible.[46] Amar does not "try to show why judges were right in refusing to incorporate First Amendment freedoms before 1925," (p. 307) but is it merely coincidental that incorporation got off the ground in 1925, four months after the Judges' Bill was enacted giving the Supreme Court broad discretionary power to decide which cases it would choose to hear?[47]

Perhaps the most refreshing aspect of Amar's account, however, is that (on the whole) judges are either minor players or the bad guys. He writes:

> The careful reader will no doubt notice that judges are not exactly the heroes and heroines of my tale. Federal judges, after all, enthusiastically enforced the infamous Sedition Act of 1798, cheerfully sending men to prison for their antigovernmental speech and

46. The institutional difficulty with incorporation is even greater under Amar's iconoclastic reading of Article III, which requires a federal forum for every claimed federal right—even if a state court has upheld the federal claim. See Akhil Reed Amar, *Parity as a Constitutional Question*, 71 B.U. L. Rev. 645, 649-50 (1991); Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. Rev. 205, 254-59 (1985).

47. See *Gitlow v. Connecticut*, 268 U.S. 652, 666 (1925) (assuming First Amendment right of free speech incorporated in due process); Judges' Bill, Act of Feb. 13, 1925, 43 Stat. 936. See also Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill* (on file with the author).

Some trace incorporation back to *Chicago, Burlington and Quincy Railroad Co. v. Chicago*, 166 U.S. 226 (1897). But while that case held that due process requires compensation when property is taken for public use, it did not so much as cite the takings clause of the Fifth Amendment.

> neutering juries along the way. It is hard to imagine a bigger betrayal of the original Bill of Rights, whether we look at the First, or the Sixth, or the Tenth Amendment. A century later, the Supreme Court strangled the privileges-or-immunities clause in its crib in the *Slaughter-House Cases*; blessed Jim Crow in *Plessy*; and blithely allowed judges to imprison a newspaper publisher (in a juryless proceeding lacking specific statutory authorization) simply because the publisher had the audacity to criticize the very judges in question. . . . Due process of law, according to the Taney Court, was satisfied by fugitive-slave hearings presided over by a financially biased adjudicator, but violated by free-soil laws like the Northwest Ordinance. And although Roger Taney himself (rightly) had doubts about the federal government's power to draft citizens outside of the Constitution's careful militia system, the Supreme Court, in the *Selective Draft Law Cases*, gave this argument the back of its hand. (pp. 305-306)

Who, then, are the heroes of Amar's tale? They are the "generations of Revolutionaries and Reconstructors who birthed and rebirthed the Bill of Rights." (p. 305) And Amar leaves no doubt which of these groups he holds in higher regard: While the Revolutionaries who created the Bill of Rights were great men, "their Bill of Rights was tainted by its quiet complicity with the original sin of slavery." (p. 293) The Reconstructors, however—"women alongside men, blacks alongside whites"—gave us a new birth of freedom because they "renounced the Slave Power and all its works." (p. 294)

But if Amar has not yet addressed the heroes of the twentieth century and their impact on our constitution, his work invites us to open our eyes to the possibility of such heroes in the twenty-first century. Indeed, to my mind, this is the point of Amar's project.[48] Why does he try so hard to convince people that our current understanding of the Bill of Rights is wildly different than the original understanding if, at the end of the day, he does not call for a return to the original understanding? The point, it seems to me, is to focus attention on the transformative power exercised by *Barron* contrarians and Reconstruction Republicans—and hold them up as a model to emulate. Through legal imagination, political organizing, and personal courage,

48. Rakove makes a similar point about Ackerman's project. See Rakove, 11 Yale J.L. & Human. at 209 (cited in note 6) ("[T]he constitutional entrepreneurship of 1787 and 1866 helps to legitimate the New Deal's radical and permanent departure from established doctrine . . . [which] in turn legitimates Ackerman's call to the citizenry to be prepared to mobilize . . . .").

they changed the constitution and gave us a new birth of freedom. If they could do it, Amar seems to be saying, so can we.

The book's dust jacket (perhaps in an effort to downplay the book's religious imagery) does not include the subtitle. It does, however, (perhaps in an effort at dry humor by the graphic designers) include the author's name between the first and second words of the title. That is, a linear reader (unmoved by contrasting typeface and color) would read the title as "The Akhil Reed Amar Bill of Rights." Some readers might consider Amar's views sufficiently idiosyncratic to make this an apt title. Yet Amar's account demonstrates that the meaning of the Constitution in general, and the Bill of Rights in particular, is in the hands of each generation. As much as his work provides insight into what earlier generations believed about the Bill of Rights, in the end, it also serves to remind us that the ultimate question is what does *this* generation believe must be *our* Bill of Rights.