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A STORY FOR ALL SEASONS: AKHIL REED AMAR ON THE BILL OF RIGHTS

Michael Kent Curtis*

INTRODUCTION

The Bill of Rights: Creation and Reconstruction,¹ by Professor Akhil Reed Amar looks at our first national Bill of Rights (drafted in 1789) and at our second, the Fourteenth Amendment (drafted in 1866). It shows how we moved as a nation from a vision of states, by and large, setting legally enforceable citizens' rights to the vision of a truly national Bill of Rights. Though others, including myself, have studied how we achieved a national Bill of Rights under the Fourteenth Amendment and the role that the battle over slavery played in defining American rights, no one has told the story of the Bill of Rights with more beauty and elegance than Akhil Reed Amar. Application of the Bill of Rights to the states, long championed by Justice Hugo Black of Alabama, has received strong, though qualified, support from a distinguished Professor at Yale Law School.

Basically, the application of the Bill of Rights to the states is the story of how a popular understanding of the Bill of Rights eventually expanded its reach beyond the narrow scope of Supreme Court decisions to make it a national guarantee that limited the states as well. This popular understanding helped to produce Section 1 of the Fourteenth Amendment.² Court decisions, in turn, nullified the plan to make states obey basic guarantees of the Bill of Rights,³ a process largely reversed later by a series of decisions culminating in those of the Warren Court.⁴ As Amar sees it, the

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¹ AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998).

² See U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); see also MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986) [hereinafter, CURTIS, *NO STATE SHALL ABRIDGE*].

³ See, e.g., *Maxwell v. Dow*, 176 U.S. 581 (1900) (holding that the Fourteenth Amendment does not require jury trials in state courts); *Hurtado v. California*, 110 U.S. 516 (1884) (holding that the Fourteenth Amendment did protect grand jury indictment in state courts); *Slaughter House Cases*, 83 U.S. 36 (1872) (holding that the rights of citizenship under the federal government were limited to things such as protection on the high seas and apparently did not include the Bill of Rights).

⁴ See, e.g., *Benton v. Maryland*, 395 U.S. 784 (1969) (making the Bill of Rights

Supreme Court generally reached the correct result, but it did not employ the best rationale.

In the late nineteenth and early twentieth centuries, the Court transformed Section 1 of the Fourteenth Amendment into a robust protector of corporate interests.⁵ Today, a similar judicial and legal transformation seems to be underway on a number of legal fronts, including new interpretations of the Bill of Rights.⁶ These developments are beyond the scope of Amar's book, but his basic story is relevant to how we might think about them.

There are many good reasons to read Amar's splendid book. It is a great story and it is our story, the story of American liberty. History gives us context and meaning. At its best, history provides a vicarious experience, which is necessary for wisdom. By increasing the number of cases and factors we consider, history can help us to reach wiser results. As Justice Black understood so well, bills of rights were invented by people who had experienced and learned from harsh abuses of power and denials of human rights.⁷ Having learned these lessons, and often having learned them very painfully, these people have important things to teach the rest of us. Thus, it is worthwhile to revisit their experience.

History is also important for legal analysis. If the law is the resultant force of the vectors of text, history, structure, precedent, and public policy, then history is one factor judges, lawyers, and public officials should consider in reaching decisions. The problem, of course, is that people do not agree on the weight to be given to these factors. Decisions in human affairs, unlike problems in mathematics, cannot be reduced to a formula.

protection against double jeopardy applicable to states); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (making the right to a criminal jury trial from the Bill of Rights applicable to the states).

⁵ See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905) (striking down a law setting maximum hours for bakers on the theory that the general right to make a contract in relation to a business is part of the liberty protected by the Fourteenth Amendment); *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150 (1897) (holding that the Equal Protection Clause protected a railroad from paying an attorney's fee to a prevailing plaintiff with small claims); *Santa Clara County v. Southern Pacific R.R. Co.*, 118 U.S. 394 (1886) (holding that the Fourteenth Amendment Due Process Clause applies to corporate persons).

⁶ See, e.g., *Lucas v. South Carolina Coastal Comm.*, 505 U.S. 1003 (1992) (holding that the Fifth Amendment applied to an owner of beachfront property whose property was allegedly taken pursuant to a South Carolina environmental regulation); *First Nat'l. Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (holding that the First Amendment privileges extend to corporations spending on ballot measures); cf. *Alden v. Maine*, 119 S. Ct. 2240 (1999) (holding that sovereign immunity protects states from suits by their employees under the federal Fair Labor Standards Act).

⁷ See *Adamson v. California*, 332 U.S. 46, 68 (1947) (Black, J., dissenting) (discussing the history of Fourteenth Amendment incorporation).

Yet, if history is one of the keys to legal meaning, how should we examine it? Ours is a nation founded on popular sovereignty, so a crucial original meaning of a constitutional provision is what "we the people" understood the provision to mean. With so many people involved, reconstruction of original meaning is an approximation at best. The task of scholarship is to give a more complete account. Fine scholars, Justice Oliver Wendell Holmes once suggested, may add a barnacle or two to the coral reef of knowledge.⁸ Akhil Amar's book has added new barnacles to the reef. As Holmes' metaphor suggests, we necessarily build on the work of our predecessors. In answering the question of whether the Bill of Rights applies to the states, we all owe a substantial debt to the work of Justice Hugo Black, to the late Professor W. W. Crosskey, and to their critics.⁹

Among Amar's many contributions, five stand out. The first is his use of the forms of constitutional arguments identified by Phillip Bobbitt to help us understand the problem of the application of the Bill of Rights to the states.¹⁰ The fit is natural, obvious, and elegant. Many of the particular arguments from text, history, precedent, and the like already existed in the literature.¹¹ Amar's great contribution is to apply them and some new ones to the historical data in a systematic, elegant, and organized way, enriching as well as reorganizing the substantial evidence already accumulated on these topics. By separately applying the lenses of text, precedent, and history, Amar helps us to see the application of the Bill of Rights to the states more clearly. Since judges and lawyers regularly use arguments from text, constitutional structure, history, and precedent, Amar's study offers valuable skills for lawyers and aspiring lawyers. There is no better way to deepen one's understanding of these methods than reading Akhil Amar's book.

In his textual and historical analysis, Amar has marshaled and expanded the substantial evidence and interpretation showing that the words "no state shall . . . abridge the privileges or immunities of citizens of the United States" was widely understood to apply Bill of Rights liberties to state action.¹² Amar recognizes and

⁸ See SHELDON M. NOVICK, *HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES* 130 (1989).

⁹ See *Adamson v. California*, 332 U.S. 46, 71-72 (1947) (Black, J., dissenting) (arguing that one of the principal purposes of the Fourteenth Amendment was to make the Bill of Rights applicable to the states); William Winslow Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations of State Authority*, 22 U. CHI. L. REV. 1, 4 (1954) (same).

¹⁰ See PHILLIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982); see also CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969) (discussing the use of structural considerations when interpreting the Constitution).

¹¹ See, e.g., Crosskey, *supra* note 9.

¹² U.S. CONST. amend. XIV. The evidence on this point continues to grow. See, e.g., Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. (forthcoming 2000);

deals with a paradox here. In 1833, thirty-five years prior to the ratification of the Fourteenth Amendment, *Barron v. Baltimore*¹³ held that the Bill of Rights was merely a limit on the federal government, not the states.¹⁴ Amar does a fine job of explaining how some judges and other “*Barron* Contrarians” could see the Bill of Rights as a limit on the states, even before the Fourteenth Amendment.¹⁵

Prior to the ratification of the Fourteenth Amendment, Americans increasingly had begun to understand and appeal to the national Bill of Rights as a charter recognizing the basic rights of all American citizens throughout the land.¹⁶ That fact also helps explain the relation of the “privileges or immunities of citizens of the United States”¹⁷ to the Bill of Rights.

A second contribution of Amar’s *The Bill of Rights* is that it gives us a wider focus. It sees the Constitution not simply as the document written in 1787 and the Framers not simply as James Madison and James Wilson. Instead, it sees the full Constitution with all its amendments and later history and views it with an expanded pantheon of creators and heroes. These include not only the men of 1787, but also John Bingham and Jacob Howard, framers of the Fourteenth Amendment, and the many men and women, black and white, who transformed public opinion and made the Thirteenth, Fourteenth, and Fifteenth Amendments possible.

A third and related major contribution is Amar’s sensitive portrayal of the role of women and Americans of African descent in the struggles that eventually led to the framing of the Fourteenth Amendment. Amar has done much to recognize their substantial contributions and to highlight the work of other scholars who have noted their role.¹⁸

A fourth contribution is that Amar emphasizes the declaratory understanding of the Bill of Rights. By this view, the Bill declared basic rights of Americans. The declaratory understanding of the Bill of Rights, in turn, helps to explain how the Fourteenth Amendment could absorb and apply Bill of Rights guarantees.

A fifth contribution is Amar’s vision of the original Bill of Rights and the Fourteenth Amendment’s second bill of rights as the products of two different worlds. Amar sees the original Bill as about federalism and majority rule. I am somewhat skeptical. Still, a major contribution of the book is to emphasize and partly to explain the transition from a state-centered judicial system of citizens’ rights to a jointly national and state system. Amar suggests that the original Bill of Rights was

Michael Kent Curtis, *Two Textual Adventures: Thoughts on Reading Jeffrey Rosen’s Paper*, 66 GEO. WASH. L. REV. 1269, 1273-80 (1998) (including some historic examples of the use of the words “privileges” and “immunities”).

¹³ 32 U.S. (7 Pet.) 243 (1833).

¹⁴ See *id.* at 249.

¹⁵ See AMAR, *supra* note 1, at 140-62.

¹⁶ See *id.* at 4; CURTIS, NO STATE SHALL ABRIDGE, *supra* note 2, at ch. 2.

¹⁷ U.S. CONST. amend. XIV, § 1.

¹⁸ See AMAR, *supra* note 1, at 239-41.

substantially about localism and states' rights.¹⁹ While the First Amendment disabled Congress from abridging the freedom of speech, press, petition, and religion, it left the regulation of these matters to the states. As a matter of judicial doctrine and judicially enforceable rights, that proposition was self-evident.

As to popular understanding, however, the picture was less clear. Citizens, even in the early years of 1798-1800, often thought of the Bill of Rights as far more than a jurisdictional statement.²⁰ It declared the fundamental rights of all Americans and, at least morally, implied that the government should not infringe upon these rights. Evidence in Amar's book further supports the idea that the declaratory tradition, so important to the framing of the Fourteenth Amendment, is old and strong.²¹ This view became more powerful over time.²² Amar's basic point about a shift to a more national understanding is undoubtedly correct. His point about the declaratory nature of Bill of Rights liberties helps to show why the idea of the rights, as merely limiting federal power, was never fully accepted.

The Establishment Clause, as Amar notes, helps to make this abstract jurisdictional point more concrete. In 1791, a number of states had establishments of religion.²³ The Establishment Clause, as originally understood, prohibited Congress from making any law respecting an establishment of religion and so left the matter of establishment or disestablishment to the states.²⁴ The rest of the First Amendment also could be read in a similar way, and that is how the Supreme Court read the First Amendment in antebellum years.²⁵

In contrast to the jurisdictional reading, the individual rights reading would treat rights of press, speech, jury trial, and religion as recognized by both the state and federal constitutions, and secured, to a limited extent by each, against violation. Even in the early years, Americans often thought of themselves as enjoying these Bill of Rights liberties, privileges, or immunities as Americans, not just Virginians or New Yorkers.²⁶ Many Americans thought these rights were protected against any act of

¹⁹ See *id.* at 5-7.

²⁰ See *infra* notes 30-33 and accompanying text.

²¹ See AMAR, *supra* note 1, at 147-56.

²² See *id.*

²³ See *id.* at 32-33.

²⁴ See *id.* at 41-42. By the time of the Fourteenth Amendment, the picture had changed. States no longer had establishments of religion and many saw the protection against establishment more as a national right. See Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085 (1995); Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106 (1994).

²⁵ See *Permoli v. New Orleans*, 44 U.S. 589 (1894); *Barron v. Baltimore*, 32 U.S. 243 (1833).

²⁶ See *infra* notes 30-33 and accompanying text; see also Michael Kent Curtis, *The Curious History of Attempts to Suppress Anti-Slavery Speech, Press, and Petition in 1835-37*, 89 NW. U. L. REV. 785, 830, 859-63 (1995) [hereinafter Curtis, *Curious History*]

government;²⁷ the rights were of the people reserved for the people. Many citizens thought their rights were more extensive than legal orthodoxy suggested.²⁸ When they cited constitutional provisions, they often cited the First Amendment, as well as the state constitution, as recognizing their rights, denying federal power over them, and protecting the rights from the states.²⁹ Each colony had a common British heritage, which gradually transformed after independence into a common American heritage. That fact helped people think of basic rights as belonging first to the English and later to Americans.

I will give a few examples of this view. In protesting the Sedition Act, a meeting of citizens of Fayette and adjoining Kentucky counties resolved that "the privilege of speaking and publishing our sentiments on all public questions" was "unequivocally acknowledged and secured to us by the constitution of this state as well as that of the United States," making all laws to impair these rights void.³⁰ Even Thomas Jefferson sometimes seemed to have assumed that Americans as a people had national freedoms guaranteed by the Bill of Rights that were quite distinct from their rights under state law. In 1814, Thomas Jefferson wrote about a state court blasphemy prosecution for the sale of a book. "I am really mortified to be told that, *in the United States of America*, a fact like this can become a subject of inquiry, and of criminal inquiry too, as an offense against religion."³¹ The prosecuting state was not Jefferson's Virginia. Jefferson did not contend that the prosecution was barred by the First Amendment, but he asked, "Is this then our freedom of religion?"³² As his italicized "*United States of America*" and his reference to "our freedom of religion" indicate, Jefferson believed that there was a freedom of religion for Americans quite distinct from the question of whether state courts or state laws respected it. The privilege was distinct from the remedy for its violation.³³

(discussing the Bill of Rights privileges and liberty protections in the abolitionist movement context).

²⁷ See Curtis, *Curious History*, *supra* note 26, at 859-63.

²⁸ See *id.*

²⁹ See *id.*

³⁰ *Albany*, SPIRIT OF THE TIMES: INDEPENDENT CHRONICLE, Dec. 6-10, 1798 at 1. For a states' rights argument, see Dr. Hill's Speech, in SPIRIT OF THE TIMES: INDEPENDENT CHRONICLE, Feb. 21, 1799, at 2; *Kentucky*, SPIRIT OF THE TIMES: INDEPENDENT CHRONICLE, Oct. 1-4, 1798, at 1; see also *Kentucky*, SPIRIT OF THE TIMES: INDEPENDENT CHRONICLE, Oct. 18-22, 1798, at 1; *Knoxville*, SPIRIT OF THE TIMES: INDEPENDENT CHRONICLE, Nov. 15-19, 1798, at 1; *Virginia*, SPIRIT OF THE TIMES: INDEPENDENT CHRONICLE, Oct. 8-12, 1798, at 1.

³¹ Letter from Thomas Jefferson to N.G. Dufief (Apr. 19, 1814), in THOMAS JEFFERSON, WRITINGS 1333, 1334 (Merril D. Peterson ed., 1984).

³² *Id.* at 1334.

³³ On at least several occasions, Jefferson had a less protective view of libel of public officials and thought that while no federal remedy existed for such defamation, a remedy was available at state law. See LEONARD W. LEVY, EMERGENCE OF A FREE PRESS, 341

As the nation expanded westward, Amar explains that more and more Americans began to think of themselves first as Americans, and second as state citizens because, for more and more people in the new states, their first government was a federal territorial one.³⁴ Amar does a particularly fine job of showing why this would be so for people like John A. Bingham, the primary author of Section 1 of the Fourteenth Amendment.³⁵

A major factor in increasing the emphasis on national rights was state repression of civil liberties, which became more intense as the controversy over slavery intensified. By the eve of the Civil War, southern states like North Carolina were banning Republican newspapers and campaign literature, censoring the mails to keep out items franked by Republican congressmen, and criminally prosecuting those who circulated Hinton Helper's anti-slavery book.³⁶ Circulators of anti-slavery literature faced threats of prison and whipping for the first offense and death for the second.³⁷ North Carolina sought to extradite Republicans who had endorsed an abridgement of Helper's anti-slavery book.³⁸ The endorsers included members of the committee that drafted the Fourteenth Amendment, including John Bingham, its primary author. Republicans facing such attacks, seeing the hash slavery was making of civil liberty, began to insist more and more that the Bill of Rights provided national protection for all American citizens throughout the nation.³⁹ Congressman John Bingham and Senator Jacob Howard told their colleagues that the Fourteenth Amendment was designed to require the states to obey the Bill of Rights.⁴⁰ They and their Republican colleagues naturally remembered the thirty years of repression of Bill of Rights liberties in the South.⁴¹

Seeds of this substantial shift in thinking about individual rights and government power lay in the long-held idea that Americans possessed certain rights recognized by the federal Bill of Rights, though technically not enforceable against their states.

(1985).

³⁴ See AMAR, *supra* note 1, at 157-59.

³⁵ See *id.* at 158.

³⁶ See Michael Kent Curtis, *The 1859 Crisis over Hinton Helper's Book, The Impending Crisis: Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment*, 68 CHI.-KENT L. REV. 1113, 1114 (1993) [hereinafter Curtis, *Helper Crisis*].

³⁷ See *id.* at 1147-67. The 1860 legislature decided that the death penalty should be imposed for the first offense. See *id.* at 1144.

³⁸ See *id.*

³⁹ See *id.* at 1151-58, 1174.

⁴⁰ See CONG. GLOBE, 39th Cong. 1st Sess. 432, 2542 (statement of Rep. Bingham); *id.* at 2765-66 (statement of Rep. Howard); Curtis, *Helper Crisis*, *supra* note 36, at 1169 nn.328, 331.

⁴¹ See Curtis, *Helper Crisis*, *supra* note 36, at 1137-59; see also AMAR, *supra* note 1, at 160-62, 192-93.

The Republican demand in 1866-1868 that the rights should be enforceable against the states involved both change and continuity.

SOME RESERVATIONS:

So far, I have justly praised this splendid book. I also have some reservations.

I. FROM A MAJORITARIAN BILL OF RIGHTS TO ONE PROTECTING MINORITY RIGHTS

In one of his powerful insights, Amar emphasizes that the Framers of the original Bill saw "the people" as the principal and government officials as their "agents."⁴² Guarantees of liberty, he says, were designed to ensure that the agents did not abuse their power to the prejudice of the people, their principal.⁴³ In this sense, according to Amar, the original Bill was popular, republican, and majoritarian. Rights of "the people" were collective rights. The later Fourteenth Amendment was more of a liberal Bill protecting minorities.⁴⁴

Guarantees of liberty have both these aspects, though at different times and for different purposes one aspect or another may be emphasized. Madison, as Amar notes, emphasized both, particularly the function of the original Bill of Rights in protecting the minority.⁴⁵ The guarantees of freedom of press and speech and the criminal procedure protections against self-incrimination and unreasonable searches, for example, are personal rights, but they also check efforts by government officials to destroy their political opponents. That protection, in turn, is essential for meaningful protection of popular sovereignty. The two aspects of the rights are two sides of the same coin. Rights of free speech, press, and religion simultaneously protect individuals and serve to check those in power. Indeed, without the protection for individuals, the check on potentially oppressive government officials cannot work. Without protection for minority views, the majority is deprived of meaningful choice—it is forced into a cafeteria with only one dish.

Amar seeks to squeeze every ounce of meaning out of the words of the text, and the result is often quite impressive. Still, all methods can run to excess. Here, Amar overemphasizes the collective nature of the Bill of Rights. While Amar sees textual reference to the rights of "the People" as denoting a more collective right,⁴⁶ this seems to be thin support. Of course, he relies on other evidence as well.

⁴² See AMAR, *supra* note 1, at 21-23, 84-85, 224.

⁴³ See *id.*

⁴⁴ See *id.* at 84-85, 244.

⁴⁵ See *id.* at 22.

⁴⁶ See *id.* at 49.

A. *Jury trial*

One of the most illuminating aspects of *The Bill of Rights* is its description of the relation of juries to popular sovereignty.⁴⁷ Juries were seen as the part of the judicial branch of government that puts popular sovereignty into action. Amar quotes de Tocqueville to illuminate the populist and majoritarian aspect of the jury system:

The institution of the jury . . . places the real direction of society in the hands of the governed, . . . and not in that of the government [It] invests the people, or that class of citizens with the direction of society The jury system as it is understood in America appears to me to be as direct and as extreme a consequence of the sovereignty of the people as universal suffrage. They are instruments of equal power, which contribute to the supremacy of the majority.⁴⁸

In his emphasis on the majoritarian nature of juries, Amar highlights one aspect of reality, but obscures another, as analysis inevitably does. Juries had both a majoritarian and individual-rights minority protection aspect, especially before the Supreme Court began to transform the institution by allowing both juries of fewer than twelve people and non-unanimous verdicts. Because the jury was required to have twelve members, to be drawn randomly from ordinary citizens, and to arrive at an unanimous decision, it could and often would function to protect minority rights.⁴⁹ If the Zenger jury is an example of protecting either a popular or a majority view,⁵⁰ the English jury that acquitted the Quaker, William Penn, shows that juries also functioned to protect minorities.⁵¹ While an all white jury in the South after the Civil War was a serious problem, after the Fifteenth Amendment and Reconstruction, juries became integrated bodies that could provide better protection for Americans of African descent. Klan prosecutions presented a problem for the jury system, but a

⁴⁷ See *id.* at 83-89. This aspect would also have pleased Justice Hugo Black.

⁴⁸ *Id.* at 88 (quoting Alexis de Toqueville).

⁴⁹ State Constitutions typically have left the historic features of the jury intact, but if they do not, federal protection is slim. See *Burch v. Louisiana*, 441 U.S. 130 (1979); *Colegrove v. Battin*, 413 U.S. 149 (1973); *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Williams v. Florida*, 399 U.S. 78 (1970).

⁵⁰ See *The Trial of John Peter Zenger for Seditious Libel*, in *LAW AND JURISPRUDENCE IN AMERICAN LEGAL HISTORY* 31-51 (Stephen S. Presser & Jamil Zainaldin eds., 3d ed. 1995).

⁵¹ See *The People's Ancient and Just Liberties Asserted, in the Trial of William Penn and William Mead, 1670* in *THE BILL OF RIGHTS, A DOCUMENTARY HISTORY* 144-58 (1971).

number of these trials resulted in convictions.⁵² Remarkably, the Klansmen were eventually protected from federal conviction, not by juries, but by the Supreme Court.⁵³ As with any other institution, the jury should be judged not on its absolute perfection, but in comparison to alternatives.

B. *Refined Incorporation*

Amar has created the idea of refined incorporation. Some Bill of Rights guarantees, Amar suggests, may not sensibly incorporate.⁵⁴ For example, if the First Amendment was merely a jurisdictional device, then it would contain no basic rights applicable to the states. The same would be true for civil juries. Amar's great contribution is to focus on both the problem and part of the solution—the popular and declaratory understanding of the rights. Unfortunately, he fails systematically to apply his insight.

One must look at the matter as the people would in 1866-1868 when the Fourteenth Amendment was under consideration, not in 1789-1791 when the original Bill of Rights was debated. As to the application of these liberties, the historic understanding that should count is that of 1866-1868.

The better result, however, is much like that arrived at by Justice Black.⁵⁵ That proposition is so for two reasons. The guarantees of the first eight amendments, the ones John Bingham and Justice Black highlighted as being applied against the states by the Fourteenth Amendment, were understood by 1866-1868 as doing far more than allocating jurisdiction; they were understood as declaring basic rights.⁵⁶ Amar demonstrates this aptly for Free Speech and Press guarantees. As the resolution from Kentucky concerning the Sedition Act indicates, that understanding reaches far back.⁵⁷ By the time of the Fourteenth Amendment, most evidence suggests that the first eight amendments were understood to declare rights, not simply to allocate jurisdiction to invade them.⁵⁸ A great contribution of Amar's refined incorporation

⁵² See ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1867*, at 76-196 (1985).

⁵³ See, e.g., *Slaughter-House Cases*, 83 U.S. 36 (1872) (holding that the rights of citizenship under the federal government differ from those under the various state governments); *United States v. Cruikshank*, 92 U.S. 542 (1875) (reversing convictions of men accused of using violence to hinder the Constitutional rights of assembly and bearing arms of two African-Americans).

⁵⁴ See AMAR, *supra* note 1, at 269-71.

⁵⁵ See *supra* note 9 and accompanying text.

⁵⁶ See CURTIS, *NO STATE SHALL ABRIDGE*, *supra* note 2, at chs. 2, 3, & 5; Curtis, *Helper Crisis*, *supra* note 36, at 1146-64.

⁵⁷ See *supra* note 30 and accompanying text.

⁵⁸ Some aspects of federal law, however, such as the federal jury district, should not be imposed on the states. Amar's analysis shows why. See AMAR, *supra* note 1, at 269-71.

analysis is to demonstrate how the understanding of the Bill of Rights changed over time. Its shortcoming is not applying the insight consistently. The case of the civil jury demonstrates the limits of the concept of refined incorporation.⁵⁹

Amar also suggests that, historically, the rights to be protected by the Privileges or Immunities Clause would include basic common law rights, either as absolutely protected or as merely protected, against discrimination.⁶⁰ The legislative history on the subject is murky. Some read the Clause as expansively protecting common law rights.⁶¹ Others, like Congressman Bingham, seem to have rejected this reading.⁶² At least some seem to have located a protection against discrimination in the Equal Protection Clause and expected judicial intervention in cases of discrimination based on race or national origin.⁶³ If there had actually been an original broad understanding of the Amendment as protecting absolute common law rights or as protecting common law rights generally against discrimination, that could raise the specter of reviving decisions like *Lochner*.⁶⁴ That the framers planned to follow such a road is quite dubious and whether we should do so today is more doubtful still.⁶⁵

C. *The Unsung Civil Jury*

Amar sings the praises of the criminal jury.⁶⁶ It provides education in citizenship.⁶⁷ The provision for public criminal trials in the Sixth Amendment ensures that citizens can watch government at work.⁶⁸

However, civil juries receive little praise. Amar suggests that perhaps the Seventh Amendment guarantee was simply not intended to be applied to the states.⁶⁹ The original understanding of the Seventh Amendment civil jury, according to Amar, was that it ensured that the federal courts would provide a jury in diversity cases where state law required it.⁷⁰ Amar sees the Seventh Amendment as reflecting the

⁵⁹ See AMAR, *supra* note 1, at 269-278.

⁶⁰ See *id.* at 182.

⁶¹ See CONG. GLOBE, 42nd Cong., 2d Sess. 844 (1872) (statement of Rep. Sherman).

⁶² See CONG. GLOBE, 42nd Cong., 1st Sess. app. 84 (1871) (statement of Rep. Bingham).

⁶³ See Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the Slaughter-House Cases Without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1, 82-85 (1995).

⁶⁴ See *id.* at 96-106.

⁶⁵ See *id.* at 36-50, 56-64, 85-86, 96-106.

⁶⁶ See AMAR, *supra* note 1, at 83-88.

⁶⁷ See *id.*

⁶⁸ See *id.*

⁶⁹ See *id.* at 225-26.

⁷⁰ See *id.*

Tenth Amendment.⁷¹ His refined incorporation conclusion is that the Seventh Amendment “becomes somewhat awkward to incorporate against states,” for incorporation would mean that “state courts must follow current state-law rules providing for jury trials in state courts,” which they would do without incorporation.⁷² In his model of refined incorporation, Amar suggests the Seventh Amendment *might* simply not be capable of incorporation.⁷³ He is right to be tentative.

One can make exactly the same point about the First Amendment rights to free speech, free press, and free exercise of religion. Originally, as the Supreme Court in *Barron* understood the matter, the Bill of Rights simply left regulation of First Amendment freedoms to the states, making application to them equally “awkward.”⁷⁴ However, quite early, and certainly by 1864-1868, politicians, editors, ministers, and other ordinary people understood the Bill of Rights as most contemporary Americans do—as providing rights to all Americans.⁷⁵ It was “a layman’s document, not a lawyer’s contract,” to quote President Franklin D. Roosevelt’s comment on the Constitution.⁷⁶ People in 1866, laymen and lawyers alike, seemed not to have engaged in recondite, refined analysis, however sensible it might have been from the perspective of legal theory. In popular understanding, it is the declaration of the right that survives and limits government. Amar himself has brilliantly illuminated the declaratory nature of the Bill of Rights.⁷⁷ A great many Americans from 1830-1868 saw rights in the Bill of Rights including free speech, free press, freedom of religion, and freedom to a jury trial as “rights,” “privileges,” or “immunities” belonging to all citizens of the United States, shielding them from state or federal government abuse on every inch of American soil.⁷⁸ For many, the civil jury trial was simply another basic right.

Amar’s evidence to support the exclusion of the Seventh Amendment is remarkably thin. He notes that, in 1850, a Georgia judge “quoted or paraphrased, in order, every clause of the first eight amendments, [including the establishment clause], except the Seventh, and insisted that all of the quoted or paraphrased clauses

⁷¹ See *id.* at 89.

⁷² *Id.* at 92.

⁷³ See *id.* at 276.

⁷⁴ See *Barron v. Baltimore*, 32 U.S. 243 (1833); see also *Permoli v. New Orleans*, 44 U.S. 589 (1845).

⁷⁵ See AMAR, *supra* note 1, at 156-60.

⁷⁶ 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 377 (1998) (quoting Franklin D. Roosevelt’s speech, given on the 150th Anniversary of the Philadelphia Convention).

⁷⁷ See, e.g., AMAR, *supra* note 1, at 20-136 (discussing various amendments in the Bill of Rights).

⁷⁸ See CURTIS, *NO STATE SHALL ABRIDGE*, *supra* note 2; Michael Kent Curtis, *The 1837 Killing of Elijah Lovejoy by an Anti-Abolition Mob: Free Speech, Mobs, Republican Government, and the Privileges of American Citizens*, 44 UCLA L. REV. 1109, 1147-50 (1997) [hereinafter Curtis, *Lovejoy*].

bound the states.”⁷⁹ Also, when Republicans “repealed the (juryless) Fugitive Slave Act of 1850, a Republican proclaimed the repeal would provide trial by jury ‘in accordance with the Constitution of the United States *and the laws of the state where such person is found.*’”⁸⁰ Neither source explicitly embraced the idea that the guarantee meant one would receive a civil jury trial if and only if the state chose to supply one, or that states could make juries of only one person.

When John Bingham cited two cases in 1866 to show the need to apply the Bill of Rights to the states, the second case he cited involved an alleged denial of the Seventh Amendment right to civil jury trials.⁸¹ In 1871, Bingham, who wrote all of Section 1 of the Fourteenth Amendment except for the citizenship clause, explained that “the privileges and immunities of citizens of the United States, as contradistinguished from citizens of the States, are chiefly defined in the first *eight* amendments to the Constitution of the United States.”⁸² Bingham then read, word for word, each of the first eight amendments, *including the Seventh*. Then he said, “[t]hese *eight* articles I have shown never were limitations upon the power of the States until made so by the fourteenth amendment.”⁸³ Bingham said that before the ratification of the Fourteenth Amendment, a state “could deny to any citizen the right of trial by jury, and it was done. Before that a State could abridge the freedom of the press, and it was done in half the States of the Union.”⁸⁴ In a speech in 1871, Representative Lawrence of Ohio insisted that the Seventh Amendment’s guarantee of a civil jury trial was protected against federal action by the Fifth Amendment’s Due Process Clause (as well as the Seventh Amendment), and against the states by the Due Process and Privileges or Immunities Clauses of the Fourteenth Amendment. Lawrence insisted that “where the power of eminent domain is to be exercised under State authority . . . a trial at law by a common law jury is now a matter of constitutional right. . . . [S]ince the adoption of the fourteenth article it may well be maintained that a common law jury trial is secured.”⁸⁵

Why is Amar queasy about the Seventh Amendment? There may be several reasons. The requirement of a jury trial in all cases where only twenty dollars or more is in controversy seems to many extraordinarily bad policy.⁸⁶ To make the pill of incorporation go down more smoothly, Amar may have been tempted to remove

⁷⁹ AMAR, *supra* note 1, at 276 (citing *Campbell v. State*, 11 Ga. 353, 364 (1852)).

⁸⁰ *Id.* (quoting CONG. GLOBE, 38th Cong., 1st Sess. 2919 (1864) (remarks of Rep. Daniel Morris) (alterations in original)).

⁸¹ See *Livingston v. Moore*, 32 U.S. 469 (1833).

⁸² CONG. GLOBE, 42d Cong., 1st Sess. app. 84 (1871) (statement of Rep. Bingham) (emphasis added).

⁸³ *Id.* (emphasis added).

⁸⁴ *Id.*

⁸⁵ CONG. GLOBE, 41st Cong., 3d Sess. 1245 (1871) (statement of Rep. Lawrence).

⁸⁶ See Charles Fairman, *A Reply to Professor Crosskey*, 22 U. CHI. L. REV. 144, 155 (1954).

the bitter civil jury trial. However, if that is the problem, it would be better to construe twenty dollars as the present value of twenty dollars in 1866 or 1791 rather than simply and totally disregard the guarantee. Furthermore, one might hold that the right could be satisfied by trial *de novo* with a jury.

There is a related problem. The values of 1866-1868 may simply be in conflict with dominant contemporary values. In such cases, legal scholars and historians can simply note the conflict.

The basic problem that leads people to look for an escape from the civil jury is that the civil jury has suffered a decline in reputation.⁸⁷ The decline occurred precisely because the civil jury expresses democratic values in opposition to plutocratic values. The civil jury system, like the tort law system, is under a sustained attack from concentrated wealth and power. This result is not surprising given the number of high-profile tort suits that threaten corporate power. The public learned of the havoc produced for women by the Dalkon Shield, as well as what the company knew and when it knew it, as a result of tort suits.⁸⁸ The public learned much of the effect of asbestos on workers, as well as what companies knew but did not reveal to workers or to government, as a result of tort suits.⁸⁹ The public learned about Ford Motor Company's negligent design of the Pinto and its conclusion that it was more cost-effective to incinerate a certain number of drivers than to make changes as a result of a tort suit.⁹⁰ Finally, the public learned much more about toxic substances and cancer as a result of the lawsuit chronicled in *A Civil Action*.⁹¹ More recent examples will no doubt come to the reader's mind. In civil actions, juries, reflecting democratic values, have compensated victims of negligence and punished what they saw as corporate misconduct.⁹² In a culture in which corporations are thought to be responsible only to stockholders and the bottom line, tort law and civil juries include community values in the calculation of the bottom line.

To the extent that juries are important decision makers, the jury system is extraordinarily difficult for special interests to capture. Jurors have short term limits,

⁸⁷ One ground Anit-Federalists urged for rejecting the Constitution was its failure to safeguard the civil jury. See, e.g., 3 DEBATES IN THE SEVERAL STATES CONVENTIONS ON THE ADOPTION OF THE CONSTITUTION 47 (photo reprint 1996) (Jonathan Elliot ed., 2d ed. 1891) (statement of Patrick Henry).

⁸⁸ See MORTON MINTZ, AT ANY COST: CORPORATE GREED, WOMEN, AND THE DALKON SHIELD (1985).

⁸⁹ See PAUL BRODEUR, OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL (1985).

⁹⁰ See FRANCIS T. CULLEN ET AL., CORPORATE CRIME UNDER ATTACK (1987). But see Cary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUT. L. REV. 1013 (1991) (suggesting misconceptions in the public's understanding of the Ford report on cost effectiveness).

⁹¹ See JONATHAN HARR, A CIVIL ACTION (1995).

⁹² See BRODEUR, *supra* note 89; MINTZ, *supra* note 88.

cannot receive campaign contributions, and are widely representative of the public at large. As a result, the jury system itself is under a well-financed attack. False and misleading stories are added to a few genuine cases of excessive jury verdicts to discredit the system. The jury mistakes on the other side, such as inadequate awards, or no awards at all in strong cases, get little attention, nor do judicial decisions reducing excessive verdicts.

II. A MODERN MORAL?

On June 16, 1858, Abraham Lincoln warned his listeners that they might go to sleep dreaming that Kansas would become a free state and awake to find Illinois a slave state.⁹³ With a pro-slavery activist Supreme Court and a national Democratic Party increasingly in the grip of the slave power, Lincoln's fear was not so fanciful as it seems today. Today, we face new concerns. The story of the Bill of Rights pays little attention to problems of "private" economic power and "private" violence. As a result, Amar and I may spend so much time admiring the shell of American liberty and learning how it became so lustrous, that we overlook the fact that the kernel is deteriorating. However, the story of the creation and reconstruction of the Bill of Rights is relevant to current threats to democratic government. Just how this is so requires an explanation that starts with the battles for liberty and against slavery.

In the 1830s, abolitionists sought to put the issue of slavery on the political agenda.⁹⁴ They sought to confront the conscience of slaveholders and their northern accomplices and to confront the national government's support for slavery. The reaction was furious. Northern mobs broke up abolition meetings, threatened individuals, and killed one abolitionist editor.⁹⁵ In response, abolitionists invoked guarantees of civil liberty, including those in the federal Constitution.⁹⁶ The threats to them were not merely from state laws, but also from private mobs. So a key insight of many abolitionists, and those who came to their aid, was that private power, like state power, can threaten basic liberties.

When people think of mobs, many think of the "lower classes." Yet, the leading historian on the subject tells us that these mobs were organized by gentlemen of property and standing.⁹⁷ Why? William Ellery Channing, the Unitarian minister, suggested that the wealthy and powerful (those who had drawn high prizes in the lottery of life) tended to identify with members of their social class, including

⁹³ See ABRAHAM LINCOLN, SPEECHES AND WRITINGS, 1832-58, at 432 (Library of America ed. 1989).

⁹⁴ See Curtis, *Curious History*, *supra* note 26, at 802-846.

⁹⁵ See *id.*

⁹⁶ See *id.* at 859-63.

⁹⁷ See LEONARD L. RICHARDS, "GENTLEMEN OF PROPERTY AND STANDING": ANTI-ABOLITION MOBS IN JACKSONIAN AMERICA 47-49, 55-59 (1970).

slaveholders.⁹⁸ Many businessmen and others feared that economic ties between the South and North would be disrupted.⁹⁹ One need only look today at the United States' continuing trade relations with China, despite China's recurring human rights abuses, to understand such a dilemma.

Northern opinion finally turned against mobbing anti-abolitionists.¹⁰⁰ However, in the South, laws and mobs prevented Republicans and opponents of slavery from speaking.¹⁰¹ While part of the fear in the South was that abolitionist literature would spark slave revolts, that was not the only or perhaps even the main concern of the southern slaveholding elite. Around seventy-five percent of southern households did not own slaves, and many southern whites were independent, non-slave holding small farmers and some were quite poor.¹⁰² Opponents of slavery sought to organize non-slaveholding southerners into an anti-slavery party that would abolish slavery on a state-by-state basis.¹⁰³ Those who raised these gut economic issues about slavery were feared as instigators of "class warfare" (to use the current phrase mobilized against those who raise issues of economic justice).¹⁰⁴

With Reconstruction, newly freed male slaves became voters and, for a time, a bi-racial coalition ruled the South.¹⁰⁵ As Eric Foner has shown, black suffrage made a difference. On economic issues such as landlord-tenant law, southern legislatures with black voters were more protective of the interest of tenants and laborers.¹⁰⁶ They were more likely to support "radical" ideas such as public education. As lawyer, author, Republican activist, and judge Albion Tourgee saw it, "[F]or the first time [in a southern state] the rights of the masses were regarded above the interest of any aristocracy, and manhood regarded as of more value than money."¹⁰⁷

Southern Republicans and their allies faced a continuing campaign of terror designed to intimidate Republicans and eliminate the newly freed slaves from the political process. In North Carolina, for example, a prominent leader who sought to build a coalition between newly freed slaves and poor whites was assassinated along

⁹⁸ See William Ellery Channing, *Tribute of William Ellery Channing to the American Abolitionists, for their Vindication of Freedom of Speech*, in ANTI-SLAVERY TRACTS NOS. 2, 3, & 11 (1970 reprint) (1861).

⁹⁹ See Curtis, *Lovejoy*, *supra* note 78, at 1132-42.

¹⁰⁰ See *id.* at 1160-71.

¹⁰¹ See Curtis, *Helper Crisis*, *supra* note 36, at 1137-38, 1153-54, 1164-67.

¹⁰² See KENNETH STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTIBELLUM SOUTH* 29-30 (1956).

¹⁰³ See Curtis, *Helper Crisis*, *supra* note 36, at 1150.

¹⁰⁴ See Curtis, *Curious History*, *supra* note 26, at 845.

¹⁰⁵ See generally ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877* (1988).

¹⁰⁶ See *id.* at 372-73.

¹⁰⁷ OTTO H. OLSEN, *CARPETBAGGER'S CRUSADE: THE LIFE OF ALBION WINEGAR TOURGEE* 197 (1965) (quoting Albion Tourgee).

with a black political leader.¹⁰⁸ Violence, and later southern laws, nullified the Fifteenth Amendment. Here again, leadership for the Klan came from the wealthy and powerful. At least, that is what Albion Tourgee, the Republican "carpet-bagger" judge who later represented Plessy in his attack on railroad segregation, said.¹⁰⁹ When prosecutions threatened to expose the Klan, North Carolina's "Conservative" dominated legislature acted quickly by repealing laws under which many prosecutions had been filed.¹¹⁰ Conservatives—as the faction described itself—were understandably reluctant to repeal laws against murder. The solution was an amnesty law that extended, as Tourgee sardonically noted, both to the Klan and its victims.¹¹¹

In this respect, the story of the Bill of Rights may skip too quickly over some extremely bleak aspects of the American experience that continued until very recently.¹¹² For a huge slice of American history, from at least 1830 to the 1960s, much of the South was neither really democratic nor open to free speech on issues of race.¹¹³ Its racially skewed electorate also tended to keep other issues off the political agenda.¹¹⁴ The closed society of the South involved class as well as racial suppression.¹¹⁵ The three-fifths clause, and later, fully counting disenfranchised blacks for purposes of seats in the House of Representatives and votes in the electoral college, gave the South a disproportionate influence compared to its number of eligible voters.¹¹⁶ Section 2 of the Fourteenth Amendment was designed to prevent just this result, but it was a dead letter.

This suggests, quite disturbingly, that for much of our history, we have been far less democratic and free even than our written Constitution suggested. Take just one example. In 1897, a populist, black Republican coalition, controlled the city government in Wilmington, North Carolina.¹¹⁷ It was displaced, not by election, but by a coup and race riot.¹¹⁸ In two days of rioting,

¹⁰⁸ See *id.* at 161-65.

¹⁰⁹ See *id.* at 156-57.

¹¹⁰ See *id.* at 185-87.

¹¹¹ See *id.*; Michael Kent Curtis, *Albion Tourgee: Remembering Plessy's Lawyer on the 100th Anniversary of Plessy v. Ferguson*, 13 CONST. COMMENTARY 187, 191 (1996) [hereinafter Curtis, *Remembering Plessy's Lawyer*].

¹¹² See generally AMAR, *supra* note 1; CURTIS, NO STATE SHALL ABRIDGE, *supra* note 2.

¹¹³ See TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS* (1989); PAUL ESCOTT, *MANY EXCELLENT PEOPLE: POWER AND PRIVILEGE IN NORTH CAROLINA, 1850-1900* (1985).

¹¹⁴ See ESCOTT, *supra* note 113.

¹¹⁵ See *id.*

¹¹⁶ See U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. amend. XIII.

¹¹⁷ See H. Leon Prather, Sr., *We Have Taken A City: A Centennial Essay in DEMOCRACY BETRAYED: THE WILMINGTON RACE RIOT OF 1898 AND ITS LEGACY* 35 (David S. Cecelski & Timothy B. Tyson eds., 1998).

¹¹⁸ See *id.* at 136-50.

a mob of white citizens led by some of Wilmington's most respected and influential residents . . . destroyed the state's only African-American daily newspaper, killed at least nine blacks and drove hundreds from their homes, forcefully expelled black and white political and business leaders opposed to Conservative Democratic rule and white supremacy, and used paramilitary forces to remove from office Wilmington's duly elected city government. This violent episode initiated a successful statewide campaign . . . to disfranchise the state's African American citizens¹¹⁹

Violence and electoral fraud aimed at a white and black Populist coalition was endemic in the South. The federal government did nothing.

One must wonder why were stories about the effort to secure free speech on the subjects of slavery and the Reconstruction terrorism story not more widely and fairly told earlier in American history. Perhaps the nation needed a story to explain the demise of Reconstruction, to explain why terrorists and later states were able to nullify constitutional guarantees, and to explain why the land of liberty and justice for all was doing nothing about it. In *Slaughter-House* and later cases, the Supreme Court obligingly supplied a legal explanation.¹²⁰ From *Prigg*,¹²¹ to *Dred Scott*,¹²² to *Slaughter-House*, to *Lochner*,¹²³ to cases denying application of the Bill of Rights to the states,¹²⁴ and beyond, it is remarkable how miserable the record of the Court often has been from the point of view of the poor and the oppressed. The much maligned Warren Court was a notable exception.¹²⁵ Little had changed since 1833. States were not bound by the Bill of Rights. Private violence was beyond the scope of federal power. Historians in the North and South also helped. Many of them viewed Reconstruction as a time when venal Carpetbaggers and ignorant blacks looted southern state governments.¹²⁶ By helping to return John Bingham and the rest to

¹¹⁹ Melton McLaurin, *Remembering for Reconciliation and Healing*, N.C. HUMAN., Winter 1999, at 1, 1 (Newsletter of the N.C. Human. Council, Greensboro, N.C.).

¹²⁰ See *Slaughter-House Cases*, 83 U.S. 36 (1872); see also *James v. Bowman*, 190 U.S. 127 (1903); *United States v. Harris*, 106 U.S. 629 (1883); *United States v. Cruikshank*, 92 U.S. 542 (1875).

¹²¹ See *Prigg v. Pennsylvania*, 41 U.S. 608 (1842).

¹²² See *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

¹²³ See *Lochner v. New York*, 198 U.S. 45 (1905).

¹²⁴ See, e.g., *Twining v. New Jersey*, 211 U.S. 78 (1908); cf. *Patterson v. Colorado*, 205 U.S. 454 (1907); *Hurtado v. California*, 110 U.S. 516 (1884). For an evaluation of *Lochner* and recent call to revive it, see PAUL KENS, *LOCHNER V. NEW YORK*, ECONOMIC REGULATION ON TRIAL 177-86 (1998).

¹²⁵ See *supra* note 3 and accompanying text.

¹²⁶ See, e.g., J. G. DE ROULHAC HAMILTON, *RECONSTRUCTION IN NORTH CAROLINA* 667 (1971 reprint) (1914).

their rightful place, Akhil Amar's *The Bill of Rights* is providing a more honest, complete, and usable past.

The old-time Republicans saw how economic power supported slavery. Abraham Lincoln referred to the tendency of prosperity to breed tyrants.¹²⁷ While Calhoun suggested an alliance between the capitalists of the North and of the South to silence abolition and labor agitation,¹²⁸ Lincoln later suggested that the rights of labor should be superior to those of capital.¹²⁹ John Bingham said that slavery was banned from the political agenda in the South because the southern slaveholding elite was protecting its profits.¹³⁰

As industrialism and railroads transformed post-Civil War America, the nation developed concentrations of wealth and capital unprecedented for that time. Corporate bribery of government officials scandalized many citizens.¹³¹ In a nation that lacked strong national power over its economy, bans on child labor and protections for labor were difficult to establish. If New York outlawed child labor, its furniture manufacturers had to compete with North Carolina, which had no child labor laws. Child labor, lack of protection for workers, and the rest, were justified as the decisions of an all-wise market.¹³² With the doctrine of economic substantive due process and a limited reading of the power of Congress over commerce, courts took too many basic economic issues out of the political process.¹³³ Coincidentally, the 1890s and the 1920s were also times during which the concentration of wealth greatly increased and mergers soared.¹³⁴ The market, as it was constructed at that time by a legal structure that allowed it to operate with fewer constraints, degraded the democratic process.

Of course, by conventional wisdom, concerns about the concentration of wealth are out of place in the discussion of constitutional law. The conventional view is that constitutional law is by and large about public, not private, power. Rarely are there legal thinkers who raise basic issues.¹³⁵

¹²⁷ See 8 THE COLLECTED WORKS OF ABRAHAM LINCOLN 405-06 (Roy P. Blaser ed., 1953).

¹²⁸ See Curtis, *Curious History*, *supra* note 26, at 826.

¹²⁹ See, The Lincoln-Douglas Debates in ABRAHAM LINCOLN, SPEECHES AND WRITINGS, (1859-1865), at 295-97 (Library of America ed. 1989).

¹³⁰ See CONG. GLOBE, 36th Cong., 1st Sess. 1861 (1860); Curtis, *Helper Crisis*, *supra* note 36, at 1149.

¹³¹ See CHARLES F. ADAMS, JR., & HENRY ADAMS, CHAPTERS OF ERIE, AND OTHER ESSAYS (Cornell Reprint 1996) (1886); KENS, *supra* note 124, at 33-40.

¹³² See KENS, *supra* note 124, at 68-79.

¹³³ See, e.g., *Adkins v. Childrens Hospital*, 261 U.S. 525 (1923); *Hammer v. Dagenhardt*, 247 U.S. 251 (1918); *Coppage v. Kansas*, 236 U.S. 1 (1915).

¹³⁴ See KEVIN PHILLIPS, THE POLITICS OF RICH AND POOR (1990).

¹³⁵ See, e.g., James G. Wilson, *Noam Chomsky and Judicial Review*, 44 CLEV. ST. L. REV. 439 (1996).

Yet, it was not always so. In the past, many thinkers, including ones who did not embrace our modern democratic and egalitarian ideals, recognized a direct relation between distribution of economic power and the form of government. These instances include Aristotle and de Tocqueville, to mention only two.¹³⁶ A high concentration of economic power, as many of these thinkers saw it, tends to produce an oligarchy.¹³⁷ A broad distribution of wealth produces a more representative government. For example, de Tocqueville, who regarded land as a measure of wealth, thought laws of inheritance were a crucial constitutional device. "It is true that these laws belong to civil affairs," de Tocqueville wrote, "but they ought, nevertheless, to be placed at the head of all political institutions; for they exercise an incredible influence upon the social state of a people, while political laws show only what this state already is."¹³⁸ De Tocqueville understood the interrelation between economic power and constitutional law. "When framed in particular manner, this law [of inheritance] draws together, and vests property and power in a few hands; it causes an aristocracy, so to speak, to spring out of the ground."¹³⁹ Of course, many other laws contribute to the concentration or dispersion of economic power, including, for example, laws regarding taxation and antitrust. Even James Madison, who earlier sought to control the dangers of economic leveling, later saw threats from the other direction. By the 1790s, Madison favored "the silent operation of laws, which, without violating the rights of property, reduce extreme wealth towards a state of mediocrity, and raise extreme indigence towards a state of comfort."¹⁴⁰

In the 1980s and 1990s, the silent operation of the laws seemed to be moving matters in the other direction, producing massive corporate mergers and an increasingly skewed distribution of income. By 1989, the top ten percent of the population held sixty-nine percent of the wealth.¹⁴¹ Critics charged that consumers were gouged and corporate coffers were filled by all sorts of governmental decisions, from decisions on generic drugs to telecommunications.¹⁴²

Consolidation of corporate media empires threatens to filter stories out of the

¹³⁶ See *id.* at 445-48 (Aristotle); see also JAMES HARRINGTON, *THE ART OF LAW GIVING IN DIVINE RIGHT AND DEMOCRACY: AN ANTHOLOGY OF POLITICAL WRITING IN STUART ENGLAND* 392-98 (David Wooten ed., 1986); *infra* notes 134-35 and accompanying text.

¹³⁷ See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, reprinted in STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, *LAW AND JURISPRUDENCE IN AMERICAN HISTORY* 259 (1995).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ James Madison, *NATIONAL GAZETTE* quoted in STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 267 (1993).

¹⁴¹ See EDWARD N. WOLFF, *THE RICH GET INCREASINGLY RICHER: LATEST DATA ON HOUSEHOLD WEALTH DURING THE 1980S* 4 (Economic Policy Institute Briefing Paper) (on file with Author).

¹⁴² See, e.g., DEAN ALGER, *MEGAMEDIA: HOW GIANT CORPORATIONS DOMINATE MASS MEDIA, DISTORT COMPETITION, AND ENDANGER DEMOCRACY* 97-113 (1998).

mass media. Rupert Murdoch dropped the BBC news from his satellite system because it was too critical of China on human rights.¹⁴³ Murdoch wanted to market soap operas and other entertainment to the Chinese.¹⁴⁴ For similar reasons his publishing empire broke a contract to publish a book critical of China, but the author found another publisher.¹⁴⁵

A major threat to democracy, of course, is the current system of campaign finance. The Supreme Court had genuine reasons to be concerned with the federal statute it struck down in *Buckley*,¹⁴⁶ but the Court has done its part to create what Bill Moyers accurately describes as "The Other Scandal" in Washington.¹⁴⁷

Amar's *The Bill of Rights*, with its understanding of popular sovereignty as a cornerstone of our constitutional government, can give us perspective on these developments. One function of the First Amendment, as Amar notes, was to protect the people from self-dealing by their elected agents.¹⁴⁸ Consider the implications of the metaphor. If officials are agents and the people are the principle, one wonders what we are to think of a system that allows a few to channel great wealth to the people's agents from whom they seek lucrative favors. The result is to corrode public trust in the democratic process. As far back as 1992, seventy-four percent of respondents agreed that "Congress is largely owned by special interests."¹⁴⁹ By 1996, more than eighty percent of the public agreed that government is "run for the benefit of the few and the special interests, not the people . . ."¹⁵⁰ Meanwhile, more and more disenchanted voters have dropped out of the political process.

Restrictions on campaign finance reform are a major aspect of our new *Lochner*-era. One of the most extravagant claims has been made in a suit against a Maine initiative that set up publically financed state elections. A suit filed by the American Civil Liberties Union claimed, among other allegations, that a system of public finance for election campaigns impermissibly chills free speech where the system

¹⁴³ See John Gittings, *Murdoch's Beijing Love-fest*, THE GUARDIAN (London), Dec. 12, 1998, at 14, available in LEXIS, News Library, The Guardian (London) File.

¹⁴⁴ See *id.*

¹⁴⁵ See *id.* For other examples of dangers inherent in media empires controlling information disposal, see, e.g., Tom Goldstein, *Does Big Mean Bad*, COLUM. JOURNALISM REV., Sept.-Oct. 1998, at 52, 52; Seth Faison, *Dalai Lama Movie Imperils Disney's Future in China*, N.Y. TIMES, Nov. 26, 1996, at A1; G. Bruce Knecht, *Magazine Advertisers Demand Prior Notice of 'Offensive' Articles*, WALL ST. J., Apr. 30, 1997, at 1.

¹⁴⁶ See *Buckley v. Valeo*, 424 U.S. 1 (1976).

¹⁴⁷ See BILL MOYERS, *THE SECRET GOVERNMENT: THE CONSTITUTION IN CRISIS* (Other Scandal in Washington (PBS Video) Series 1988); see also Donald Bartlett & James B. Steele, *How the Little Gets Crunched*, TIME, Feb. 7, 2000, at 38-40.

¹⁴⁸ See AMAR, *supra* note 1, at 21, 23, 26.

¹⁴⁹ E. JOSHUA ROSENKRANTZ, *BUCKLEY STOPS HERE: LOOSENING THE JUDICIAL STRANGLEHOLD ON CAMPAIGN FINANCE REFORM* 16 (1998).

¹⁵⁰ Noam Chomsky, "Consent Without Consent": *Reflections on the Theory and Practice of Democracy*, 44 CLEV. ST. L. REV. 415, 417 (1996).

provides limited extra matching funding for the publicly financed candidate outspent by opponents who choose not to take public finance.¹⁵¹ The theory seems to be that wealth has not only a right to speak, but a right not to be answered by those with lesser resources.

A reasonable interpretation of the First Amendment needs to preserve the right of the people to criticize their agents *and* to discourage practices which make or appear to make the agents responsive to concentrated wealth, not the average voter. The marketplace of ideas, like other markets, needs true competition. Free television and radio time for political candidates, a revival of the Fairness Doctrine, and public financing of elections are options to explore for those who want to preserve the kernel as well as the shell of democracy. Problems of campaign finance are sufficiently crucial and complex to justify attention from our best legal minds.

Some might read Amar's book as suggesting that the popular sovereignty aspects of the Bill of Rights have been transmuted by the Fourteenth Amendment. This essay suggests, instead, that the Bill of Rights continues to have a dual aspect. The need for both the popular sovereignty and individual rights protections of the Constitution and Bill of Rights is as great or greater than ever.

If one sees the hallmark of the *Lochner*-era as expansion of the power of concentrated wealth and a corresponding shrinkage of the democratic process, we are in the midst of a second *Lochner*-era. This era is characterized by court decisions that make it difficult to control the purchase of political influence,¹⁵² by a set of rules for the global economy set by groups like the World Trade Organization, which is

¹⁵¹ See ACLU Complaint, *Daggett v. Bernier*, available at American Civil Liberties Union, (visited Jan. 28, 2000) <<http://www.aclu.org/court/meefr.html>>. Paragraph five of the complaint reads as follows:

Non-participating candidates are also put in the unconstitutional position of either curtailing their own speech or effectively subsidizing their "clean" opponent's speech. Unlike the federal public financing system for presidential elections, which establishes at the outset the maximum payment from the election fund and imposes a fixed spending ceiling for publicly-financed candidates, the MCEA provides "clean" candidates with an initial payment from the Maine Clean Election Fund ("MCEF") in an amount equal to the average amount spent in the two preceding elections, plus an additional dollar-for-dollar subsidy to match the amount a non-participating opponent raises or spends in excess of the initial distribution. Thus, once the matching subsidy is triggered, the "clean" candidate is released from the spending limit that was initially imposed, and the MCEF provides additional funds to thwart any attempt by a non-participating opponent to deliver his or her message by outspending a "clean" candidate. (The only limit on the amount of the matching subsidy is that it cannot exceed 200 percent of the initial payment from the MCEF).

Id.

¹⁵² See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976).

insulated from the democratic process;¹⁵³ and by a politically-constructed global market that makes the maintenance of national labor, health, and environmental standards more problematic.¹⁵⁴ The World Trade Organization strikes down national environmental and health regulations it finds dubious, much as the *Lochner*-era courts sometimes did.¹⁵⁵ The invisible hand of a legally-constructed market more and more is removing basic issues from the democratic process. For example, the French face great difficulty in banning milk with Bovine Growth Hormone or meat with such hormones because a few men in the World Trade Organization hold such a rule to be anti-competitive.¹⁵⁶ That rule is so, amazingly enough, even if the French apply the rule to their own dairy farmers as well.¹⁵⁷ Similarly, Americans cannot ban the sale of seafood whose harvest has a decimating effect on the sea turtle population, because that rule too is struck down as being anti-competitive.¹⁵⁸ Banning products made by child labor, slave labor, exploited labor, or environmental degradation may meet the same fate. Even if they do not, the global economy has made effective regulation difficult. A global market without global labor, consumer, and environmental standards may make "hash" of protections for workers, consumers, the environment, and also of democracy—if one views democracy as the ability of "we the people" to structure the aspects of our lives that mean the most to us.¹⁵⁹

One answer is to replace broad democracy with the market, on the theory that the market gives "us" what "we" buy, and therefore what "we" want. Yet, even requiring labels that tell consumers basic facts they want to know may be in trouble, nationally and internationally. At least one court has interpreted the First Amendment to mean that Vermont cannot require merchandisers to label milk to indicate whether it was produced with Bovine Growth Hormone, though the state showed this to be a fact that seventy-five percent of its consumers wanted to know.¹⁶⁰ In a free market, keeping desired information from consumers seems bizarre. A central legitimizing myth of the free market is that consumers get to choose the products they want.

Ironically, many state efforts to reform the current campaign finance scandal may

¹⁵³ See Joan Claybrook, *WTO, Where's the Outrage*, PUBLIC CITIZEN NEWS, Nov./Dec. 1999, at 2; *High Cost of Global Trade Documented in New Book*, PUBLIC CITIZEN NEWS, Nov./Dec. 1999, at 1 [hereinafter *High Cost*].

¹⁵⁴ See Claybrook, *supra* note 153, at 2; *High Cost*, *supra* note 153, at 1.

¹⁵⁵ See *id.*; see also *Lochner v. New York*, 198 U.S. 45, 63-64 (1905).

¹⁵⁶ See Mark Weisbrot, *A Trade Body on Hormones*, BOSTON GLOBE, Aug. 4, 1999, at A23, (Op-ed), available in LEXIS, News Library, Bglobe File.

¹⁵⁷ See *id.*

¹⁵⁸ See James Bruggers, *San Francisco-Area Animal Groups Sue over Dolphin-Safe Tuna Label*, KNIGHT RIDDER/TRIB., Business News, Aug. 19, 1999, available in LEXIS, News Library, Business Services File; Editorial, *Turtles, Coyotes, Butterflies*, CHRISTIAN SCI. MONITOR, June 17, 1999 at 10.

¹⁵⁹ For many, however, shrinking democracy may be a small price to pay for a prosperity they attribute—rightly or wrongly—to this new world order.

¹⁶⁰ See *International Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67 (2d Cir. 1996).

be hampered by the incorporation doctrine plus *Lochner*-like legal doctrines. The problem of the next century may be the revival, in new clothes no doubt, of *Lochner*-era jurisprudence.

CONCLUSION

These concerns bring this essay back full circle, to extolling the virtues of this remarkable book. At its deepest level, it is a tale of popular sovereignty at work. Amar's story is one of ordinary Americans confronting a great evil and its concentrated power and of how guarantees of civil liberty are essential if such an effort is to have a fighting chance. Buying and selling human beings, of course, is another market, but abolitionists and Republicans saw it as more than that. They insisted on a market bounded by ethical rules. If some failed to appreciate problems beyond slavery, they were fallible human beings, like the rest of us.

Albion Tourgee, Republican, carpetbagger, judge, and later lawyer for Plessy in the landmark case of *Plessy v. Ferguson*, noted the problem. In response to a Gilded Age creed that equated wealth with virtue, he insisted, "The Power of wealth . . . is just as properly subject to restraint as that of the biceps and is even more liable to abuse."¹⁶¹ In 1894, he wrote, "Almost every branch of our government has lost touch and sympathy with the people."¹⁶² He noted sadly, "The idea is almost universal that money rules."¹⁶³ This proposition was so "no matter which party is in power, and the general impression is that the enactment of law, its administration and enforcement, are also controlled by the power of money."¹⁶⁴

Akhil Reed Amar's story suggests that Justice Black was wise to treat the history of Bill of Rights liberties as teaching that these parts of the text deserve special solicitude. Once one understands the structural role of these liberties in preserving democratic government, they do look quite important. Justice Black's study of the Levellers made him aware of the problem of rogue agents.¹⁶⁵ As Akhil Amar notes, that agency problem is also a central concern of the Bill of Rights and, I believe, the Fourteenth Amendment as well.¹⁶⁶ Yet, recent history also suggests that legal doctrines and theories can prove quite malleable.

It is easy to respond to the state of democracy in modern America with despair. Those saddened by current developments may take some hope from the story of the

¹⁶¹ OLSEN, *supra* note 107, at 285-86.

¹⁶² *Id.* at 325.

¹⁶³ *Id.*

¹⁶⁴ Curtis, *Remembering Plessy's Lawyer*, *supra* note 111, at 198.

¹⁶⁵ See ROGER K. NEWMAN, HUGO BLACK 450-51 (1994); Michael Kent Curtis, *In Pursuit of Liberty: The Levellers and the American Bill of Rights*, 8 CONST. COMMENTARY 359 (1991); Edward G. Hudon & John Lilburn, *The Levellers, and Mr. Justice Black*, 60 A.B.A. J. 686 (1974).

¹⁶⁶ See AMAR, *supra* note 1, at 21-23, 84-85, 224.

relation of the crusade against slavery to the Bill of Rights. Critics of slavery and advocates of the rights of blacks and women also faced immense obstacles and won what they achieved only after a long and difficult struggle. Margaret Mead suggests that we should never underestimate the ability of a few dedicated people to change the world. Indeed, she says, nothing else ever has.¹⁶⁷

¹⁶⁷ See MARGARET MEAD, *COMING OF AGE IN SAMOA: A PSYCHOLOGICAL STUDY OF PRIMITIVE YOUTH FOR WESTERN CIVILIZATION* (1928).