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COMMENTS ON AKHIL REED AMAR'S *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION*

Melvin I. Urofsky*

I am pleased to see that Professor Akhil Reed Amar is following in a long and worthy tradition. For much of this century, the Harvard Law School has been dominated by Felix Frankfurter, his acolytes, and disciples. While they either preached judicial restraint or, after Justice Frankfurter was appointed to the United States Supreme Court in 1939, defended his often indefensible opinions, they all had one thing in common—bad writing. Justice Frankfurter's opinions, or to be more accurate, law review articles masquerading as judicial opinions,¹ may have been well-reasoned and carefully researched, but they had an inevitable propensity to put the reader to sleep after the third sub-paragraph.

However, a short distance down I-95 stood the Yale Law School, which, ever since the rise of the Legal Realists in the 1920s, has been known for the elegance of its writing. Walton Hamilton, Thurman Arnold, and Jerome Frank could write circles around their counterparts at Harvard and Columbia.² Perhaps the most luminous piece of legal writing in the first half of this century, Benjamin Cardozo's *The Nature of the Judicial Process*, was given as the Storrs Lecture at Yale.³ Alexander Bickel, Harvard-trained and indoctrinated by Justice Frankfurter, wrote too well for the people at Cambridge, and he did his greatest work at Yale.⁴ In recent years, there have been Robert Burt, Bruce Ackerman, and Akhil Reed Amar.⁵ Even if one does

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¹ See, e.g., *Adamson v. California*, 332 U.S. 46, 59 (1947) (Frankfurter, J., concurring).

² See, e.g., THURMAN ARNOLD, *FAIR FIGHTS AND FOUL: A DISSIDENTING LAWYER'S LIFE* (1965); THURMAN W. ARNOLD, *THE FOLKLORE OF CAPITALISM* (1937); JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* (1949); JEROME FRANK, *LAW AND THE MODERN MIND* (1930); WALTON HAMILTON, *THE POLITICS OF COMPETITION* (1940); WALTON HAMILTON, *THE POLITICS OF INDUSTRY* (1957).

³ See BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

⁴ See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962); ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1978).

⁵ See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS*; AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1998); ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* (1992); ROBERT A. BURT, *TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND* (1988).

not agree with their arguments, one can at least savor the joy of well-written, if at times wrong-headed, prose.

At this point, Professor Amar is probably saying to himself, "This is the set up. He has not come to praise me, but to bury me, and the knife is about to appear." If this were an ordinary panel, and Amar's *The Bill of Rights*⁶ an ordinary book, that would be true. Panelists are invited on the assumption that they will tear into the author's argument, resulting in a sort of intellectual throwing of the author to the lions (we panelists) for the delectation of the roaring mob (you readers) in the coliseum (this room—use your imaginations!).

Alas, I must disappoint this expectation. I do, in fact, disagree with a few of Amar's minor arguments. The characterization of contemporary rights as counter-majoritarian is true only in a limited fashion. It is clear that some of the great cases involving speech, press, and rights of the accused have dealt with people who, to put it charitably, are the dregs of society.⁷ Yet privacy, for example, is a right that the majority sees as belonging to its members as well as to those of outlandish groups. During the debate over the confirmation of Judge Robert Bork to the Supreme Court, his opposition to a constitutionally protected right of privacy offended one group that the Reagan administration had clearly counted on to support Bork—white southerners, especially women. Polls showed that southern white women were among the strongest advocates of a right to privacy, and they feared that Bork's presence on the Court would undermine their rights.⁸

I have no intention of nit-picking, however, for Amar's major theses have quite convinced me. Rather, I want to look at some of the implications of those theses—and I do mean theses, plural.

Amar's book contains two overt theses, and one that is understated but still quite important. In his first thesis, Amar argues that to understand the first ten amendments to the Constitution, we have to give up our contemporary habit of seeing them through the lens of counter-majoritarian protection.⁹ In other words, forget all of the great cases we studied in law school, and go back to 1789 to understand the creation and ratification of those amendments in the context of the times.

If we do that, the key phrase to keep in mind is the majestic opening of the Constitution itself, "We the People of the United States," for the amendments ground themselves in both a populism that sees the fount of all sovereignty as the people itself, as well as a federalism that is also grounded in populism. There is a fear of

⁶ AHKIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998).

⁷ Consider, as just two examples, Ernesto Miranda, *see* *Miranda v. Arizona*, 384 U.S. 436, 492 (1966), and Clarence Earl Gideon, *see* *Gideon v. Wainwright*, 372 U.S. 335, 336-37 (1963).

⁸ *See* ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* (1989).

⁹ *See* AMAR, *supra* note 6, at 7-8.

central government, and a belief that the government closest to the people, at this time the states, would be most protective of the rights of the people. The various protections should be seen not as individualistic, but as popular, protecting the people as a whole against the feared depredations of a central authoritarian government, the experience of which remained vivid in the minds of the Framers as well as the Ratifiers.

Beyond that, the amendments closely track the scheme laid out in the body of the Constitution itself, and so we have to look at these amendments as *structural*, that is, as part of the governmental framework. They were intended not to protect individual rights, but rather to serve as part of the larger purpose of protecting the people as a whole against government by a small authoritarian elite. To use a modern idiom, they were there to control agency costs. Above all, the Framers designed them to limit the powers of the central government while bolstering the discretion and authority of the states.

What happens, then, to convert rights that sound in populism to those that sound in individualism? How was the Establishment Clause of the First Amendment, which Amar argues specifically permitted the states to establish churches,¹⁰ turned on its head to prohibit states from doing what had originally been a preserved power? How did the whole notion of a Bill of Rights protecting the people in the states against the federal government get turned around to protect individuals against the states?

The answer is incorporation, and in Part II of the book, Amar makes what is to me a convincing case that Jonathan Bingham and his colleagues who drafted the Fourteenth Amendment, with its Due Process and Equal Protection Clauses, did in fact mean to incorporate the first eight amendments and apply them to the states.¹¹ While Amar does not agree with Hugo Black's "jot for jot" theory of incorporation and rightly dismisses the Frankfurter view of "fundamental fairness" as a basis for incorporation, his end result is that, with a few exceptions, the first eight amendments ought to apply to the states, in light of what the Reconstructors of 1866 intended.¹²

Here we have the two basic theses of Amar's book. First, that we need to read the first ten amendments as a structural addition to the Constitution, and that the rights enumerated sound in populism and states' rights federalism, not individualism. Second, that the aim of the Fourteenth Amendment was to incorporate these rights and to make them individual, and that in 1868 the states and not the federal government were seen as the chief danger against "the people."

There is a third thesis as well. About two years ago, I received a call from the Cumberland Law School, inviting me to be on a panel. Professor Lawrence Friedman was scheduled to give a lecture on his new book, *Crime and Punishment in American*

¹⁰ See *id.* at 33-34.

¹¹ See *id.* at 164-67.

¹² See *id.*

History,¹³ and I was asked to speak for a few minutes on how such works of history affected judges.¹⁴ In my comments, I suggested that judges, even those with some knowledge of and appreciation for history, rarely utilize the works of scholars unless it suits their jurisprudential needs.¹⁵ There is a fine book by Charles Miller on this issue,¹⁶ and, of course, there is the questionable use of bad history on Chief Justice Rehnquist's part every time he wants to uphold some form of state subsidy to religious institutions.¹⁷

Justices Rehnquist, Scalia, and Thomas all have a very static view of the Constitution in general, and of the Bill of Rights in particular. Yet, more than anyone else on the current Court, the Chief Justice uses a sort of frozen time-frame in which to explicate the meaning of rights. As an example, take his opinion for the majority in the assisted suicide cases decided in 1997.¹⁸ In an extremely mechanistic way, he asked whether physician-assisted suicide was considered a right at the time of the original framing of the Constitution or in the 1860s when the Fourteenth Amendment was drafted and ratified.¹⁹ Finding no such right existed at the time, the Court found that it did not exist now. *Q.E.D.*, the Second and Ninth Circuits' decisions were reversed.²⁰

This mechanical reading proved too much for five members of the Court who entered concurrences disagreeing in whole or in part with the Chief Justice's reasoning. I commend to you especially Justice Souter's nuanced reading of the

¹³ LAWRENCE FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* (1993).

¹⁴ I was about to say I could give them the answer to that in two seconds when they told me of the honorarium. I quickly did some math in my head and figured out that even if I spoke for the full ten minutes they wanted, I would be billing them at a higher hourly rate than that charged by some of my law school classmates who now work on Wall Street. The temptation proved too great, and so off I flew to Montgomery, Alabama.

¹⁵ See Melvin I. Urofsky, *Courts, Legislatures and History: Having Faith in Time*, 27 CUMB. L. REV. 941, 942 (1997).

¹⁶ See CHARLES A. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* (1969).

¹⁷ See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 113 (Rehnquist, J., dissenting) (arguing that Madison thought the First Amendment prevented the establishment of a national religion, but that it did not create a bar to complete government influence). According to Leonard Levy, "Rehnquist wrote fiction and passed it off as history." LEONARD LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 155 (2d ed. 1994).

¹⁸ See *Vacco v. Quill*, 521 U.S. 793, 796 (1997) (overturning state laws permitting assisted suicide in large measure because, according to the Court, the nation's history and tradition did not grant such a right); *Washington v. Glucksberg*, 521 U.S. 702, 705 (1997) (same).

¹⁹ See *Glucksberg*, 521 U.S. at 709-13.

²⁰ The cases, the lower court decisions, and the Supreme Court opinions are analyzed in Melvin I. Urofsky, *Leaving the Door Ajar: The Supreme Court and Assisted Suicide*, 32 U. RICH. L. REV. 313 (1998).

Fourteenth Amendment's Due Process Clause, and his understanding that, over time, rights may change in terms of what they mean and to whom they apply.²¹

It is this notion that I believe constitutes the third, and in some ways the most important, thesis of Professor Amar's book. The debate has been a faulty one up until now. On the one hand, we have the champions of original intent, arguing that the Constitution and its amendments mean exactly what they meant at the time of drafting and ratification—not one whit more or less. On the other side, we have those who believe that the Fourteenth Amendment's Due Process and Equal Protection Clauses not only incorporate the first eight amendments but implicitly update them whenever necessary. The first group appeals to a rigid, static view of history, a view that bears no relation to reality; the second appeals to common sense, but without much historical evidence to support their claims.

Amar's work in showing how the popular understanding of rights changed between 1789 and 1866, how rights grounded in a populist federalism were transformed into rights supportive of individualism, and how the specter of a strong central authority waned and was replaced by fear of bigoted state governments, reflects the dynamics of change over time.²² What it should do, although I am not at all confident that it will, is make judges think a bit more carefully about how history affects popular understanding of rights.

If we were to apply Amar's use of history to a subject in which I am very interested, assisted suicide, it would be true that throughout much of the history of western civilization for the past two millennia, suicide was frowned upon. It eventually became a felony, with the suicide's goods forfeited to the crown.²³ Assisting suicide meant assisting in the commission of a felony, and was thus, by common law rules, a felony in itself. This remained the case down to the twentieth century.

During all of this time, medicine could do little other than providing temporary relief to some ill. Surgery was non-existent until the late eighteenth century. Antibiotics did not appear until the middle of the twentieth. Thus, a serious illness or accident usually led to a quick death and most people died at home. Given this

²¹ See *Glucksberg*, 521 U.S. at 734 (Souter, J., concurring).

²² I disagree with Professor Michael J. Klarman's contention that the Amar thesis is just another form of originalism. See Michael J. Klarman, Remarks at the Institute of Bill of Rights' Symposium on *The Bill of Rights: Creation and Reconstruction* (Jan. 21, 1999). While Amar certainly looks to original intent to see the historical bases for the Bill of Rights, he then makes it quite clear that the meaning of those rights has changed over time and that we can not interpret the amendments solely on the basis of what they meant in 1791 or 1868. See AMAR, *supra* note 6, at 3-19.

²³ See GLANVILLE WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 261-64 (1957); see also *Hales v. Petit*, 75 E.R. 387, 397-99 (1562) (holding that committing suicide is unnatural).

scenario, physician-assisted suicide did, in fact, make little sense and no one would have listed it as one of those rights which Thomas Jefferson believed self-evident.

Yet, look at the state of medicine at the end of the twentieth century, with its wonder drugs, surgical miracles, and machines that can keep the body "alive" even when the brain is dead. Today, people die mostly in hospitals, and the gamut of tools available to doctors can prolong that dying process for a long time. However, we still cannot cure certain disease, and do not even understand others, such as ALS (Lou Gehrig's disease). For people contracting these diseases, or left horribly crippled by an accident, death may be welcome. If we believe that autonomy is a right enjoyed by the people and by individuals, then perhaps the right to choose death, or even to seek help in doing so, reflects not the perverse wishes of mental incompetents, but a logical and historically justified transmogrification of what autonomy means.²⁴

This may be taking Professor Amar's thesis well beyond where he is comfortable, but I think that this brilliant and creative historical analysis has much to teach not just historians (who, of course, already appreciate history), but also law professors, who by and large think history ought to be banished from law schools, and judges, for whom not just original intent, but also the changes that take place subsequently, ought to be part and parcel of the decision-making process.

So, Professor Amar, no long knives, but a heartfelt thank you. Your book not only illuminates but instructs. Perhaps, if we are all lucky, it may even teach those most in need of instruction.

²⁴ See PETER G. FILENE, *IN THE ARMS OF OTHERS: A CULTURAL HISTORY OF THE RIGHT-TO-DIE IN AMERICA* (1998).