

1999

Response: Continuing the Conversation

Akhil Reed Amar

Follow this and additional works at: <http://scholarship.richmond.edu/lawreview>



Part of the [Constitutional Law Commons](#)

Recommended Citation

Akhil R. Amar, *Response: Continuing the Conversation*, 33 U. Rich. L. Rev. 579 (1999).

Available at: <http://scholarship.richmond.edu/lawreview/vol33/iss2/13>

This Article is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

RESPONSE

CONTINUING THE CONVERSATION

*Akhil Reed Amar**

In *The Bill of Rights: Creation and Reconstruction*,¹ I aimed to start a conversation, not end one. I am thus grateful for the generosity of the many fine scholars who in the preceding pages have graciously accepted the invitation to converse. And I am especially grateful for the extraordinary hospitality of the *University of Richmond Law Review*, which has kindly given a home to this conversation.

I suspect the folks at Yale University Press will also be grateful. Publishers, of course, are always hunting for good blurbs for paperback editions, and almost every one of the preceding essays has some great soundbites. In alphabetical order: Dean Aynes has “no reservations in praising the quality” of this “pioneering” and “elegant[.]” book.² Professor Bloom describes it as a “beautifully written book” that “deserves to sit on every constitutional scholar and lawyer’s shelf along with such contemporary classics as Alexander Bickel’s *The Least Dangerous Branch*, Charles Black’s *Structure and Relationship in Constitutional Law*, John Hart Ely’s *Democracy and Distrust*, and Philip Bobbitt’s *Constitutional Fate*.”³ Building on “two of the most breathtaking and important law review articles of the last

* Southmayd Professor of Law, Yale Law School.

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

2. Richard L. Aynes, *Refined Incorporation and the Fourteenth Amendment*, 33 U. RICH. L. REV. 289, 311 (1999).

3. Lackland H. Bloom, Jr., *Long Live the Bill of Rights! Long Live Akhil Reed Amar’s The Bill of Rights!*, 33 U. RICH. L. REV. 313, 321, 313 (1999)

decade," the book is, he says, a "massive and impressive undertaking" executed with "energy, brilliance, and discipline" offering a "a 300-page case study of textual analysis performed at the highest level of professionalism Perhaps no working constitutional scholar employs textual analysis more carefully and skillfully than Professor Amar."⁴ Judge Blue calls the book "stunning."⁵ As a work of intellectual history, he labels it a "landmark study that will be an invaluable resource for students of early American history for generations to come."⁶ And as a work of legal scholarship, it is, he says, "studded with keen insights on a dazzling array of legal problems" and "will provide an invaluable resource for students, judges, and practitioners."⁷ Professor Graber begins by proclaiming the book a "masterpiece"—"meticulously detailed, historically sensitive, and largely persuasive."⁸ It is, he says, "state of the art legal scholarship that will no doubt influence the way the next generation of constitutional lawyers and historians study fundamental constitutional rights."⁹ Graber goes on to praise the book for "wonderful history[,] sophisticated doctrinal analysis," and "remarkably accessible prose," and ends by describing it as "clearly . . . one of the best books on American constitutionalism published this decade. No one can claim to be an educated member of the constitutional community who has not read" it.¹⁰ Professor Koppelman proposes to "incorporate by reference and join in Steven Calabresi's lengthy encomium" published in another symposium.¹¹ Professor Krauss calls the book "strikingly original [and] quite powerful," "elegantly written," "fun to read," and "packed with brilliant insights into our constitutional history."¹² Professor Lash describes the first half of the book as

4. *Id.* at 313-15.

5. Jon C. Blue, *The Government of the Living—The Legacy of the Dead*, 33 U. RICH. L. REV. 325, 325 (1999).

6. *Id.* at 326.

7. *Id.* at 327.

8. Mark A. Graber, *The Constitution as a Whole: A Partial Political Science Perspective*, 33 U. RICH. L. REV. 343, 343 (1999).

9. *Id.*

10. *Id.* at 345, 347, 376.

11. Andrew Koppelman, *Akhil Amar and the Establishment Clause*, 33 U. RICH. L. REV. 393, 393 n.1 (1999).

12. Stanton D. Krauss, *The Original Understanding of the Seventh Amendment Right to Jury Trial*, 33 U. RICH. L. REV. 407, 407 (1999).

“marvelous” and says that the second half “set[s] the benchmark for future discussions.”¹³ Professor Lawson opens by describing the book as “one of the best law books of the twentieth century” written by “one of the century’s premier legal scholars.”¹⁴ Lawson ends by saying that “Professor Amar has brilliantly pointed the way to a sound understanding of many of the most difficult and contentious issues in constitutional theory.”¹⁵ Likewise, Professor Maltz begins and ends with warm praise, saying that the book is “by any standard a major contribution to the literature on the Bill of Rights” which “skillfully combines historical research and legal analysis to give the reader a variety of fresh, important insights” and calling upon other scholars to “follow [Amar’s] example in their treatment of the Fourteenth Amendment.”¹⁶ And Professor Spoo, who approaches the book from a law-and-literature perspective, admires the way in which “[a]esthetic and historical argument interact richly in *The Bill of Rights*” to offer an attractive account of the Constitution as “the People’s Poem.”¹⁷

The above summary is, of course, extremely selective—as paperback blurbs virtually always are. For almost every one of the preceding essays also has some friendly words of criticism—some gently put, others forcefully asserted. In alphabetical order: Dean Aynes wonders whether the book’s model of “refined” incorporation is truly superior to less refined versions.¹⁸ Professor Bloom in a passing footnote reacts skeptically to the claim that the Fifteenth Amendment is best read to protect “voting” in jury rooms and the more general political right of jury service.¹⁹ Judge Blue raises large methodological questions about the book’s emphasis on text, history, and structure at the expense of precedent, translation, and comparative law.²⁰ Pro-

13. Kurt T. Lash, *Two Movements of a Constitutional Symphony: Akhil Reed Amar’s The Bill of Rights*, 33 U. RICH. L. REV. 485, 489, 498 (1999).

14. Gary Lawson, *The Bill of Rights as an Exclamation Point*, 33 U. RICH. L. REV. 511, 511 (1999).

15. *Id.* at 523.

16. Earl M. Maltz, *The Concept of Incorporation*, 33 U. RICH. L. REV. 525, 525, 536 (1999).

17. Robert Spoo, “No Word Is an Island”: *Textualism and Aesthetics in Akhil Reed Amar’s The Bill of Rights*, 33 U. RICH. L. REV. 537, 539, 570 (1999).

18. See generally Aynes, *supra* note 2, at 300-11.

19. See Bloom, *supra* note 3, at 317-18 n.31.

20. See generally Blue, *supra* note 5.

fessor Graber suggests that the book would have benefitted from more attention to the work and concerns of political scientists.²¹ Professor Holt sees the book as insufficiently radical, and inattentive to all-important issues of class.²² Professor Koppelman argues that the book leads to outlandish results concerning religious establishments.²³ Likewise, Professor Krauss finds one particular doctrinal corner of the book wrong-headed—namely, its account of the Seventh Amendment.²⁴ Professor Lash describes the basic project of the book as “unfinished” in the absence of a more complete account of, and encounter with, the New Deal.²⁵ Professor Lawson reminds us that we must go beyond the words of the Bill of Rights to fully understand legal liberty in America.²⁶ Professor Maltz does not try to disagree with the book, but he does try to deepen it by focusing more attention on issues of judicial restraint.²⁷ And Professor Spoo reminds us that proper constitutional interpretation must in the end be more than merely aesthetically pleasing.²⁸

In the spirit of continuing the conversation, I shall in what follows attempt to address some of the larger criticisms contained in the preceding essays. But this focus on the criticisms should not, I hope, obscure my heartfelt thanks for these essays’ many specific compliments and their overall generosity of spirit.

I. IN GENERAL

Professor Graber and Judge Blue raise important questions about the overall methodology of the book—especially about what the book omits. Both of these essays are extremely thoughtful meditations on the book, and there is some truth to their criticisms.

21. See Graber, *supra* note 8, at 344-45.

22. See generally Wythe Holt, *We Some of the People: Akhil Reed Amar and the Original Intent of the Bill of Rights*, 33 U. RICH. L. REV. 377 (1999).

23. See generally Koppelman, *supra* note 11.

24. See generally Krauss, *supra* note 12.

25. See Lash, *supra* note 13, at 498.

26. See generally Lawson, *supra* note 14.

27. See generally Maltz, *supra* note 16.

28. See Spoo, *supra* note 17, at 578.

Graber suggests that the book in key places tends to slight the pedagogy, scholarship, and concerns of political scientists.²⁹ Begin with the issue of pedagogy: The Introduction of the book opens by describing how law professors in law school have carved up the Constitution and the Bill of Rights.³⁰ This opening, Graber observes, scants the ways in which the Constitution may be studied more holistically in certain political science classes. Moreover, even if law professors and law students read the document more holistically, the Constitution would still be carved up within the academy, given that different departments—law, political science, history, philosophy—might each approach the Constitution in sharply different ways.³¹

These are excellent points—my book is indeed written from the vantage point of a law professor teaching in a law school. Autobiographically, this is a book inspired by my own (law school) students, as I hope I made clear even before the book's Introduction, in my Acknowledgments.³² And sociologically, I think there is special reason to focus particular attention on the legal education and legal narrative of lawyers. Political scientists, historians, philosophers, and others may think about and analyze the Constitution and constitutional interpretation—but lawyers on a routine basis actually *do* constitutional interpretation, and help remake the real-life Constitution, as part of their daily legal practice. The law students of today will be the law clerks and staffers of tomorrow, and the legislators, governors, attorneys general, mayors, judges, aides, draftspersons, lobbyists, prosecutors, defense attorneys, and civil litigators of the next generation. If my book can help change the narrative and the constitutional perspective of law students, then over the long run perhaps it can change how constitutional interpretation is actually done in the real world. Or so I told myself as I set out to write the book. But Graber nicely reminds me that I should not forget about the rest of the academy—and that holistic practices elsewhere actually strengthen my belief that holistic interpretation and analysis can be done and done well. I am especially heartened to hear that he believes that some

29. See generally Graber, *supra* note 8, at 344-46.

30. See AMAR, *supra* note 1, at xi-xii.

31. See generally Graber, *supra* note 8, at 345, 348-54.

32. See AMAR, *supra* note 1, at ix.

members of his own discipline might find my book useful and congenial.³³ I hope he spreads the word to his colleagues! Or perhaps I should say *our* colleagues. For I do not mean to talk only to fellow lawyers and turn my back on fellow academics. Graber notes that most law professors train would-be lawyers rather than would-be scholars.³⁴ But at Yale Law School, I am in the lucky position of training both. This symposium is itself a powerful reminder of this fact—no fewer than three of its participants were at some point students of mine at Yale, and two of these three have doctoral degrees outside of law (one in political science and one in English literature).

Now turn to Graber's concern that the book seems to slight the scholarship of political scientists.³⁵ If so, it is an unintended oversight on my part. For Graber is right to infer that I have no "personal or intellectual grudge against political science scholarship."³⁶ Indeed, the book does at least try to integrate into its analysis the work of important political scientists, such as Donald Lutz, Andrew McLaughlin, Ralph Lerner, Herbert Storing, J.A.C. Grant, and Graber himself.³⁷ I confess that several of the books that Professor Graber mentions are books that I have not yet read—but if he thinks I can learn from them, I shall certainly add them to my reading list. As to some of the other works he mentions, I can only say that I have read them

33. See Graber, *supra* note 8, at 350, 376.

34. See *id.* at 350, 352.

35. See generally *id.* at 344-46.

36. *Id.* at 344.

37. See AMAR, *supra* note 1, at 29 n.*, 38 n.*, 93, 126 n.†, 151 n.*, 283 n*. In other writing I have borrowed quite heavily from political scientists. For example, my first essay on American federalism owes a large debt to McLaughlin and Martin Diamond. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987). My writings on voting rules prominently rely on and cite to the work of Anthony Downs, Maurice Duverger, Morris Fiorina, V.O. Key, and Doug Rae, to name just a few. See Akhil Reed Amar, Note, *Choosing Representatives by Lottery Voting*, 93 YALE L.J. 1283 (1984); Akhil Reed Amar, *Lottery Voting: A Thought Experiment*, 1995 U. CHI. LEG. FORUM 193; Akhil Reed Amar & Vikram David Amar, *President Quayle?*, 78 VA. L. REV. 913 (1992). My analysis of presidential succession issues builds on the work of Ruth Silva and Allan Sandler. See Akhil Reed Amar, *Presidents, Vice Presidents, and Death: Closing the Constitution's Succession Gap*, 48 ARK. L. REV. 215 (1995); Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113 (1995). Similarly, my work on self-incrimination pays special tribute to the early work of Edward Corwin. See AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997).

but they did not seem to me to bear so directly on the specific issues highlighted by my book as to warrant specific mention.

Graber's final concern is his most important: At times, my book slights issues of central concern to political scientists—especially issues of constitutional culture and constitutional enforcement outside of courtrooms.³⁸ These are indeed important issues, and they loom large in the book's first half, which focuses on the original Bill of Rights. But Graber is right in noting that these issues are given shorter shrift in the book's second half, which focuses on the Fourteenth Amendment.³⁹ Most importantly, the book devotes less attention than it should to the role that Congress was supposed to play in enforcing the substantive commitments of the Amendment. To be sure, the book does briefly discuss early Congressional legislation under Section 5 of the Fourteenth Amendment.⁴⁰ The book also briefly notes that "many congressional architects of Reconstruction envisioned not only judicial enforcement . . . but also—and perhaps more centrally—congressional enforcement. Section I was . . . in part a grant of power to themselves, and they drafted it broadly."⁴¹ But the book fails to offer a detailed account of the precise role that Congress was envisioned to play in defining fundamental rights and freedoms, and how that role should influence judicial interpretation and enforcement of the Fourteenth Amendment. This was an unfortunate omission, and I have tried to make amends for it in my most recent work. In an article published in the February 1999 issue of the *Harvard Law Review*, I try to specify in greater detail the proper role of Congress under Section 5 in implementing Section 1.⁴² The methodology of this analysis—prominently featuring intratextual and historical analysis, buttressed by judicial doctrine—closely follows the general methodology of the book. And the substance of my analysis—sharply critiquing the Supreme

38. See Graber, *supra* note 8, at 349-50.

39. See generally *id.* at 360-75

40. AMAR, *supra*, note 1, at 207-09. This brief discussion notes how conservatives admitted that the Amendment in effect incorporated the Bill of Rights against states but denied that Congress had more free-floating power to bind states to new rights or to regulate private persons at will. These are themes that Professor Maltz amplifies in his thoughtful essay.

41. *Id.* at 175 n.*.

42. See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 748, 818-27 (1999).

Court's recent *City of Boerne v. Flores*⁴³ opinion (which was handed down after my book went to press)—fits rather nicely, I think, with the account of Congress's role that Graber himself offers in his rich review essay.

Now turn to Judge Blue's thoughtful review, which expresses concerns about the book's methodological narrowness. I think the good judge is onto something—but not quite what he thinks he is onto. He seems to think that the book is driven exclusively by considerations of text, history, and structure, giving little or no weight to precedent, or to considerations of common sense, or to translation-style arguments based on changed circumstances.⁴⁴ But this is not my general methodological vision, as practiced (and expounded) in this book and elsewhere. I believe that precedent and common sense and changed circumstances are indeed important factors to consider in constitutional analysis. Indeed on the very page that Blue highlights, where the book speaks of getting legal interpretation "right," we find the following rather clear words: "As Philip Bobbitt and Richard Fallon have observed, textual arguments count in court—and so do arguments from history and original intent—but precedent counts, too. Judges must consider all these factors, and others as well, when deciding cases."⁴⁵ If somehow the substance of this passage were in any way unclear, surely the invocations of Bobbitt and Fallon—canonical exemplars of methodological catholicity—should remove all doubt about my methodological stance.

Although my book does not discuss in detail all the modern precedents, it tries to show how these modern precedents in general cohere with the teachings of text, history, and structure. Indeed, at times, the book could with fairness be accused of straining text and history precisely to accommodate precedent. One of the biggest differences between the book's version of refined incorporation and versions of total incorporation put forth by other scholars and judges concerns the Seventh Amendment. The book puts forth a plausible (though not indisputable) reading of the Seventh Amendment that might

43. 117 S. Ct. 2157 (1997).

44. See Blue, *supra* note 5, at 327-29.

45. AMAR, *supra* note 1, at 307 (footnote omitted).

explain why current doctrine—which refuses to make the Amendment applicable to states—might be defensible as a textual matter. My specific conclusions here trouble both Dean Aynes and Professor Krauss.⁴⁶ But they do have the considerable virtue of meshing with Supreme Court precedent. And the book makes clear that this is indeed a virtue—because precedent does indeed count.⁴⁷ The book further suggests that, outside the incorporation context, this plausible textual reading of the Amendment may indeed have been properly rejected by federal judges for reasons of practical administration.⁴⁸ And so the book does make clear, here and elsewhere, that both precedent and practical considerations are important factors in constitutional interpretation.

Judge Blue, I think, overreads the book's final sentence, which notes that modern judges and lawyers have often "gotten it right."⁴⁹ He seems to think that this sentence—contrary to what I explicitly say one paragraph earlier and what I have said repeatedly elsewhere—must mean that *only* text, history, and structure count. But there are other more plausible readings of this sentence. For example, surely judges and lawyers get it "wrong" when they explicitly base their legal views on faulty claims about text and history. Earlier in this century, men like Felix Frankfurter and Charles Fairman did indeed oppose incorporation on the basis of textual and historical arguments that were in fact (as my book documents) wrong as textual and historical claims. What's more, where text, history, and structure also cohere with common sense and modern conditions, precedent would indeed ordinarily be "wrong" to deviate from this presumptive legal equilibrium in the absence of a very strong reason. Does Judge Blue think that incorporation—though supported by text, history, and structure—is in fact inconsistent with common sense and modern conditions? If so, he should say so. But if not—and I suspect he in general supports the policy wisdom of incorporation—then his methodological concern seems to be misplaced. What *specifically* does the book say that he finds archaic or unwise? Moreover, surely

46. See Aynes, *supra* note 2, at 310. See generally Krauss, *supra* note 12.

47. See AMAR, *supra* note 1, at 276.

48. See *id.* at 276.

49. *Id.* at 307.

a careful analysis of text, history, and structure can help tutor our common sense judgments—teaching us from rich real-life examples what can happen when, for instance, states are free to suppress speech, religion, privacy, and so on. Even if constitutional history does not, strictly speaking, bind us, surely it can educate us, and inform the very common sense that Blue champions (and that I have never disputed as relevant).

Blue seems to think that the book resists the idea of translation—updating the protection of old values to accommodate new realities.⁵⁰ But my argument is simply that proper translation requires as a first step correct interpretation of the old values before we can begin to “translate” the original protections to meet changing conditions. Consider, for example, the following passages from Chapter Three’s analysis of the Second Amendment:

And if we seek more expansive modern-day readings of the amendment’s broad language, attention to the amendment’s first clause—focusing on the necessary preconditions for democratic self-government by the people of a “free state”—suggests a broad understanding of *arms*. The amendment is about empowering the people so that they may rule. And today that empowerment may call for much more than guns (a word that, in fact, nowhere appears in the amendment). To preserve a free state today, perhaps the people must be “armed” with modems more than muskets, with access to the Internet more than to the shooting range. As recent events in Russia and China have shown, fax machines are perhaps the most powerful weapons of all.⁵¹

.....
A case can be right for the wrong reasons, of course, and perhaps a national draft can be defended in the twentieth century for reasons rather different from those offered by the *Selective Draft Law Cases*. Circumstances have changed—the Founders’ militia does not really exist today—and as will be evident in Part Two, the Fourteenth Amendment reflected a much more sympathetic view of a national army and a much more skeptical view of state-organized militias. Thus it is possible that modern judges

50. See Blue, *supra* note 5, at 329, 337.

51. AMAR, *supra* note 1, at 49-50.

must Reconstruct the Creation vision here. But the first step of proper analysis is to get that vision right.⁵²

Thus far, I have suggested that Judge Blue has misunderstood my general methodological approach. Professor Bloom is closer to the mark when he writes that “[i]nstead of championing a specific constitutional methodology, Professor Amar capably employs virtually all accepted forms of constitutional analysis.”⁵³ I suspect that Judge Blue is misled because of an earlier book of mine, *The Constitution and Criminal Procedure: First Principles*.⁵⁴ This earlier book does indeed offer a sharply worded—too sharply worded, I now think—critique of an important quadrant of current doctrine. But not because precedent is entitled to little or no weight. On the contrary, I explicitly say in that book that although textual argument is “a proper starting point for proper constitutional analysis,” sometimes “plain-meaning textual argument must in the end yield to the weight of other proper constitutional arguments—from history, structure, precedent, practicality, and so on.”⁵⁵ I further say that, for example, “the problem with the so-called warrant requirement is not simply that it is not in the text and that it is contradicted by history. The problem is also that, if taken seriously, a warrant requirement makes no sense.”⁵⁶ This earlier book pays great attention to doctrine—as a quick scan of its index of cases makes clear.⁵⁷ But I argue that precedent in this quadrant is utterly self-contradictory, and that many strains of the precedent do violence to common sense and modern needs. The Fourth Amendment caselaw is utterly inconsistent: warrants are required except where they are not, and probable cause is an absolute mandate except on Tuesdays and at airports and border crossings and The basic idea driving Fifth Amendment caselaw is utterly opaque and obscure—a riddle wrapped in an enigma inside a mystery—and upside-down to boot, helping the guilty at the expense of the innocent.

52. *Id.* at 59.

53. Bloom, *supra* note 3, at 315.

54. AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997).

55. *Id.* at 153.

56. *Id.* at 8.

57. *See id.* at 257-65 (collecting citations to literally hundreds of modern cases).

Speedy Trial Clause doctrine is marked by seven basic propositions, but propositions one through six are logically inconsistent with proposition seven. More globally, the Court's broad Fifth Amendment caselaw violates core Sixth Amendment principles, and overly broad protections of guilty defendants end up making innocent defendants worse off. I suspect that Judge Blue may disagree with some of these claims as a substantive matter—but they are utterly unremarkable, methodologically. They are standard appeals to doctrinal coherence and common sense, alongside analysis of text, history, and structure.

And so Judge Blue, I respectfully submit, errs in describing my overall interpretive methodology in *The Bill of Rights* and elsewhere. But here is the vital kernel of truth in his account. He rightly senses that I am considerably less celebratory of judges and caselaw than he is.⁵⁸ For example, I think that the Constitution's text, history, and structure are more sensible in criminal procedure than the caselaw that judges have crafted in the name of text, history, and structure. The Bill of Rights as written was wiser and more normatively attractive than the interpretation of the Bill offered by antebellum judges. (The Bill as written frowned on the infamous Sedition Act of 1798 criminalizing opposition speech, but judges upheld the Act; conversely the Bill as written permitted free-soil laws, but judges in the *Dred Scott v. Sandford*⁵⁹ case invalidated these laws in the name of the Bill.) The Fourteenth Amendment as written protected blacks and free speech; but the mid-Republic Court gave us *Plessy v. Ferguson*⁶⁰ and *Patterson v. Colorado*.⁶¹ Instead of protecting the core concerns of the antislavery activists who crusaded for this Amendment—liberty and equality for underdogs—the Court invalidated Congressional reconstruction statutes and crafted elaborate protection for propertied elites and corporations.

In a telling footnote, Blue asks us to celebrate *Brown v. Board of Education*⁶² “regardless of” original intent.⁶³ I think

58. See generally Blue, *supra* note 5, at 327-33.

59. 60 U.S. (19 How.) 393 (1856).

60. 163 U.S. 537 (1896).

61. 205 U.S. 454 (1907).

62. 347 U.S. 483 (1954).

63. See Blue, *supra* note 5, at 330-31 n.26.

this lets the Court off too easy. *Brown* was right and easy as a matter of text because the Fourteenth Amendment promised blacks equality, and Jim Crow was plainly not equal in purpose and effect and social meaning. Its whole aim was to stigmatize and subordinate equal black citizens—to create a caste system supported by law. But if this is so, *Plessy* was wrong in 1896, and the Court was wrong for following *Plessy* for so many years; and *Brown* itself was wrong in not more forthrightly overruling *Plessy* and admitting that the Court itself had blood on its hands and bore some responsibility for giving its imprimatur to this evil and unconstitutional system. Lest we try to apologize for the Court by pointing out the limits of its powers to stand up to Jim Crow in 1896, let us remember that the Court was vigorously protecting property and corporations in this era—and that the Court itself helped kill Congressional efforts to enforce the Civil War amendments, in cases like the 1883 *Civil Rights Cases*.⁶⁴ When we fail to confront these embarrassing (to judges) facts, and when we offer overly rosy views of judges, we encourage a kind of judicial hubris that leads to cases like *Boerne*, which Professor Graber rightly criticizes as historically dubious and institutionally troubling.⁶⁵

I suspect that Judge Blue's footnote⁶⁶ reflects the mild age gap between us. When he was going to law school, the Court seemed more progressive than the country—and scholars feared that the great cases championing underdogs—incorporating the Bill of Rights, protecting political dissent, affirming the equality of racial minorities, even against federal statutes—could not be justified by honest appeal to text, history, and structure. By the time I went to law school, generations of historians had begun to present constitutional history in a more progressive, less Beardian/Levy-like/Dunning-esque light. And so one important theme of my book is that liberals should not fear text and history—if anything, they should be fearful of a Court that lightly disregards these beacons and follows its own policy preferences (which, historically, have tended to be rather unattractive).

64. 109 U.S. 3 (1883).

65. See Graber, *supra* note 8, at 373-74.

66. Blue, *supra* note 5, at 330-31 n.26.

To illustrate all this with a concrete example: Judge Blue draws the title of his essay from Justice Holmes.⁶⁷ When Judge Blue went to law school, Holmes was viewed as a hero by many. This is less true today, and I personally do not view Holmes as a hero. I will take the Fourteenth Amendment and the Bill of Rights (honestly interpreted) over Holmes's oeuvre (honestly interpreted) any day. Holmes authored *Patterson v. Colorado*⁶⁸ and *Debs v. United States*,⁶⁹ two of the most dreadful First Amendment opinions imaginable. And even his later classic dissents are far less inspiring and attractive than the First Amendment itself. Holmes never really "got it"—as the great First Amendment scholar Alexander Meiklejohn well understood.⁷⁰

What is true of Holmes personally is, I think, true of judges generally. If forced to pick, I would take the Bill (honestly interpreted) over the caselaw (honestly interpreted). Of course, we are not forced to pick—our law has room for both text and precedent, as I have tried to make clear. In my book I tried to show just how inspiring and attractive the text in fact is, when interpreted with honesty and historical sensitivity. As Judge Blue's first sentence notes—shrewdly picking up on the first sentence of the book's Introduction—I describe the Bill of Rights itself as "the high temple of our constitutional order."⁷¹ Judge Blue calls this a "revealing" metaphor, and he is right. Indeed, the first sentence of the book's Introduction goes on to describe the Bill as "America's Parthenon."⁷² The imagery here is intentional, subtly suggesting that although the Parthenon-like building of the Supreme Court is beautiful, Americans should never lose sight of the even more beautiful Bill itself. But (to repeat) the imagery does not suggest that the Court and its precedents be ignored—they too have their proper place.

In the end, both Graber and Blue usefully remind us of the distinctive perspective of *The Bill of Rights: Creation and Reconstruction*. As a thoughtful and well-read political science

67. See Blue, *supra* note 5, at 325, 342.

68. 205 U.S. 454 (1907).

69. 249 U.S. 211 (1919).

70. See generally ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* (1960).

71. Blue, *supra* note 5, at 325; AMAR, *supra* note 1, at xi.

72. AMAR, *supra* note 1, at xi.

professor, Graber might well have approached the book's topics with more attention to the concerns and writings of political scientists. As a wise and creative judge, Blue might well have written a book more attentive to and celebratory of wise and creative judges. As neither a political scientist nor a judge, I have written a somewhat different book that undoubtedly is limited by my own institutional perspective, as a post Warren-Court Yale Law School professor.

II. IN PARTICULAR

Apart from Graber and Blue, all of the other essayists today focus more on the book's specifics than on its general methodology. All, that is, with the possible exception of Professor Holt. For although he voices many specific grievances, these are linked, perhaps, by an overall methodological critique. The book, in his view, is a rather "[in]effective," if "otherwise laudable effort" to "provoke" political activism among today's largely inert citizens.⁷³ Given this understanding of the book's purpose, its inclusions and exclusions seem very odd to Holt. Why, he asks, is there lots of discussion of the Alien and Sedition Acts of 1798 and the Virginia and Kentucky Resolves and the Revolution of 1800, but no discussion of the Whiskey Rebellion?⁷⁴ Whereas scholars like Staughton Lynd have offered accounts of the CIO and the plight of "American working folk during the awful crisis of the Great Depression," these themes, Holt notes, are absent from my book.⁷⁵ Why so much attention to "elite issues" of British troop-quarterming and the Zenger case?⁷⁶ If the goal is to rouse today's masses from their slumbers and prod them to take to the streets, why is the book's approach to popular sovereignty so "genteel, to say nothing of legalistic, orderly, and managed"?⁷⁷

My answer is that I was trying to write a very different book from the one Holt seems to imagine—less to raise the political consciousness of today's dispossessed, and more to offer a care-

73. Holt, *supra* note 22, at 391.

74. *See id.* at 383, 390.

75. *Id.* at 381.

76. *See id.* at 387.

77. *Id.* at 381.

ful account of the creation and reconstruction of the Bill of Rights, an account tightly organized around the words and history of the original Bill, and of those parts of the Fourteenth Amendment that bear most directly on the Bill. The events of 1798-1800 tightly intertwine with First Amendment expression rights, Sixth Amendment jury trial rights, and Tenth Amendment rights of states and of the people; conversely, the Whiskey Rebellion is much less relevant to these issues.⁷⁸ The Great Depression of the 1930s and the CIO lie well outside the eras that generated the texts I am trying to parse and understand. Holt may think that British troop-quartering was simply an "elite" issue of "abstract" concern,⁷⁹ but the issue is prominently mentioned in the Declaration of Independence and many other revolutionary-era pronouncements, played a large role in many state constitutions, and obviously underlay the words of the Third Amendment. Zenger bears directly on issues of press freedom and jury trial which are textually prominent in the Bill itself.

Holt wants more discussion of social class, but the 1789 Bill of Rights was not cleanly organized around a strict rich/poor divide. Rather it represented a compromise between moderate Federalists like Madison and moderate Anti-Federalists who needed to be wooed aboard the new constitutional ship leaving port. And even the Federalist/Anti-Federalist divide was not simply rich/poor, as Holt himself admits.⁸⁰ The book does, however, try to capture the social dimension of more aristocratic centralists versus more populist localists on issues of Congressional size and representation, military structure, judge/jury relations, and much more. And the entire second half of the book is an attempt to discuss the constitutional dimensions of deepest issue of class in America—slavery—and to celebrate one

78. Holt also thinks that the "words of the Constitution played a minimal role in resolving the [1798-1800] crisis, as compared to ordinary political activity." *Id.* at 390. Not quite: Political activity in Virginia and Kentucky and in the election of 1800 was hugely important, but these appeals to the people were themselves importantly organized around the "words" of the Constitution, as is obvious from the Virginia and Kentucky Resolves themselves, and from many other contemporaneous pamphlets and speeches and newspaper essays and so on. In short, my book does not share Holt's Marxian preference for crude materialist explanations.

79. *See id.* at 387.

80. *See id.* at 389 n.47.

of the most inspiring mass movements in American history, the antislavery crusade, populated by ordinary folk, men and women, rich and poor, black and white.

At times, I wonder about the care with which Holt has read the book. For example, he quarrels with my passing account of federal common law,⁸¹ without noticing an extensive endnote in which I refine, support, and document this account.⁸² And there are other lapses in his essay, but I am loath to end my discussion of Holt on a negative note. For I agree with him that there is indeed a need for a more present-minded work that addresses the democratic deficiencies of our current political condition. We need a book—many books—willing to address the role of women and gays in the military, willing to talk about the growing gap between rich and poor, willing to defend governmental programs akin to “forty acres and a mule” designed to give every American citizen a stake in our society, willing to champion the rights to inclusion of long-excluded racial minorities, willing to speak directly to working folk with high-school educations about their awesome rights and responsibilities in a true democracy, willing to turn constitutional conversation away from lawyers and judges and towards ordinary citizens. In fact, I myself have tried to write such a book. Co-authored with my friend Alan Hirsch, this book—entitled *For the People*⁸³—has a very different style, purpose, audience, and scope than *The Bill of Rights*. Perhaps this book would appeal more to Holt than did *The Bill of Rights*. (Hope springs eternal.)

Holt aside, the essays in the preceding pages are in general highly complimentary. But these essays also raise interesting questions about the book and some of its claims. This is not the place to try to answer all these questions, but a few quick responses may be in order. In his extraordinarily generous review of the book, Professor Bloom wonders whether I am overly exuberant in reading the Fifteenth Amendment to protect blacks' rights to serve and “vote” on juries.⁸⁴ Bloom is right to

81. *See id.* at 390-91 n.54.

82. AMAR, *supra* note 1, at 102 & 344 n.85.

83. AKHIL REED AMAR & ALAN HIRSCH, *FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS* (1998).

84. *See* Bloom, *supra* note 3, at 317-18 n.31.

want to see more analysis of the issue than the book provides. I compressed discussion of this issue in the book precisely because a complete and (to me at least) highly convincing analysis of the issue had already appeared in a fifty-plus page article in the 1995 issue of the *Cornell Law Review*, authored by Professor Vikram David Amar.⁸⁵ Given that Bloom himself invokes Larry Tribe at this precise point in his essay, perhaps I should also report that in private communications with the author of that article, Professor Tribe himself generously expressed his admiration of the article's basic approach.

Professor Stan Krauss has today offered an extremely rich and detailed discussion of the Seventh Amendment, and I shall not hazard any final assessment of his ultimate conclusions here. Instead I shall content myself with two tiny points. First, my friend Stan generously credits me with more courage than I in fact displayed. He writes that I was "[u]ndaunted by the fact that no one seems ever to have endorsed [my] vision of the original meaning of the Jury Trial Clause before now."⁸⁶ If, in fact, no thoughtful scholar had ever read the historical evidence as I do, I would indeed have been daunted.⁸⁷ But as I note in the book, the reading of the Seventh Amendment that I put forward was advanced by Professor Charles Wolfram—in perhaps the best and most canonical article ever written on the Amendment⁸⁸—as the reading most strongly supported by the relevant historical materials.⁸⁹ In the end, Wolfram went on to reject this reading, but the specific reasons he gave for this rejection do not stand up to close analysis (as I try to show in the book at page 91, and as Krauss nowhere denies). This leads to my second point. Perhaps Krauss himself should be daunted—though not necessarily deflected, ultimately—by the fact that his reading of the Seventh Amendment leaves unanswered the key question of whether the Amendment properly applies against the states after Reconstruction. By contrast, my pro-

85. Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203 (1995). Full disclosure: Vikram is my brother.

86. Krauss, *supra* note 12, at 413.

87. Perhaps I would have nevertheless forged ahead, but surely with even more trepidation.

88. Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973).

89. See AMAR, *supra* note 1, at 91.

posed reading might be said to have the virtue (though perhaps it is a cowardly virtue) of meshing better with current precedent, and not requiring a major restructuring of a large amount of litigation in the courts of the several states.⁹⁰

Dean Aynes's very thoughtful essay comparing and contrasting total and refined incorporation is also relevant here. As Aynes perceptively observes, the results of refined incorporation "are largely congruent with" existing caselaw.⁹¹ In particular, he notes that, unlike total incorporation, refined incorporation is able to find "justification . . . for not incorporating the Seventh Amendment."⁹² Aynes gently raises questions about this approach, and in one particular instance he asks for more information. I am happy to oblige here. Aynes notes that under refined incorporation, a state would be able to prosecute its citizens for offenses committed in sister states or on the high seas.⁹³ By contrast, total and mechanical incorporation of the Sixth Amendment might create problems if judges were to insist that the jury must literally come from "the State and district wherein the crime shall have been committed."⁹⁴ Aynes suggests in a footnote that it is difficult to imagine a state seeking to prosecute a wholly extraterritorial crime, and points out that the book "provides no examples" of such a case.⁹⁵ The example I had in mind here was a 1941 Supreme Court case, *Skiriotos v. Florida*,⁹⁶ in which the justices ruled that a state could legitimately prosecute its own citizens for acts undertaken wholly on the high seas.⁹⁷ Here too, we see how refined incorporation tries to make its peace with existing precedent.

All this leads us to Professor Koppelman, for he worries that—in a different corner of the Bill of Rights—the book's refined incorporation approach might overly unsettle sound caselaw.⁹⁸ If the Establishment Clause does not mechanically incorporate against the states, he asks, what prevents a state

90. *See id.* at 276.

91. Aynes, *supra* note 2, at 311.

92. *Id.*

93. *See id.* at 308-09 n.123.

94. U.S. CONST. amend. VI.

95. Aynes, *supra* note 2, at 309 n.123.

96. 313 U.S. 69 (1941).

97. *See id.* at 75.

98. *See generally* Koppelman, *supra* note 11, at 397-402.

from, say, adopting a state motto declaring itself a "Congregationalist Christian State"?⁹⁹ In considering the book's answer to this question—which emphasizes principles of equal citizenship, free exercise, and equal protection—Koppelman notes some ways in which religious classifications are different from, say, racial classifications.¹⁰⁰ Fair enough, but surely religious classifications are also very different from, say, distinctions among star-gazers like astrologers and astronomers. (The example is Koppelman's.) There is no star-gazing clause in the Constitution, but there is a Free Exercise Clause. Although the book highlighted the role of this Clause,¹⁰¹ Koppelman's analysis curiously omits all mention of it. But this Clause—especially when conjoined with the Equal Protection Clause—seems highly relevant. Surely a state cannot, consistently with proper principles of free and equal religious exercise, impose a one-penny tax on all nonCongregationalists and only nonCongregationalists. Surely it cannot do precisely the same thing by imposing a one-penny tax on everyone while rebating the penny to every Congregationalist. Indeed, a state may not give each Congregationalist, as such, a penny—denial of which to nonCongregationalists is obviously a formal discrimination against these religious outsiders, an improper relegation of them to second-class status, and a kind of "opportunity cost" tax on their religion qua religion. For similar reasons, a state should not be allowed to proclaim itself a "Congregationalist State," just as it should be allowed to designate itself a "Republican Party" state. On this view, incorporation of the Establishment Clause as such would add very little to the principles of religious liberty and equality embodied elsewhere in the Constitution.¹⁰²

Now turn to Professor Lash's interesting meditation. Lash wonders about the role of the New Deal in my account.¹⁰³ In turn, I wonder whether any elaborate account is truly required.

99. *Cf. id.* at 399.

100. *See id.* at 399-402.

101. *See AMAR, supra* note 1, at 254.

102. Today's Court has sometimes done more with the Establishment Clause—reading into it a principle of strict separation that in fact is historically unsound and has at times ended up discriminating against religion in grossly improper ways. But the Court now seems to be moving away from separation and towards equality/neutralty as the new, and in my view proper, polestar.

103. *See generally* Lash, *supra* note 13, at 498-509.

For if I am right, the text of the Fourteenth Amendment properly supports the main body of modern incorporation caselaw. If so, what need is there to posit some mysterious unwritten amendment during the New Deal? Perhaps there might be a need to posit some sort of unwritten 1930s amendment to explain doctrine outside the Bill of Rights—say, the Commerce Clause—though in a short talk I gave after the book went to press I have expressed doubts about even this.¹⁰⁴ But is there a comparable need to point to the 1930s to explain why states must respect fundamental freedoms? Why not point to the 1860s as a fully satisfying foundation—and one much less controversial than the highly provocative account offered by my great colleague Bruce Ackerman?¹⁰⁵

In regard to the lovely and thoughtful essays of Professors Lawson and Maltz, I have little to say except thank you. Each of these essays takes off in an intriguing direction, offering interesting new perspectives on the material that I tried to showcase in the book.¹⁰⁶

Finally, let me say a quick word about Professor Spoo's elegant essay. He is, I think, exactly right to sense the benign spirit of Lincoln hovering over my book.¹⁰⁷ I have already noted the implicit contrast between the Supreme Court and the Bill itself in the opening sentence of the book's Introduction, which speaks of "the high temple of our constitutional order—America's Parthenon."¹⁰⁸ But there is another building in Washington, D.C., that also calls to mind the Parthenon, and this building is indeed the highest temple of American Civil Religion. I mean of course the place where Lincoln dwells, and it is just this place that I hoped would come to the sensitive reader's mind when I returned to the "temple" metaphor in the

104. See Akhil Reed Amar, *The Constitutional Virtues and Vices of the New Deal*, 22 HARV. J.L. & PUB. POL'Y 219 (1998).

105. See generally 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998).

106. See generally Lawson, *supra* note 14; Maltz, *supra* note 16.

107. See generally Spoo, *supra* note 17, at 541-44.

108. AMAR, *supra* note 1, at xi.

closing pages of my last chapter,¹⁰⁹ whose title comes from Lincoln himself—"A New Birth of Freedom."¹¹⁰

III. IN CONCLUSION

There is far more rich and thoughtful material in the preceding essays than one short response essay could hope to address. I am mindful that I have, alas, passed over many interesting points that, in other contexts, I should like to have discussed in detail. I hope there will be future occasions and other venues, formal and informal, to say more than I have here and now. My aim today is not to end the conversation, but to continue it.

109. *See id.* at 288.

110. *Id.* at 284.