# LONG LIVE THE BILL OF RIGHTS! LONG LIVE AKHIL REED AMAR'S *THE BILL OF RIGHTS*!

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Akhil Reed Amar's volume, *The Bill of Rights: Creation and Reconstruction* (*"The Bill of Rights"*),[1] deserves to sit on every constitutional scholar and lawyer's shelf along with such other contemporary classics as Alexander Bickel's *The Least Dangerous Branch*,[2] Charles Black's *Structure and Relationship in Constitutional Law*,[3] John Hart Ely's *Democracy and Distrust*,[4] and Philip Bobbitt's *Constitutional Fate*.[5] This book builds on two of the most breathtaking and important law review articles of the past decade—Professor Amar's *The Bill of Rights as a Constitution*, and *The Bill of Rights and the Fourteenth Amendment*.[6] Professor Amar's contributions to constitutional scholarship are of the first order. *The Bill of Rights* is the centerpiece of that contribution but it is scarcely its limit. I will focus, very briefly, on the following four aspects of *The Bill of Rights* which I believe help to explain its significance: (1) its place as the cornerstone of a large and seemingly well-integrated scholarly agenda; (2) its analytic methodology; (3) its explanatory power; and (4) its rhetorical elegance.

*An Integrated Project.* A standard but frequently all too true criticism of law professors is that we often fail to have a co-

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

2. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (2d ed., Yale Univ. Press 1986) (1962).

3. CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

4. JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

5. PHILLIP BOBBITT, CONSTITUTIONAL FATE (1982).

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

herent research agenda.[7] We tend to be eclectic, producing a piece on this and a piece on that with little apparent connection. One cannot credibly level this charge against Professor Amar. Rather, he has quite clearly embarked on the project of methodically confronting and working through the foundational issues of constitutional law in a logical and interconnected manner while bringing to bear a unique perspective and offering up new insights.

All of Professor Amar's major works, as well as most of his shorter pieces, build on that which has preceded and anticipate that which is yet to come. To date, *The Bill of Rights* is truly the planet with the greatest gravitational pull in Professor Amar's universe; but it is closely connected to his other important works, like *Of Sovereignty and Federalism*,[8] *The Consent of the Governed: Constitutional Amendment Outside Article V*,[9] *The Constitution and Criminal Procedure: First Principles*,[10] as well as the most recent *Intratextualism*.[11]

*The Bill of Rights* is, by itself, a massive and impressive undertaking. It is all the more impressive, however, when seen as just a part, though a central part, of a much broader project. Possibly the most central tenet of Professor Amar's scholarship is a belief that things do tend to fit together, at least in our Constitution, our constitutional history, and perhaps even more remarkably, our constitutional law as well. He attempts to present an account of a relatively holistic conception of the Constitution through an ever expanding integrated body of scholarship. Heavily emphasizing the significance of popular sovereignty, Professor Amar attempts to demonstrate the interconnectedness of different provisions of the text, originalist purpose at different significant times, important constitutional paradigm cases, other influential texts, including state constitutions and both renowned and obscure constitutional precedent. He has executed this herculean task with energy, brilliance and

7. This criticism is one to which I must myself plead guilty.

8. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987).

9. Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994).

10. AKHIL REED AMAR, THE CONSTITUTIONAL AND CRIMINAL PROCEDURE: FIRST PRINCIPLES (1997).

11. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

discipline. As impressive as such a project may be, the mere, though admittedly rare, ability to produce it does not validate its claims.[12] Ultimately, one must judge the value of the project on its substantive merits rather than on the ambition of its scope. Still, the ability to perceive and explain so much of this disorderly area with a relatively coherent vision is the mark of quite an extraordinary mind at work.

*Methodology.* A holistic approach to constitutional law will often fail because no single theory, perspective or methodology is sufficient to explain this rich, complicated, and indeed messy area of law. Most "grand theories" run aground as they attempt to force us to relinquish too much that is settled, too much that seems correct, however awkward it may be to explain. I do not believe that Professor Amar's work suffers from this difficulty. It consciously attempts to expand our horizons rather than contract them. Instead of championing a specific constitutional methodology, Professor Amar capably employs virtually all accepted forms of constitutional analysis. As such, despite the frequent novelty of his insights, he generally derives them with the conventional tools of our trade.

Perhaps no working constitutional scholar employs textual analysis more carefully and skillfully than Professor Amar. This book is, in a sense, a 300-page case study of textual analysis performed at the highest level of professionalism; however, his careful reading of the First Amendment,[13] the Second Amendment,[14] and Section 1 of the Fourteenth Amendment[15] stand out in particular. Yet Professor Amar does not simply do textual analysis well. He has made extraordinary contributions to textual methodology. Throughout this volume and, more expansively, in a recent article in the Harvard Law Review,[16] Professor Amar employs and explains the importance of intratextualism—the practice of drawing conclusions from similar or dis-

12. Recently, Judge Richard A. Posner has taken aim at the pursuit of grand theory in constitutional law and elsewhere and Professor Amar has been, at least, a minor target. *See* Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1 (1998); Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1638 (1998).

13. *See* AMAR, *supra* note 1, at 20-45.

14. *See id.* at 51-59.

15. *See id.* at 163-74.

16. Amar, *supra* note 11.

similar phrasing in separate constitutional provisions. Of course, Professor Amar did not invent intratextual analysis. As he well illustrates, Justices Marshall and Story all but perfected this technique during the Founding generation.[17] Professor Amar has brought intratextualism to our attention, however, and he has examined and deployed it in much the same way that Professor Charles Black did with structural argument.[18] The intratextual analysis that Professor Amar uses in comparing the wording of the First Amendment and the Necessary and Proper Clause,[19] the Preamble and the Ninth and Tenth Amendments,[20] and the Second Amendment and Article I, paragraph 16[21] is truly illuminating and is among the most intellectually satisfying aspects of this book.

Much of Professor Amar's book involves detailed consideration of originalist materials. Professor Amar builds his case plausibly and understandably. I am not a constitutional historian, but rather a user of the products of constitutional historians. Thus, I will leave the critique of Professor Amar's historical analysis to others. I do note, however, that the historical narrative is measurably enriched by Professor Amar's conscious attempts to study and explain constitutional history, not simply from the perspective of the Framers and ratifiers, but to encompass as well the contributions of significant additional actors in our constitutional drama such as Peter Zenger, James Callender, Samuel Hoar, Harriet Beecher Stowe, and Frederick Douglas.[22] Likewise, Professor Amar builds his textual and historical case with a persuasive comparison of the resolution of constitutional issues involving the territories alongside of the states[23] and by developing how state constitutions influenced the drafting of the Bill of Rights, which in turn influenced the drafting of later state constitutions.[24]

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17. *See id.* at 749-66.

18. *See generally* CHARLES BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

19. *See* AMAR, *supra* note 1, at 36-39.

20. *See id.* at 120-25.

21. *See id.* at 51-52.

22. *See id.* at 84-85, 236-37, 261-62.

23. *See id.* at 156-58, 167-69, 247-51, 277-78.

24. *See id.* at 28-29, 32-33, 60-61, 64-65, 67, 83.

Professor Amar is also a master analyst of precedent. Although doctrinal analysis does not play as large a role in *The Bill of Rights* as in some of Professor Amar's other work, a close reading of constitutional classics such as the *Slaughter-House Cases*[25] or *Barron v. Mayor of Baltimore*[26] delivers fresh insight. He is equally adept at illuminating issues with precedent that is scarcely part of the constitutional canon, such as *Campbell v. State*[27] or *Livingston v Moore*.[28]

Professor Amar also uses structural analysis expertly. Indeed he makes a major contribution to structural analysis by extending it beyond the formal governmental institutions created by the Constitution such as the Congress, the President, and the states to the People as the repository of national sovereignty. As such, structural methodology becomes one of Professor Amar's strongest arguments, especially in support of his reading of the Second Amendment and the Jury Clauses.[29]

Professor Amar has written a book which certainly has the potential to be influential long into the future because it employs, builds on, and enriches the conventional devices of constitutional analysis, rather than attempting to restrict them, refine them to the point that they may only be utilized by a highly skilled elite, or throwing them overboard for the technique of the moment.

*Explanatory Power.* The most significant distinguishing feature of *The Bill of Rights* is its explanatory power. This is not a book that attempts to set our world on its head. Quite the contrary. Although his insights are often unique, Professor Amar's explicit goal in *The Bill of Rights* is to explain how we have arrived at where we are and why,[30] for the most part, we should be here. More often than not, I believe that he succeeds.[31]

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25. 83 U.S. (16 Wall.) 36 (1873); *see* AMAR, *supra* note 1, at 210-13, 226-27.

26. 32 U.S. (7 Pet.) 243 (1833); *see* AMAR, *supra* note 1, at 128-29, 140-46, 164-66.

27. 11 Ga. 353 (1852); *see* AMAR, *supra* note 1, at 154-55, 165, 169.

28. 32 U.S. (7 Pet.) 469 (1833); *see* AMAR, *supra* note 1, at 182-83.

29. *See* AMAR, *supra* note 1, at 46-50, 83-88, 98-104, 129-33.

30. *See id.* at 307.

31. On occasion, I find some of Professor Amar's claims a bit too creative to be persuasive. I tend to agree with the substance of Professor Tribe's criticism of Professor Amar's articles on constitutional amendment outside of Article V and presidential immunity from suit. *See* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV.

I will focus briefly on what I consider to be three of the most significant contributions of the book. The first is the explanation and justification for the exalted status of the Bill of Rights in our legal and political culture. Conventional wisdom credits Madison and the 1787-1791 generation with the creation of this edifice. Certainly, they gave it birth. But even conventional wisdom notes the embarrassing incompleteness of the initial Bill of Rights, both in its inapplicability to the states, as well as its toleration of slavery and unconcern with many other significant aspects of equality and liberty. Still, we have tended to perceive the 1791 Bill of Rights as a great start—as a charter of individual liberty subsequently expanded and improved by the Fourteenth Amendment. Professor Amar argues, on the basis of text, history, precedent and structure, that the Bill of Rights was initially conceived as a combination of structural and individual rights protection with heavy emphasis on structure.[32] Consequently, the Bill of Rights was not utilized significantly to protect individual rights prior to the Fourteenth Amendment (which is understood by conventional accounts). Furthermore, it was not widely revered as a charter of liberty, nor even generally considered a "Bill of Rights" prior to adoption of the Fourteenth Amendment. Thus the Framers of the Fourteenth Amendment had as much to do with our current conception of and reverence for the Bill of Rights (and not simply its incorporation) as the Framers of 1787-1791.

There are a number of reasons why the pre-Civil War conception of the Bill of Rights might be quite different from our own. The Supreme Court's jurisdiction was quite limited. An aggressively individualistic conception of the Bill of Rights could not coexist with the institution of slavery, even assuming that slaves would not be considered rights holders given that the suppression of the rights of abolitionists was also crucial to the

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1221, 1240-41, 1246-48 (1995). With a few minor exceptions, however, such as the notion that the Fifteenth Amendment should be understood to ensure the right to vote on juries, *see* AMAR, *supra* note 1, at 272-74, I find *The Bill of Rights* to be significantly less eccentric than the analysis and claims of the articles discussed by Professor Tribe. That is hardly to suggest that I endorse all of the analysis in this book, but rather, that I consider most claims to be well within the bounds of reasonable disagreement.

32. *See generally* AMAR, *supra* note 1, at 1-133.

continued existence of slavery.[33] The explanation that Professor Amar highlights so effectively in this book is the underlying difference in the nature of the perceived threats against which the Bill of Rights was intended to protect prior to and after the Civil War.

Before the Civil War, the primary concern was self-dealing and unresponsiveness by an elite centralized government; a problem of tyranny of the minority, or "agency costs" as Professor Amar puts it.[34] After the Civil War, the primary threat was the reverse: the more familiar majority oppression of the minority.[35] This is hardly a revelation; but part of the genius of Professor Amar's book is how well it reminds us of what we have forgotten, or at least what we have de-emphasized. We have tended to think of the Bill of Rights as a full-blown, though still incomplete, charter of liberties as of 1791, though we should have been aware that this was not really so. Professor Amar documents how clearly this was not the case, forcing us to reconceptualize the origin of the Bill of Rights, thereby crediting the 1868 generation not simply with expanding the application of the Bill of Rights, but for reconstructing it (as well as the nation). If the book accomplished no more than this, it would be a serious contribution indeed.

Professor Amar also offers the most plausible explanation of incorporation of the Bill of Rights to the states that I have yet encountered. For twenty years, I have taught the Black,[36] Brennan,[37] and Frankfurter[38] approaches to incorporation and have found none of them wholly satisfactory. Justice Black's total incorporation seems obtusely mechanical and inadequate to explain what the Court actually has done. Justice Brennan's selective incorporation seems manipulative and ungrounded in text or history. Justice Frankfurter's fundamental fairness approach seems better able to explain judicial practice and presents a plausible theoretical explanation as well but still remains distressingly ad hoc.

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33. *See id.* at 160-62, 269-72, 278-79.
34. *See id.* at xiii.
35. *See id.* at 288-94.
36. *See* Adamson v. California, 332 U.S. 46, 120 (1947) (Black, J., dissenting).
37. *See* Malloy v. Hogan, 378 U.S. 1 (1964).
38. *See Adamson*, 332 U.S. at 67 (Frankfurter, J., concurring).

Professor Amar builds a textual and structural case for his refined incorporation approach, which distinguishes individual protection guarantees from structural provisions.[39] He presents a plausible originalist defense.[40] Obviously, his exposition will not end originalist arguments on this subject. As with the Rosenbergs and the Kennedy assassination, historical debate over the incorporation of the Bill of Rights seems destined to continue indefinitely. Refined incorporation is largely consistent with existing incorporation. Its acceptance would not require rejection of any prior decisions to incorporate, though if taken seriously, it would require extension to previously unincorporated provisions.[41] I certainly do not expect the Court to adopt Professor Amar's refined incorporation approach. The incorporation battle has been fought and won with other weapons. For students of the Constitution, however, it provides a better justification of this essential component of our constitutionalism.

The most important theme in all of Professor Amar's work, including *The Bill of Rights*, is popular sovereignty. A reader of Professor Amar's work must conclude that if one project is dear to his heart, it is to put "the People" back into our constitutional discourse. In *The Bill of Rights* and elsewhere, Professor Amar argues that we have misunderstood both the Founding and the Reconstruction Eras by failing to appreciate the significance that these respective framing generations placed in "the People" and by mistaking it for a faith in or commitment to one level of government or another. This is a truly significant rediscovery. As Professor Amar shows throughout the book, but especially with respect to the Second Amendment and the jury, consideration of the importance of the People as a constitutional entity, indeed as an institution, refocuses analysis and often provides a credible explanation for matters which otherwise seem confused and obscure. Professor Amar's explication of how the jury implements and has protected popular sovereignty in a

39. *See* AMAR, *supra* note 1, at 215-30.

40. *See id.* at 225-30.

41. As I understand it, refined incorporation would lead to the incorporation of the Second Amendment right to keep and bear arms, the Third Amendment prohibition against quartering of troops, the Fifth Amendment right to indictment by grand jury, and the Seventh Amendment right to a trial by jury in a civil case. *See id.* at 257-77. I must confess that I find the discussion of the extent to which jury rights ought to be incorporated a bit ambiguous.

real and significant way largely explains the emphasis in the Bill of Rights on an institution which to many modernists seems archaic and troublesome.[42] Likewise, a focus on popular sovereignty largely explains why our "embarrassing Second Amendment"[43] was anything but embarrassing to the 1787 generation who understood the role of arms in protecting "the People" against arbitrary centralized government, and to the 1868 generation who understood the role of arms in protecting "the People" against private violence aided by an unresponsive state.[44] Recognition of the central role of the sovereignty of the People often changes the entire nature of the constitutional conversation. Professor Amar builds an overwhelming case for the significance of "the People" in constitutional law. This is a contribution of the first order of magnitude.

*The Rhetoric.* I have read classics such as *The Least Dangerous Branch*[45] and *Democracy and Distrust*[46] several times during my career. I would return to these books if for no other reason than intellectual enlightenment—the joy of discovering new insights in familiar territory. But I return to them as well because they are simply a joy to read. *The Bill of Rights* is a book that I will return to many times for the same reason. This is a beautifully written book, especially given that its subject is often quite technical. It is a book that I believe can be appreciated by scholar and layman alike. Let me provide just two examples.

Focusing on why application of the Bill of Rights to the States may have seemed quite different to the generation of 1787 than the generation of 1868, Professor Amar explains:

> As white, male, propertied Virginians, Madison, Jefferson and Henry belonged to an ongoing republic that had been practicing self-government for 150 years before the Constitution came along. Thus the Virginia House of Burgesses was already older for them than the Fourteenth Amendment is for us today. In a deep sense, the Virginia Declara-

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42. *See id.* at 23-24, 70-75, 83-93, 242-44, 269-75.

43. *See generally* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

44. *See* AMAR, *supra* note 1, at 47-49, 216-18, 262-63.

45. BICKEL, *supra* note 2.

46. ELY, *supra* note 4.

> tion of Rights was for them prior to the federal Bill of Rights. Chronologically and perhaps emotionally, Virginia came first, before the Union. But not for Bingham, or for an entire generation of later Americans growing up in places like Ohio. Before Ohio was even a state, it was a federal territory, governed by the federal Constitution and the Union's Northwest Ordinance. For Bingham, *these* documents came first, framing the state and constraining its lawful power.[47]

In this short elegant paragraph, Professor Amar describes a basis for a difference of mindset that helps explain an extraordinary transformation of the Constitution and the Bill of Rights.

Describing the transformation of vision between 1787 and 1868, Professor Amar writes:

> Over and over, the 1789 Bill proclaimed "the right[s]" and "the powers" of "the people"—phrases conjuring up civic republicanism, collective political action, public rights, and positive liberty. The complementary phrase in the 1866 amendment—"privileges or immunities of citizens"—indicates a subtle but real shift of emphasis, reflecting a vision more liberal than republican, more individualistic than collectivist, more private than public, more negative than positive.[48]

Here, in a short but rich paragraph, two-thirds of the way through the book, Professor Amar employs textual analysis to epigrammatically capture much of the argument that has preceded in a manner that rings so true to the reader.

I could go on with countless other examples. If you have not read the book, the prospect of enjoying many more such passages should be reason enough to buy or even borrow a copy. If you have read the book, you will doubtlessly recall several such favorite examples of your own.

Will this book come to be regarded as a classic? I hope so. I hope that I have explained why it deserves to be. I have no doubt that it will be so regarded by serious constitutional histo-

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47. AMAR, *supra* note 1, at 158.
48. *Id.* at 215-16 (alteration in original).

rians and scholars. I do not know whether it will become a part of the canon to a somewhat wider audience. In an admittedly unscientific journey through the legal and historical sections of two of the leading chain book stores recently, I was disheartened to find that Amar's *The Bill of Rights* was not to be found in the company of Bickel, Bork, Epstein, Dworkin, Posner, or Ely (though perhaps all copies had been sold).

Happily, Amar's *The Constitution and Criminal Procedure: First Principles*[49] was indeed represented. I attribute this to nothing more than the fact that all but *The Bill of Rights* are available in paperback. I do not doubt that this deficiency will soon enough be remedied. This is a book that could and should be appreciated and enjoyed by an audience substantially broader than the scholarly community.

As I noted above, this book is rather clearly part of a much larger emerging but obviously uncompleted design. Considering that Professor Amar is still a young scholar, and given his astounding productivity, it will be fascinating to see how he will build upon and perhaps even transform *The Bill of Rights* as he extends its lessons to other contexts. In a brilliant and provocative volume, *The Constitution and Criminal Procedure: First Principles*,[50] Professor Amar has already engaged in far more detailed analysis of many of the criminal procedure guarantees. I can imagine a similar, more detailed future treatment of the First Amendment, Second Amendment, Eighth Amendment and what Professor Amar has referred to as the "diaspora of rights—those scattered provisions before and after the Bill of Rights that could be viewed as a companion Bill of Rights in exile."[51] *The Bill of Rights* is a bold and enlightening foundation for a scholarly enterprise that will hopefully continue to expand and to enrich us for generations to come.

49. AMAR, *supra* note 10.
50. *Id.*
51. AMAR, *supra* note 1, at 298.