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The Constitution as a Whole: A Partial Political Science Perspective

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THE CONSTITUTION AS A WHOLE: A PARTIAL POLITICAL SCIENCE PERSPECTIVE

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The Bill of Rights: Creation and Reconstruction (*"The Bill of Rights"*)[1] is a professionally rewarding and disturbing masterpiece. The work is professionally rewarding because Professor Akhil Amar develops a meticulously detailed, historically sophisticated, and largely persuasive account of how the liberties set out in the Bill of Rights were originally understood and the original relationship between the Bill of Rights and the Fourteenth Amendment.[2] This is 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. Professor Amar's book is professionally disturbing in part because, having agreed to write an essay for this symposium, there seems little of substance to contribute other than five pages of extravagant praise and five pages of nitpicking. *The Bill of Rights* is also professionally disturbing because what I believe to be state of the art legal scholarship is yet another work by a distinguished law professor that evinces little interest in what scholars in my home discipline, political science, are saying about American constitutionalism.[3] The

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

2. Dare I add that *The Bill of Rights* is a politically rewarding masterpiece because the United States became a more just society when states were obligated to honor the individual liberties set out in the Bill of Rights, or does this demonstrate my lack of constitutional sophistication, namely an inability to demand that Americans adopt some hideous policy merely because it seems the best reading of the language and history of a particular text?

3. Consider the numerous legal commentaries on the present state of constitutional theory that discuss only works on constitutional theory written by law professors. *See* RICHARD A. POSNER, OVERCOMING LAW (1995); LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES (1996); MARK V. TUSHNET, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTI-

consistent lack of engagement in legal writing with contemporary political science scholarship is particularly surprising given that constitutionalist concerns are far more central to political science than to the numerous disciplines that have informed much contemporary legal commentary. Professor Amar's work demonstrates and acknowledges the numerous contributions contemporary historians are making to American constitutional studies.[4] Political scientists who read *The Bill of Rights*, however, are likely to feel themselves treated more as the citizens to whom Professor Amar wishes to speak than the fellow scholars with whom he wishes to converse.

Rather than nitpick on the explicit arguments made in *The Bill of Rights*, the following pages nitpick on the ways that the work implicitly excludes political scientists from important constitutional conversations about the protection of fundamental liberties. The exclusion is rhetorical rather than deliberate. Professor Amar bears no personal or intellectual grudge against political science scholarship that I can detect. My quarrel is primarily with his tendency to write in ways that implicitly reduce all normative constitutional questions to questions of constitutional law. At crucial points, for example, *The Bill of Rights* makes claims about the way Americans understand the Constitution that are supported only by evidence about the way law professors understand the Constitution. This failing cannot be remedied merely by adding two political science, three sociol-

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TUTIONAL LAW (1988). Tushnet's recent work is far more informed by political science scholarship. *See* MARK V. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999). Posner, unfortunately, has taken to complaining about the lack of empirical grounding for much contemporary constitutional theory, never mentioning numerous constitutional studies by political scientists (and others) that attempt to integrate constitutional analysis with legal findings. *See* Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1 (1998). For representative books by political scientists integrating empirical findings and constitutional analysis, see KRISTIN BUMILLER, THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS (1988), MARK A. GRABER, RETHINKING ABORTION: EQUAL CHOICE, THE CONSTITUTION, AND REPRODUCTIVE POLITICS (1996), and JENNIFER L. HOCHSCHILD, THE NEW AMERICAN DILEMMA: LIBERAL DEMOCRACY AND SCHOOL DESEGREGATION (1984). This footnote would be at least 20 pages if I included articles from the *Law and Society Review* and similar journals devoted to the research Posner claims is not being done.

4. *See* AMAR, *supra* note 1, at 301-05. Professor Amar does not discuss or cite the most important study of the Fourteenth Amendment written by a political scientist. *See* JUDITH A. BAER, EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT (1983).

ogy, and one political psychology work to the relevant string citation.[5] Scholars outside the law school are asking different constitutional questions than most law professors. The conflation of American constitutionalism and constitutional law, for this reason, obscures important issues of constitutional pedagoguery and practice that a broader interdisciplinary awareness would bring to light.

The particular focus of this essay is on the two passages in *The Bill of Rights* that most clearly equate constitutional scholarship with legal scholarship: Professor Amar's assertion that Americans rarely study the Constitution as a whole and his declaration that questions concerning whether the Fourteenth Amendment incorporates the Bill of Rights are profoundly important. Had *The Bill of Rights* explicitly considered the way nonlegal scholars teach American constitutionalism, Professor Amar might have recognized that better integration of the subject matter of constitutional law will still leave constitutionalism studied piecemeal by discipline. His effort to improve understandings of the Constitution as a whole requires radical reform of the academy rather than minor revisions in first year constitutional law courses. Had *The Bill of Rights* examined the Constitution from the perspective of persons responsible for designing and maintaining constitutional orders, a perspective more common in political science than in law, Professor Amar might have considered questions about actual institutional capacity to protect fundamental liberties to be as important as the precise liberties to be protected. This perspective might foster more awareness of the constitutional failings of the Fourteenth Amendment and greater attention to the politicians and justices responsible for the incorporation of the Bill of Rights during the 1950s and 1960s.

None of these observations undermine the substantive conclusions Professor Amar reaches. *The Bill of Rights* is a wonderful history and a sophisticated doctrinal analysis. Professor Amar can no more be expected to explore all the constitutional con-

5. One manifestation of the artificial boundaries between law and political science is that citations in law reviews are not counted in political science reputational surveys, while citations in political science journals are not counted in the analogous legal surveys.

cerns liberty raises than any other scholar.[6] If there is a weakness in *The Bill of Rights*, that weakness may be a tendency to use language in ways that limit constitutional investigation to doctrinal analysis.[7] The problem is less the failure to address certain issues than rhetorical practices that fail to acknowledge those important questions concerning the nationalization of civil liberties that are not questions of constitutional law.

This essay is written from my perspective as a political scientist, but I make no claim to represent political scientists in general, and not just for the obvious reason that I have no authority to speak for everyone with a Doctor of Philosophy in political science or even for all the dues paying members of the Law and Courts section of the American Political Science Association. At best, the claims made in this paper reflect the concerns of those political scientists who are returning to that discipline's historic concerns with constitutional analysis. Law professors who claim that political scientists slight legal considerations when constructing attitudinal or strategic models of judicial decision making will get no quarrel from me.[8] The present forum, however, is far better suited for discussing how law professors might benefit from some political science perspectives than for detailing how political scientists would benefit from taking law more seriously.

I. TEACHING CONSTITUTIONALISM

From the beginning, quite literally, *The Bill of Rights* identifies constitutional scholarship with legal scholarship. The first

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6. He also cannot be expected to read or cite every work in any discipline that might be relevant to his subject.

7. I should emphasize from the start that I do not know Professor Amar personally and do not have any mind reading capacities. For all I know, he may be extremely well read in the political science literature. My comments are simply that *The Bill of Rights* could have been improved by greater acknowledgment of certain constitutional issues that political scientists tend to think about. I have no idea the degree to which Professor Amar thinks about these matters.

8. For the leading examples of this strand of public law scholarship in political science, see LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998), and JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993). I briefly criticize the failure of these and similar works to immerse themselves in legal writing in Mark A. Graber, *Historical Institutionalism as/and Scholarship*, 9 L. AND CTS. NEWSL. 14 (forthcoming 1999).

paragraph proclaims, "[i]nstead of being studied holistically, the Bill [of Rights] has been broken up into discrete blocks of text, with each segment examined in isolation."[9] The evidence for this assertion about how "we" study the Constitution is confined to an analysis of how law professors study the Constitution. Professor Amar criticizes the "typical law school curriculum" for dividing responsibility for teaching various constitutional provisions between numerous courses, and "legal scholarship," where again "[e]ach clause is typically considered separately."[10] "[N]o legal academic in the twentieth century," he concludes, "has attempted to write in a truly comprehensive way about the Bill of Rights as a whole."[11]

No mention is made in the introduction of how the Constitution is studied in other disciplines, or even if the American Constitution is a basic unit of study in other disciplines. The last pages of *The Bill of Rights* do assert that "this is a law book (written about law by a law professor)."[12] Perhaps the pronoun "we" in the introduction refers only to law professors and other members of the legal community. Still, *The Bill of Rights* is being marketed to a general audience[13] and is written in remarkably accessible prose.[14] Until the very end of the work, readers have every reason to think Professor Amar is criticizing a general failure of American constitutional scholarship rather than a distinctive limitation of American legal scholarship. If some other discipline is teaching and studying the Constitution properly, surely examples of this better practice should be pointed out. Moreover, even if the intended audience for this book is far more narrow than initial appearances and merit suggest, a more explicit recognition of how disciplines other than law study American constitutionalism is a necessary

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

10. *Id.*

11. *Id.* at xi-xii.

12. *Id.* at 302.

13. *See id.* at 296 (stating that "this is a book written not just for lawyers and judges but for ordinary citizens who care about our Constitution and our rights"). Notice that the relevant categories are lawyers and ordinary citizens, which means that the role of nonlegal scholars is unclear.

14. Among other virtues, *The Bill of Rights* may be the most well-written book on American constitutionalism published this decade.

prerequisite for thinking about the American Constitution as a whole.

A. *Constitutionalism and the Curriculum*

Undergraduates at American universities are taught American constitutionalism in ways that seem far more holistic by Professor Amar's standards than the curriculum at most major law schools. Most political science departments have a one or two term course sequence that unsuccessfully attempts to cover as many constitutional issues as possible. Article II issues are not farmed out to the course on the presidency, and constitutional criminal procedure is not left to the department of criminal justice. What I do not teach in my constitutional law courses probably does not get taught to political science majors and graduate students at the University of Maryland. Many political scientists and, I suspect, most historians, teach constitutional law chronologically rather than by subject. This approach fosters appreciation of potential connections between different constitutional provisions that the law school approach may obscure. Undergraduates may quickly perceive relationships between *Brown v. Board of Education*,[15] *Miranda v. Arizona*,[16] and *New York Times Co. v. Sullivan*[17] when these cases are taught by the same instructor, in the same course, and, often, in the same week.[18]

Nevertheless, the undergraduate curriculum on closer inspection is no more holistic than the law school curriculum (and not just because many college professors use law school casebooks when teaching constitutional law). American constitutionalism at the undergraduate level is broken up by discipline rather than by subject matter. The history department offers a course in American constitutional history, the philosophy department offers a course in constitutional theory, and the political science department offers a course in constitutional politics. One result

15. 347 U.S. 483 (1954).
16. 384 U.S. 436 (1966).
17. 376 U.S. 254 (1964).
18. For some of the relationships between these cases, see HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT (1965), and Louis Michael Seidman, Brown *and* Miranda, 80 CAL. L. REV. 673 (1992).

is less attention to the sort of doctrinal issues that are typically covered in loving detail by law professors. Another consequence is a good deal of repetition, particularly if the political scientist teaching constitutional law is philosophically or historically minded.[19] A third consequence is the tendency not to foster thinking in any systematic way about the relationships between constitutional history, philosophy, and politics. Philosophy students may never explore how the political environment of the 1970s influenced the Supreme Court's decision in *Roe v. Wade*.[20] Some political science students may never consider the independent influence of legal ideas on judicial decisions.[21]

The partial perspectives all disciplines offer on American constitutionalism suggest that any course of study not centered on American constitutionalism or on constitutionalism in general will treat much material in isolation that is better studied as a whole.[22] This problem is far broader than the tendency in law schools for free speech and criminal procedure to be taught in different classes. The organization of the academy, rather than any distinctive failing of legal pedagogy, is the single greatest obstacle to truly comprehensive understandings of American constitutionalism. Some students learn American constitutionalism almost exclusively from experts on constitutional law, others learn American constitutionalism almost exclusively from experts on constitutional history, and so on. If the legal curriculum seems particularly piecemeal, the cause may be the greater isolation of law schools from other academic disciplines.

Institutional problems generally require institutional solutions. Professor Amar's admirable effort to read the Constitution as a whole is, at best, partial compensation for the costs that relative academic isolation impose on constitutional studies. His constitutional law courses are likely organized in ways

19. I plead guilty as charged.

20. 410 U.S. 113 (1973).

21. This, I believe, is the fundamental weakness of a leading textbook on constitutional law in political science. *See* LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: INSTITUTIONAL POWERS AND CONSTRAINTS (3d ed. 1998).

22. Both the law school and undergraduate curriculum are clearly guilty of isolating the study of American constitutionalism from the study of alternative constitutional forms.

that make students aware of the interconnections between the liberties set out in the Bill of Rights, but are probably not organized in ways that foster questions about the sort of political culture necessary to maintain the constitutional regime *The Bill of Rights* admires. My courses do better on issues of constitutional culture and worse on questions of constitutional doctrine. Political scientists, law professors, and other scholars who teach the Constitution will never be able to cram all of constitutionalism into their one or two course sequences. Still, we can at a minimum teach and write in ways that acknowledge that our courses do not offer comprehensive coverage of American constitutionalism, even if we cover every provision in the Constitution's text or review the history of the Supreme Court from 1787 to the present.

More significantly, constitutional scholars in all disciplines should strive to break down the artificial barriers between academic disciplines, particularly the barriers between law schools and graduate departments. What, after all, justifies the often near total separation of the law school from other academic disciplines that regard law or constitutionalism as a basic unit of study? Given Professor Amar's interdisciplinary focus and interest in addressing citizens, should he not be teaching undergraduates and graduate students, as well as future legal practitioners? Indeed, I suspect that his writings, and those of such scholars as Bruce Ackerman[23] and Sandy Levinson,[24] will be of far more professional use to my Doctor of Philosophy students, almost all of whom will become professors, than to Yale law students, almost all of whom will become lawyers.[25] These observations suggest that fostering more comprehensive thinking about American constitutionalism will in the long run require structural reorganization of the university, not simply some rethinking of the traditional constitutional law course.[26]

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

24. *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988); RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Sanford Levinson ed., 1995).

25. I also suspect that Professor Amar and I have more intellectual interests in common than I do with most political scientists who teach quantitative methods and than he does with most law professors who teach federal taxation.

26. Why American constitutionalism or constitutionalism in general ought to be a

B. *Constitutionalism in Scholarship*

Constitutional scholarship outside the legal academy also seems more holistic than most legal scholarship. Historians can defend themselves, though I am curious whether Jack Rakove's *Original Meanings*[27] offers a comprehensive understanding of the Constitution of 1787. Within political science, Wayne Moore's *Constitutional Rights and Powers of the People*[28] represents a distinguished recent effort that is "writ[ten] in any comprehensive way about the Bill of Rights as a whole" and "consider[s] the rich interplay between the original Constitution and the Bill of Rights."[29] Members of the Princeton school of constitutional thought write extensively about the need for constitutional interpreters to consider the entire Constitution rather than particular provisions one at a time. Walter Murphy, in particular, insists on the importance of ordering and coordinating various constitutional values.[30] Steve Elkin and Karol Soltan have edited several collections of essays concerned with constitutionalism from the perspective of the persons responsible for designing and maintaining constitutional orders.[31] Rog-

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central organizing theme in law school or in the undergraduate curriculum is not clear. Organizing such a course of study, after all, will require treating other material in isolation that is better examined as a whole. Students who are better placed to realize the connections between *Brown* and *Miranda* may be poorly placed to appreciate the connections between the statutory and constitutional law of confessions. Philosophers may decide that treating constitutional issues as a species of moral problems may be more important than ensuring that students know the social context of particular Supreme Court decisions. At any rate, this suggests that the curriculum changes Professor Amar might want are more far ranging and impose more costs than a quick perusal of *The Bill of Rights* suggests.

27. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996).

28. WAYNE D. MOORE, CONSTITUTIONAL RIGHTS AND POWERS OF THE PEOPLE (1996). Readers should decide for themselves whether Princeton, Harvard, Yale, Chicago, California, and the other university presses are sufficiently undistinguished that law professors cannot reasonably be expected to be familiar with the constitutional scholarship by non-lawyers that these presses publish.

29. Akhil Reed Amar, *The Bill of Rights as a Constitution,* 100 YALE L.J. 1131, 1132 (1991).

30. *See* Walter F. Murphy, *An Ordering of Constitutional Values,* 53 S. CAL. L. REV. 703 (1980). The most influential work in the Princeton tradition is SOTIRIOS A. BARBER, ON WHAT THE CONSTITUTION MEANS (1984).

31. *See* A NEW CONSTITUTIONALISM: DESIGNING POLITICAL INSTITUTIONS FOR A GOOD SOCIETY (Stephen L. Elkin & Karol Edward Soltan eds., 1993); KAROL EDWARD

ers Smith has detailed the ways in which changing understandings of liberalism have influenced the interpretation of numerous constitutional provisions,[32] and has recently written on how different comprehensive approaches to the Constitution inspired different models of citizenship.[33] Howard Gillman is documenting how numerous constitutional provisions were originally understood as means for preventing class legislation.[34] My first book highlighted the broader jurisprudential and philosophical groundings for free speech arguments, the economic policies and political institutions thought necessary to protect free speech, and the other constitutional understandings Americans have thought a commitment to free speech entailed.[35] One occasionally finds political scientists writing doctrinal exegesis of particular constitutional provisions or problems, but such works have had less influence than more broader concerns.

The difference between the dominant lines of constitutional scholarship in the legal academy and in political science departments may partly reflect the different pedagogical purposes of law schools and undergraduate institutions. Law schools primarily train practicing lawyers. Professor Amar and I may mourn this fact, but the traditional, narrowly focused, law review discussion of a discrete area of law may be of more immediate use to a legal practitioner than the mode of legal analysis found in *The Bill of Rights* or in the constitutional scholarship most political scientists produce.[36] Political science depart-

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SOLTAN & STEPHEN L. ELKIN, THE CONSTITUTION OF GOOD SOCIETIES (1996). Professors Elkin and Soltan also edit a journal, *The Good Society*, dedicated to issues of constitutional design.

32. *See* ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW (1985).

33. *See* ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY (1997).

34. *See* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE (1993); Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 POL. RES. Q. 623 (1994); Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building*, 11 STUD. IN AM. POL. DEV. 191 (1997).

35. *See* MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM (1991).

36. This is my best guess. Legal practitioners and judges are obviously the best authorities on what sort of scholarship they find most useful.

ments train undergraduates to be good citizens and graduate students to be good political scientists. Playing law professor in a political science classroom is frowned upon, and the chances of placing a traditional doctrinal argument in a refereed political science journal are slim. Thus, the environment in political science departments is far more conducive to producing works as ambitious as *The Bill of Rights* than another commentary on whether *Roe v. Wade*[37] was correctly decided. Professor Amar's emphasis on how different his work seems from many of his peers in law school leads him to discount (or at least not acknowledge) the similarities between his work and those of non-legal constitutional scholars (in disciplines other than history).

The Bill of Rights is a strikingly original work, but not quite for some of the reasons suggested in the book's introduction. Many scholars treat the Constitution as a whole. Indeed, most law professors who write on constitutional theory treat the Constitution as a whole. Ronald Dworkin,[38] Cass Sunstein,[39] and Sandy Levinson[40] all offer comprehensive visions of constitutional life, even though the first two in particular spend much time applying those visions to particular constitutional problems. Professor Amar is extraordinarily skilled at detailing how particular constitutional provisions should be interpreted in light of the language used in related constitutional provisions and the more general principles underlying the inclusion of that language in the Constitution. This form of constitutional argument, which he labels "intratextualism,"[41] is indeed a distinct, important, and enlightening approach to constitutionalism. Still, as Professor Amar acknowledges elsewhere, intratextualism is not unique in treating the Constitution as a whole. Structural arguments also "seek[] to identify and draw meaning from larger constitutional patterns."[42] Moreover, both intratextualism and structuralism retain the traditional doctrinal focus of legal

37. 410 U.S. 113 (1973).

38. *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996); RONALD M. DWORKIN, LAW'S EMPIRE (1986); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

39. *See* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993).

40. *See* sources cited *supra* note 24.

41. *See* AMAR, *supra* note 1, at 296; Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) [hereinafter Amar, *Intratextualism*].

42. Amar, *Intratextualism*, *supra* note 41, at 790.

writing. Most political scientists do not focus on such questions as, How should the First Amendment be interpreted? Constitutional scholarship in my discipline tends to focus on such questions as, (1) What are the essential features and vital struggles within a particular constitutional regime? (2) How are constitutional orders created, maintained and destroyed? and (3) How can institutions be designed to ensure wise government actions and the protection of fundamental rights? Mere recognition of these questions would not require Professor Amar to practice political science without a license; such scholarship tends to be of low quality.[43] Still, had *The Bill of Rights* been better grounded in political science scholarship, the book might have at least acknowledged several vital questions concerning incorporation that are not questions of constitutional law. This awareness would not require any alteration in Professor Amar's understanding of what the Constitution means, but might have influenced his thinking on the constitutional issues associated with how those meanings have and have not been realized in practice.

II. DESIGNING CONSTITUTIONS

The second part of *The Bill of Rights* begins by asserting "we must tackle questions like these:"[44]

> What is the relation between the Bill of Rights and the Fourteenth Amendment? Does the amendment "incorporate" the Bill, making the Bill's restrictions on federal power applicable against states? If so, which words in the Fourteenth Amendment work this change? Are all, or only some, of the provisions of the first ten amendments incorporated or absorbed into the Fourteenth? If only some, which ones, and why? Once incorporated or absorbed, does a right or freedom declared in the Bill necessarily constrain state and federal governments absolutely equally in every jot and tittle?[45]

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43. *See* Mark A. Graber, *Law and Sports Officiating: A Misunderstood and Justly Neglected Relationship*, *in* 16 CONST. COMMENTARY (forthcoming 1999).

44. AMAR, *supra* note 1, at 137.

45. *Id.*

Professor Amar offers a series of fascinating answers to these questions. He claims that the persons responsible for the post-Civil War Constitution understood the Privileges and Immunities Clause of the Fourteenth Amendment as prohibiting state action that violated the individual rights provisions set out in the Bill of Rights. Moreover, he insists that those individual rights provisions are best interpreted as they were understood in 1868, not how they were understood in 1791 when the Bill of Rights was ratified. His argument persuasively demonstrates that these were fundamental goals of many northern antislavery activists and that the language they used when drafting and defending the Fourteenth Amendment strongly supports the position *The Bill of Rights* describes as "refined incorporation."[46]

I am convinced, or as convinced as I need to be for purposes of constitutional practice. The constitutional historian in me wants to do more research with primary sources and learn what professional historians have to say about *The Bill of Rights* before proclaiming to the world that "refined incorporation," or some close cousin, is the absolute best interpretation of the original understanding of the relationship between the Fourteenth Amendment and the Bill of Rights. Still, for the purposes of constitutional interpretation, all that should be demanded is a highly plausible reading, a standard *The Bill of Rights* clearly meets.

Very few justices, lawyers, politicians, or citizens have the time or capacity to do the serious historical research necessary to determine whether Professor Amar has produced the absolute best analysis of the original meaning of the Fourteenth Amendment. The most one can reasonably expect is that constitutional authorities will be aware of the range of readings that most historians regard as competent.[47] Moreover, historical understandings change over time. Professor Amar notes that the dominant understandings of both the Framing and Reconstruction have changed dramatically during the last fifty years

46. *See generally id.* at 137-283.

47. *See* Martin S. Flaherty, *The Practice of Faith*, 65 FORDHAM L. REV. 1565, 1575 (1997). *See generally* Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995).

and that "an immense amount of work on Reconstruction remains to be done."[48] The high probability that scholarship in the near future will again revise the dominant Reconstruction story suggests that insisting constitutional understandings be based on the best historical understandings of a given time will undermine the degree of stability that both constitutionalism and originalism promise.[49]

For numerous reasons, the powers of the federal government and rights of American citizens should not be a strict function of what some historian finds in the attic of the Madison or Bingham estates. Constitutions, Steven Holmes and Phil Bobbitt suggest, function best by constraining political choice.[50] Both the constraint and the choice elements are necessary ingredients of a sound constitutional regime. A constitution that did not constrain politics would result in chaos; a constitution that provided too much constraint would impose a dictatorship of the past. Professor Amar has clearly given refined incorporation the textual and historical pedigree necessary to belong to the choice set of legitimate constitutional alternatives. Still, when choosing between refined incorporation and other highly plausible constitutional readings, Americans should consider which will result in the most just society. Such investigations require recourse to both normative theory, for determining the nature of just societies, and social science, for determining the most likely consequences of adopting a particular constitutional policy.[51]

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48. AMAR, *supra* note 1, at 302-04.

49. Professor Amar recognizes this point when he asserts "precedent counts, too." *Id.* at 307.

50. *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 118 (1991); Stephen Holmes, *Precommitment and the Paradox of Democracy*, *in* CONSTITUTIONALISM AND DEMOCRACY 195 (Jon Elster & Rune Slagstad eds., 1988).

51. Professor Amar briefly recognizes the need to supplement intratextualism with other constitutional logics, and makes a good case that refined incorporation has made the United States a more just society. *See* AMAR, *supra* note 1, at 289-90, 299. His writings on constitutional procedure would benefit from more empirical understandings of the constitutional vices and virtues of actual policies in practice, but I have made that argument elsewhere. *See* Mark A. Graber, *Book Review*, 7 LAW & POL'Y BOOK REV. 431, ¶ 5 (Sept. 1997) <http://www.unt.edu:80/lpbr/subpages/reviews/amar.htm> (reviewing AKIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES (1997)).

For present purposes, I am more interested in Professor Amar's questions than his answers. His introduction proclaims, "we *must* tackle questions" concerning the incorporation of the Bill of Rights not simply because those questions are central to the themes of the *Bill of Rights*, but because they "'go[] to the very nature of our Constitution' with 'profound effects for all of us.'"[52] "'[I]t is difficult,'" Professor Amar and Professor William Van Alstyne agree, "'to imagine a more consequential subject.'"[53] This "assessment," the paragraph continues, is "confirmed by the extraordinary number of twentieth-century legal giants who have locked horns in the [incorporation] debate."[54]

Professor Amar again bases a general claim about the Constitution entirely on what law professors and the Supreme Court have said about our constitutional regime. The introductory paragraphs to Part II move from claiming that the incorporation debate "'go[es] to the very nature of our Constitution'" to discussing "the centrality of the incorporation debate to twentieth-century constitutional law" without betraying any awareness that some questions that "'go[] to the very nature of our Constitution'" might not be questions of constitutional law.[55] The "legal giants" who testify to the significance of the incorporation debate are all academic lawyers or federal justices.[56] Whether non-lawyers who have studied the Constitution or officials in the legislative and executive branches of government attach the same significance to the relationship between the Bill of Rights and the Fourteenth Amendment is not mentioned.

Questioning the precise significance of incorporation is, of course, nitpicking of the worst sort. No one thinks unimportant the issues raised in Part II of *The Bill of Rights*. Professor Amar's claim that a particular series of questions is important, even extremely important, to American constitutionalism does not in any way deny that another series of questions may be as "profound" or "consequential." Still, scholarly interest in the incorporation debate varies by discipline and time. The giants of constitutional studies outside the legal profession have dis-

52. AMAR, *supra* note 1, at 137 (emphasis added) (footnote omitted).
53. *Id.* at 138 (footnote omitted).
54. *Id.*
55. *Id.* at 137-38 (first alteration in original).
56. *See id.* at 138.

played less interest in incorporation than law professors and justices. Moreover, this generation of legal scholars seems less interested in that issue than their immediate predecessors. Thinking more self-consciously about the reasons for this difference may help identify other important questions of constitutional politics that persons sharing Professor Amar's concern about protecting fundamental rights ignore at their peril.

A. *The Doctrinal Significance of Incorporation*

Even law professors may doubt whether, in 1999, questions concerning the relationship between the Bill of Rights and the Fourteenth Amendment remain central concerns of American constitutionalism. The legal writings and cases Professor Amar cites as demonstrating the importance of the incorporation debate are more than twenty years old. From the perspective of both constitutional law and constitutional politics, the most important incorporation questions are well settled, except possibly the incorporation of the Second Amendment.[57] The Supreme Court has ruled that states are obligated to honor virtually all of the individual liberties set out in the Bill of Rights.[58] No Supreme Court justice, prominent judicial wannabe, academic superstar, or high ranking government official outside of Alabama is presently challenging this consensus.[59] Even Robert Bork thinks that the Supreme Court should adhere to existing precedent.[60]

The Bill of Rights does not challenge this dominant consensus. Professor Amar admits that contemporary doctrine is fairly

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57. *See* Brannon P. Denning, *Gun Shy: The Second Amendment as an "Underenforced Constitutional Norm,"* 21 HARV. J.L. & PUB. POL'Y, 719, 752-61 (1998); Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1 (1996); David E. Murley, *Private Enforcement of the Social Contract: DeShaney and the Second Amendment Right to Own Firearms*, 36 DUQ. L. REV. 15, 32-48 (1997); Michael J. Quinlan, *Is There a Neutral Justification for Refusing to Implement the Second Amendment or is the Supreme Court Just "Gun Shy,"* 22 CAP. U.L. REV. 641 (1993).

58. *See* AMAR, *supra* note 1, at 138-39, 306-07 (citing the relevant cases).

59. For a discussion of various challenges to incorporation by elected officials and justices in Alabama, see Robert R. Baugh, *Applying the Bill of Rights to the States: A Response to William P. Gray, Jr.*, 49 ALA. L. REV. 551 (1998).

60. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 94 (1991).

consistent with refined incorporation. His "tale . . . ends up supporting most of today's precedent about the Bill of Rights."[61] What the book does is "explain how today's judges and lawyers have often gotten it right without quite realizing why."[62] Accomplishing this goal is a worthwhile endeavor, but hardly one that has "profound effects for all of us."[63] Scholarship which provided a more coherent constitutional justification of the Louisiana Purchase would be a welcomed project. Still, while a judicial decision or executive decree that the United States at present cannot exercise sovereignty west of the Mississippi would really have "profound effects for all of us," such rulings are unlikely to be forthcoming even if the entire Yale Law faculty reaches the conclusion that in 1803 President Jefferson acted with any color of constitutional authority.[64]

Traditional doctrinal analysis directed at courts normally highlights those issues presently under serious judicial consideration. Professor Amar, to his credit, is at least as interested in addressing fellow citizens as he is nine justices.[65] Still, if the central focus of *The Bill of Rights* is on how the Constitution should be interpreted, the work might have considered at more length those questions presently dividing the body politic, rather than such relatively settled issues as incorporation (or the Louisiana Purchase). The most important questions of constitutional law in 1999 have more to do with government structure and power than the rights protected by the Constitution (though Professor Amar is right to note that no sharp distinction exists among the two).[66] The questions include:

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61. AMAR, *supra* note 1, at 307.

62. *Id.* Professor Amar does object to the ways in which the Supreme Court has been interpreting particular liberties set out in the Bill of Rights, but his arguments against these objectionable precedents do not depend for the most part on the argument in *The Bill of Rights*. *See id.* at 307 n.* (acknowledging that his "critique" of "modern judicial doctrine" on constitutional criminal procedure is "tangential to the main issues of Creation-Reconstruction synthesis at the core of [this] book").

63. Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 934 (1965).

64. For Jefferson's constitutional scruples, see Gerhard Casper, *Executive-Congressional Separation of Power During the Presidency of Thomas Jefferson*, 47 STAN. L. REV. 473, 490-97 (1995).

65. This decision no doubt pleased the marketing department of Yale University Press.

66. *See* AMAR, *supra* note 1, at 127-29.

> Did the framers intend to limit government power to a few specified functions? Was the New Deal implicit in the constitution of 1787 or in the constitution of 1868? If not, are the Supreme Court's decisions sustaining the New Deal justified either by the constitutional moment in 1937 or by the nature of a living constitution?[67]

Professor Amar briefly mentions these issues, but citizens interested in fuller discussion will have to turn from *The Bill of Rights* to the writings of Bruce Ackerman and Howard Gillman.[68]

B. *The Constitutional Significance of Incorporation*

Professor Amar's concern with the incorporation debate is better understood as exhibiting a broader constitutional perspective than the average law review essay, not simply in the sense of recognizing the interconnections between various constitutional provisions, but in recognizing that constitutional questions may be fundamental even when such issues are not presently being litigated in the federal courts. Fundamental constitutional questions define a particular political regime. The question whether the United States should adopt a presidential or parliamentary system of governance goes to the heart of our constitutional order, even though our commitment to a presidential system seems relatively enduring. Incorporation is similarly vital to our constitutional order. The issues associated with the nationalization of fundamental rights are of profound significance for all citizens. Educated citizens cannot make intelligent political choices unless they understand the reasons why the persons responsible for the Constitution of 1787 chose a presidential system and the reasons why the persons responsible for the Constitution of 1868 chose something like refined incorporation, even if these constitutional practices are not likely to change in the foreseeable future.

Still, and this is the place this essay stops nitpicking, Professor Amar's important questions are incomplete. He asks tradi-

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67. *See id.*

68. *See* sources cited *supra* notes 23, 34.

tional legal questions about the meaning of a constitutional text. The more fundamental questions, from a political science perspective, concern the relationships between constitutional language and constitutional practice, and how a text is expected to structure and has structured political life. The question at the heart of a liberal democratic constitutional order is, How (and how well) does this constitution protect fundamental rights? The question is not simply, What rights does this constitution protect? The first question incorporates the second. We cannot evaluate how well a constitution protects fundamental rights until we know what rights that constitution was designed to protect. Still, the questions of constitutional law do not exhaust constitutional analysis. Constitutionalists must identify and assess those constitutional mechanisms responsible for realizing constitutional rights. Placing a right in the text of the constitution does not necessarily increase the probability the right will be protected.

The Bill of Rights is alert to some of the interplay between constitutional liberty and constitutional structure. Part I very effectively demonstrates that the original Bill of Rights is better understood as establishing institutions and practices by which persons could protect their fundamental rights than as a simple declaration of individual rights. "[T]he Bill of Rights," Professor Amar brilliantly demonstrates, "can itself be seen as a *Constitution* of sorts—that is, as a document attentive to structure, focused on the agency problem of government, and rooted in the sovereignty of We the People of the United States."[69] Still, the text might have elaborated a bit more on what Hamilton meant when, in *The Federalist Papers*, he declared that the Constitution was "itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS."[70] More significantly, Professor Amar, when discussing the Fourteenth Amendment, does not explain why the Framers of 1868 thought the reconstructed Constitution would better protect individual rights than the Constitution of 1787. The result is a celebration of the second most significant constitutional failure in American history.[71]

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69. AMAR, *supra* note 1, at 127.

70. THE FEDERALIST NO. 84, at 515 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

71. The greatest failure was the inability of constitutional institutions to prevent

1. Protecting Rights: The Creation

Virtually all of the debates during the conventions that drafted and ratified the Constitution of 1787 were devoted to the structure of the national government. Even questions concerning government policy and power tended to be discussed in terms of how to structure government institutions. The most vigorous defenses of slavery, for example, were articulated during debates over how to allocate representation in Congress. Many southerners were quite willing to give the national government broadly defined powers if the government was structured in ways that would ensure control by representatives from slaveholding states. Pierce Butler of South Carolina even declared himself in favor of "abolishing the State Legislatures" should representation "proceed[] on a principle favorable to wealth as well as numbers of Free Inhabitants," a principle all thought would favor the South.[72]

The participants in the slavery debate recognized, as Professor Amar does, that debates over the structure of government implicate the protection of fundamental rights. The persons responsible for the Constitution of 1787 were not unconcerned with individual liberties. Rather, they maintained that such freedoms were best protected by well-designed political institutions rather than by parchment declarations. "[A]ll observations founded upon the danger of usurpation," Hamilton declared in *The Federalist Papers*, "ought to be referred to the composition and structure of the government, not to the nature or extent of its powers."[73] Madison insisted that religious freedom was better protected by an electoral system that prevented any religious sect from dominating government than by any textual assertion of religious freedom.[74]

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the Civil War.

72. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 144 (Max Farrand ed., Yale Univ. Press 1966). I detail this argument at length in MARK A. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL (forthcoming 2001).

73. THE FEDERALIST NO. 31, at 196 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* THE FEDERALIST NO. 84 *supra* note 70, at 515. This theme will be developed at length in GRABER, *supra* note 72.

74. *See* THE FEDERALIST NO. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961).

The persons responsible for the original Constitution may have been wrong to oppose a Bill of Rights. Placing a specific set of rights or limitations on government power in the written text of a constitution may be a vital means for ensuring that government in practice respects those rights and limitations.[75] Such textual declarations may increase public awareness of and commitment to those rights, or justify an institutional obligation to protect those rights.[76] Still, questions concerning what liberties ought to be placed in a constitutional text should be considered in light of how to design a constitution that will protect liberty, and not simply as a matter of what liberties a constitution ought to protect.

The main Federalist objection to a Bill of Rights suggests that differences between proponents and opponents of the Constitution on this issue were primarily over constitutional design rather than constitutional power or constitutional right. Alexander Hamilton, James Madison, James Wilson, Roger Sherman, and most of their political allies rarely raised substantive objections to the content of the liberties set out in the first ten amendments to the Constitution.[77] *The Federalist Papers*, *The Federalist* No. 84 in particular, insisted that such fundamental liberties as the freedom of speech would be protected even if not explicitly mentioned in the text. The Federalist objections to the Bill of Rights went to redundancy and the problem of defining rights, not substance.[78] Reading the Constitution as a whole, therefore, suggests that the first ten amendments are best understood as a means for increasing the probability that the national government will respect certain rights, and not as additional limitations on federal power.

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75. Though nowhere in *The Bill of Rights* is there an argument that what protection Americans have provided for freedoms is more the result of the Bill of Rights than the structure of government (or, from a different perspective, the sociology of the country).

76. *See* AMAR, *supra* note 1, at 129-32.

77. Differences did surface over the interpretation of those liberties.

78. *See* THE FEDERALIST NO. 84, *supra* note 70, at 514.

2. Protecting Rights: Reconstruction

Had *The Bill of Rights* been written from the perspective of a constitutional designer, Professor Amar might have begun Part II by asking the political question, What were the persons responsible for the post-Civil War Constitution trying to do when they drafted the Fourteenth Amendment? in addition to the legal question, What did the persons responsible for the post-Civil War Constitution mean by the language used in the Fourteenth Amendment? This political question, as discussed above, incorporates the legal question. We cannot understand what John Bingham and others were trying to accomplish when they drafted the Fourteenth Amendment unless we know what they meant by the text they choose. Still, greater emphasis on how the Framers of the post-Civil War Constitution thought they were bringing about major political changes highlights some features of Reconstruction civil rights law and politics that get slighted in *The Bill of Rights*.

The constitutional design perspective identifies an apparent paradox in northern constitutional thought. Professor Amar documents that a strong strand of antebellum northern thought believed *Barron v. Mayor of Baltimore*[79] to be mistaken, that the Constitution of 1787/1791 already obligated states to protect certain liberties set out in the Bill of Rights.[80] *Barron* was hardly the only or even the most important decision Republicans believed the Supreme Court got wrong. Antislavery advocates were uniformly enraged by the Taney Court's decisions in *Prigg v. Pennsylvania*[81] and *Dred Scott v. Sandford*.[82] The latter decision, in particular, was understood as a gross usurpation and not a simple misreading of the Constitution. Republicans firmly believed that any sincere constitutional interpreter would have concluded that constitutional history and the constitutional text plainly demonstrated that Congress had at least the power, if not the obligation, to regulate slavery in the territories. Thus, while the antebellum experience demonstrated the

79. 32 U.S. (7 Pet.) 243 (1833).
80. *See* AMAR, *supra* note 1, at 145-62.
81. 41 U.S. (16 Pet.) 539 (1842).
82. 60 U.S. (19 How.) 393 (1857).

need for national protection of fundamental rights, that experience also demonstrated that parchment barriers, even clear parchment barriers, did not necessarily constrain either constitutional politics or constitutional law. Given that northern Republicans believed that antebellum problems were caused in large part by failures to adhere to constitutional text, why would they have attempted to solve their problems by adding more text? The antebellum Constitution explicitly vested Congress with "[p]ower to . . . make all needful Rules and Regulations respecting the territory . . . belonging to the United States."[83] If Jacksonians on the Supreme Court and in the White House nevertheless insisted that such language did not authorize Congress to ban slavery north of the Missouri Compromise line, surely their democratic party successors were capable of ruling that, appearances to the contrary, the Privileges and Immunities Clause did not incorporate the individual liberties set out in the Bill of Rights.

This paradox can be resolved by considering the interplay of structure and individual rights that Professor Amar documents so well in his discussion of the original Bill of Rights. *The Bill of Rights* correctly notes that the central concerns of the Framers of 1868 were structural, that Sections 2 and 3 of the Fourteenth Amendment were expected to "profoundly shape the configuration of political power in America,"[84] and that "many informed men simply were not thinking carefully about the words of section I at all."[85] Remarkably, although Professor Amar points to numerous interconnections between Section 1 of the Fourteenth Amendment and various provisions of the original Constitution, he makes very little effort to read Section 1 in light of the rest of the Fourteenth Amendment. Those relationships provide the key to reading the post-Civil War Constitution.

The Fourteenth Amendment, read as a whole, demonstrates that the Civil War amendments were as concerned with the relationships between government structure and individual

83. U.S. CONST. art. IV, § 3, cl. 2.

84. AMAR, *supra* note 1, at 203. I would add that Section 4, by impoverishing the slaveholding minority, was expected to have a similar effect.

85. *Id.* at 202.

rights as the original Bill of Rights. Republicans objected to various individual rights violations in the South, but the central organizing theme of that antislavery coalition was majoritarianism.[86] Antislavery attacks on an anti-Republican slave power and slave policies, scholars agree, "formed the core of the Republican appeal to northern voters."[87] Republican newspapers consistently asserted that slavery policies violated republican principles by allowing minority rule. "If our Government, for the sake of Slavery, is to be perpetually the representative of a minority," one journal declared, "it may continue republican in form, but the substance of its republicanism has departed."[88] William Seward declared that the central issue of the day was "whether a slaveholding class exclusively shall govern America."[89] Significantly, Republicans believed that violations of individual rights in the South were a consequence of minority domination, and not an instance of majority tyranny. The main difference between the northern Republicans of the Civil War era and Anti-Federalists of the 1780s was the difference between a commitment to national or local majoritarianism as the best means for protecting fundamental rights.

Every provision of the Fourteenth Amendment was designed to ensure that the Slave Power was permanently destroyed. Sections 2, 3, and 4 simultaneously promote individual freedom and democratic majoritarianism by establishing a set of economic and political rules thought to guarantee that the Slave Power would never be able to dominate the national government. Sections 1 and 5 simultaneously promote individual freedom and democratic majoritarianism by giving national majorities the power to protect citizens in those localities where descendants of the Slave Power continue to rule. The result was not greater

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86. *See* ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR (1970).

87. William E. Gienapp, *The Republican Party and the Slave Power*, *in* NEW PERSPECTIVES ON RACE AND SLAVERY IN AMERICA: ESSAYS IN HONOR OF KENNETH M. STAMPP 51, 57 (Robert H. Abzug & Stephen E. Maizlish eds., 1986); *see id.* at 53-54; Larry Gara, *Slavery and the Slave Power: A Critical Distinction*, 15 CIV. WAR HIST. 5, 6, 12 (1969).

88. Gienapp, *supra* note 87, at 64-65.

89. 4 WILLIAM HENRY SEWARD, THE WORKS OF WILLIAM H. SEWARD 274 (George E. Baker ed., Boston, Houghton, Mifflin and Co. 1884); *see id.* at 256, 292-93.

constitutional protection for minorities per se, but rather greater power for national majorities to protect their supporters and wards in places where they were local minorities.

The main emphasis of the constitutional revolution of 1868 was on who should protect liberty and not on the liberties to be protected. "The Fourteenth Amendment," William Nelson correctly declares, "was understood less as a legal instrument to be elaborated in the courts than as a peace treaty to be administered by Congress in order to secure the fruits of the North's victory in the Civil War."[90] This reading of the entire Fourteenth Amendment explains why Republicans did not fear that Section 1 would be perverted in the near future and did not concern themselves with the precise details of what was being protected. Sections 2, 3, and 4 practically guaranteed that Reconstruction Republicans would be responsible for interpreting that measure. Liberty and majoritarianism were protected because the liberty loving majority would forever determine the meaning of the liberty protecting Constitution.

Professor Amar places too much emphasis on judicial protection for fundamental rights when he declares that "[a]s the paradigmatic speaker in need of constitutional protection shifted from a localist criticizing the central government to a Unionist defending its Reconstruction policies, carpetbagging federal judges appointed in Washington became more trustworthy guardians of First Amendment freedoms than localist juries."[91] Congress during Reconstruction did dramatically expand the jurisdiction of federal courts to provide greater protection for individual rights in the South.[92] Moreover, the Fourteenth Amendment was written in a way to make clear that its provisions could be enforced in the absence of legislation.[93] Still,

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90. WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 110-11 (1988).

91. AMAR, *supra* note 1, at 242.

92. *See* STANLEY I. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS 143 (1968).

93. An early version of the text read as follows:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all the privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.

while federal judges were deemed more trustworthy than southern juries, Reconstruction Republicans clearly thought the national Congress more trustworthy than both. As Nelson concludes in his study of the Fourteenth Amendment, "the framing generation anticipated that Congress rather than the courts would be the principle enforcer of section one."[94]

The primary responsibility of federal justices, in the original Republican scheme, was to enforce federal civil rights acts passed under the Fourteenth Amendment.[95] Given the performance of the antebellum judiciary in *Barron v. Mayor of Baltimore*[96] and *Dred Scott v. Sandford*,[97] the Chase Court's decision in *Ex parte Milligan*,[98] and the general sense among Republicans that judicial majorities were not enthusiastic about the course of Reconstruction, good reason exists for thinking that the persons responsible for the post-Civil War Constitution did not intend to vest ultimate authority for protecting individual rights in the federal judiciary. Stanley Kutler and others have demonstrated that the Supreme Court had risen from its *Dred Scott* nadir.[99] Still, the dominant constitutional theme of this period was a push towards legislative supremacy. When faced with the possibility that the federal judiciary might issue rulings hostile to Reconstruction, Republicans responded by passing measures stripping the court of the jurisdiction necessary to hear a crucial case.[100] A tribunal that could not be trusted to sustain major Reconstruction legislation was not likely to be the institution entrusted with primary responsibility for establishing national standards of liberty.

Scholars more concerned with what the persons responsible for the Fourteenth Amendment were trying to do are likely to

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CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866).

94. NELSON, *supra* note 90, at 122.

95. Here, I should emphasize, I am not claiming that the main purpose of the Fourteenth Amendment was to provide constitutional foundations for the Civil Rights Act of 1866, a view which Professor Amar and others effectively discredit. Rather, my claim is that the main purpose of the Fourteenth Amendment was to provide constitutional foundations for any act Congress might think necessary to protect the fundamental rights of persons of color and southern Unionists.

96. 32 U.S. (7 Pet.) 243 (1833).

97. 60 U.S. (19 How.) 393, 453-54 (1857).

98. 71 U.S. (4 Wall.) 2, 130-31 (1867).

99. *See* KUTLER, *supra* note 92, at 161-65.

100. *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514-15 (1869).

be more critical than Professor Amar is of the achievements of the Reconstruction Congress. *The Bill of Rights* unequivocally celebrates the constitutional order constructed in 1868. "The Reconstruction generation," Professor Amar writes, "took a crumbling and somewhat obscure edifice, placed it on new, high ground, and remade it so that it truly would stand as a temple of liberty and justice for all."[101] In his view, Americans give "too much credit to James Madison and not enough to John Bingham" for the liberties we enjoy today.[102] *The Bill of Rights* acknowledges that judicial majorities (with very little political protest) did not immediately interpret the Privileges and Immunities Clause as protecting the individual rights set out in the Bill of Rights, but offers very plausible arguments as to why this history does not refute that work's interpretation of the original understanding of the Fourteenth Amendment.[103] At no point does Professor Amar assign any blame to the Reconstruction generation for the dismal state of civil liberties in the United States from the 1870s until at least the 1950s.

When the constitutional spotlight is on what the Framers of 1868 were trying to do when they used certain language rather than simply on what they believed that language meant, the reconstructed Constitution seems more a failure than a success story. Whatever the original understanding, state governments for the next seventy-five years did not regard themselves as obligated by the Fourteenth Amendment to honor the liberties set out in the Bill of Rights, and were not encouraged to do so by the federal government. Until World War II, the Fourteenth and Fifteenth Amendments did almost nothing to improve the lot of persons of color, political dissenters, religious minorities, and other persons whose fundamental rights were routinely violated by state governments. The appropriate architectural metaphor for the post-Civil War Constitution is less the "temple of liberty and justice," than Sleeping Beauty's castle, a beautiful mansion surrounding by thorns and obscured from view.

Reconstruction Republicans are implicated in the failure of the post-Civil War Amendments for two reasons. First, although

101. AMAR, *supra* note 1, at 288.
102. *Id.* at 293.
103. *See id.* at 206-07, 212-13.

some persons responsible for the Fourteenth Amendment fought hard for civil rights throughout their political careers, many Republicans lost interest in the fate of persons of color and the Fourteenth Amendment during the 1870s. John Bingham lived until 1900, but does not appear to have been too upset or even interested when the Supreme Court in the *Slaughter-House Cases*[104] ruled that states were still free to decide whether to protect the liberties set out in the Bill of Rights.[105]

Second, and more important from a political science perspective, the framework established by Reconstruction Republicans for protecting liberty did not work as expected. The Reconstruction generation assumed that constitutional institutions which prevented a slaveholding minority from dominating the national government and empowered national (northern-based) majorities to protect local minorities would ensure that fundamental liberties were protected throughout the United States. The reconstructed Constitution did facilitate northern political power. For the next hundred years, the President was almost always a citizen of a state that fought on the Union side during the Civil War, and the Supreme Court exhibited a decided northern tilt. Those coalitions, nevertheless, failed to protect liberty for the next hundred years because national northern majorities lost interest in protecting liberty. Trusting their rectitude, the Reconstruction generation never considered the constitutional choices that would have to be made should their cherished majoritarian and libertarian convictions lead to different results in practice.

The failure of the Fourteenth Amendment to protect liberty (or the right liberties) for approximately one hundred years was a constitutional failure and not, as *The Bill of Rights* implies, a mere failure of Americans to follow or correctly interpret constitutional rules. Well designed constitutions lay down rules and structure institutions in ways that best ensure the rules will be followed. Indeed, when institutions are well designed, certain rules need not be explicitly laid down. Spaghetti and meatballs will be served once a week at the Graber/Frank residence if the

104. 83 U.S. (16 Wall.) 36 (1873).

105. See *id.* at 78-79; 2 DICTIONARY OF AMERICAN BIOGRAPHY 277-78 (Allen Johnson ed., 1929) (providing biography of John Armor Bingham).

family constitution in practice guarantees that Abigail selects the menu on Monday night. A mere parchment declaration that pasta will be served that day may not be effective.[106] Thus, when evaluating a scheme of constitutional liberty, constitutionalists must not only consider the rules laid down, but whether sufficient institutional mechanisms are in place for protecting those liberties and other freedoms not so specified. The constitutional revolution of 1868 was unsuccessful because the institutional mechanisms for realizing national standards of liberty were insufficient to ensure government adherence to the rules laid down.

A good case can be made that the Framers of 1868 did the best they could, that nothing more could have been done in 1868 that would have provided more constitutional liberty in 1908. Perhaps the best a constitutional text can do is provide popular majorities with the textual tools to enforce fundamental rights, and unpopular minorities with textual resources that can be used to appeal to the moral and legal conscience of popular majorities. When democratic majorities do not want to protect rights, in this account, even the best designed democratic constitutions fail. Professor Amar and I probably agree that constitutional politics in practice is far more complex than this simplistic account. Constitutional texts structure political preferences and provide instrumental tools for realizing preferences. Still, in asking whether there was any politically feasible step the Framers of 1868 could have taken to ensure better protection for fundamental rights, we will be moving beyond examination of the rules they laid down and discussing whether better institutional means exist for ensuring those rules are followed. We will be asking constitutional questions rather than mere questions of constitutional law.

3. Protecting Rights: The Present

If standard accounts of the Bill of Rights "attribute too much of modern constitutionalism to the Founding . . . and not enough to the Reconstruction,"[107] then surely *The Bill of*

106. It was not.

107. AMAR, *supra* note 1, at 300.

Rights attributes too much of modern constitutionalism to the Reconstruction and not enough to the Warren Court. Professor Amar has very little to say, and even less that is positive to say, about the processes by which most provisions in the Bill of Rights were incorporated in practice during the 1950s and 1960s. He describes the Reconstruction generation in heroic terms. Because of "their mighty labors," *The Bill of Rights* declares, "our Bill of Rights was reborn."[108] The Warren Court, by comparison, is credited only with the bumbling recovery of John Bingham's handiwork. "Courts today have ended up in pretty much the right place," Professor Amar concludes, "even if they have not always offered the best textual and historical reasons."[109]

This claim that the main roots of the present system of constitutional liberty lie in the late 1860s, not the 1950s, is problematic. That an analysis of 1868 provides the best justification for the present system of constitutional liberty does not entail that such an analysis, in fact, explains why that regime was put in place and maintained. The particular choices and language of the Reconstruction generation seem to have had only a limited influence on the judicial decisions that actually incorporated most of the provisions in the Bill of Rights.[110] Justice Hugo Black aside, the liberal justices on the Warren Court were not known for their devotion to constitutional text and history. A fair possibility exists that, had the Fourteenth Amendment not existed, some members of that tribunal would have used the Thirteenth Amendment or some other constitutional provision to compel state governments to respect some fundamental freedoms.[111]

The Constitution of 1999 does not protect rights in the manner prescribed by the Constitution of 1868. The Reconstruction generation assumed that Congress would be the institution that

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108. *Id.* at 294.

109. *Id.* at 307.

110. Most of the provisions in the Bill of Rights were incorporated at a time when most academics believed that the Fourteenth Amendment was not intended to incorporate the Bill of Rights. One possible inference that might be drawn from this is that those decisions could be narrowed or even overruled during a time when the best scholarship concludes that the Framers did intend the total or refined incorporation of the liberties set out in the first 10 amendments to the Constitution.

111. *See generally* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

established the national standard of liberty. The main (though not only) role of the Supreme Court was implementing national legislation passed under Section 5 of the Fourteenth Amendment. At present, the Supreme Court is the institution that establishes the national standard of liberty. Congress occasionally participates in this endeavor by passing legislation correcting some judicial decision. The main contribution elected officials have made to the nationalization of civil liberties, however, is their willingness to place on the Supreme Court jurists who support the nationalization of civil liberties, and their refusal to pass legislation stripping federal courts of the jurisdiction necessary to nationalize civil liberties.

The Supreme Court's recent decision in *City of Boerne v. Flores*[112] is a good vehicle for considering the differences between the constitutional order designed by the Reconstruction generation and the constitutional order established by Chief Justice Warren. The justices in *Boerne* declared unconstitutional the Religious Freedom Restoration Act, a bill that required state governments to respect certain free exercise rights that the Supreme Court had previously ruled were not protected by the First or Fourteenth Amendments. Justice Anthony Kennedy's opinion for the Court held that Section 5 of the Fourteenth Amendment vested Congress with the right to remedy and deter constitutional violations,[113] but did not vest Congress with the power "to decree the substance of the Fourteenth Amendment's restrictions on the States."[114]

This position seems clearly wrong from the perspective of 1868. Republicans were primarily concerned with empowering Congress, not the Supreme Court. Nothing in the history of the Fourteenth Amendment supports the view that Congress could pass a law forbidding states from banning peaceful advocacy of racial equality only if the Supreme Court agreed that the constitutional right of free speech was not limited to the rule of no prior restraint. *Boerne* makes sense only from the perspective of the late twentieth century. In our political order, the Supreme Court, not Congress, routinely defines constitutional rights. Jus-

112. 117 S. Ct. 2157 (1997).
113. *See id.* at 2164.
114. *Id.*

tice Kennedy's error, in this view, is less the result in *Boerne* than his attributing to the Reconstruction generation the scheme for protecting liberty that was not put into place until after the post-Civil War Amendments were ratified.[115]

This distinction between the system of 1868 and the system of the 1950s is particularly important for persons committed to preserving or modifying the present regime of constitutional liberty. Inspired by *The Bill of Rights*, constitutionally minded citizens who favor the present scheme of constitutional liberty might ask, What explains the success of the system of 1868? No answer exists to the question. The system of 1868 was not a success, so there is nothing to explain. Reproducing the conditions of Reconstruction may, if anything, weaken present protections for civil liberty. The proper questions are, What explains the success of the system of the 1950s? and How might that system be maintained?[116] These questions focus on the political and intellectual environments of the late twentieth century that are actually responsible for present practice.

Close attention to the political and intellectual forces that in practice sustain the present state of incorporation provides an additional reason for questioning the celebratory tone of *The Bill of Rights*. Total incorporation of the Bill of Rights certainly seemed like a good idea to liberals when Earl Warren was in charge. The most profound impact of refined incorporation over the next fifty years, however, may be to sharply curtail state environmental laws and campaign finance regulations.[117] This possibility suggests the need for serious thinking as to whether incorporation was desirable during the 1950s and 1960s because the Warren Court was defining the content of fundamental liberties or because having fundamental liberties defined at the national level will generally produce better results. Incorporation in 2010, like due process in 1900, may do more to preserve

115. Although the Warren Court was responsible for nationalizing the Bill of Rights, I believe that the view that the judiciary was the institution most responsible for defining constitutional rights was first developed during the late nineteenth century. This topic requires much more research.

116. Persons of a different constitutional persuasion will ask, "How might that system be destroyed or modified?"

117. *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978).

a conservative status quo than protect the rights of historically disadvantaged minorities.

III. FINAL THOUGHTS FOR A NEW BEGINNING

The above pages have offered a partial political science critique of *The Bill of Rights*. The critique is partial partly because I am partial to the scholarship political scientists are doing on American constitutionalism. With such notable exceptions as Sandy Levinson, Bruce Ackerman, Mark Tushnet, Stephen Griffin, and Barry Friedman, much of this work has not penetrated deeply into the legal academy. For the most part, a form of imperial scholarship[118] exists among law professors of all races and political persuasions, one that reduces constitutional scholarship to scholarship that appears (or first appeared) in law reviews and constitutionalism to constitutional law. Constitutionalists who read the political science scholarship are likely to recognize that not all constitutional questions are questions of constitutional law. Indeed, as I have argued, the most crucial questions constitutionalism asks are not doctrinal at all, but concern how institutions have been and might be designed to privilege certain outcomes, most notably the protection of certain fundamental rights. Sometimes the Fourteenth Amendment has been used to protect a disadvantaged minority; other times, the protected minority may include the richest persons in the country. Understanding why an amendment can produce such different results in different periods is as significant a constitutional endeavor as understanding how that amendment is best interpreted.

My political science perspective is also partial because no perspective on American constitutionalism is complete. Political scientists, as is the case with members of other disciplines, do some things well and other things not so well. Few if any nonlawyers have the doctrinal sophistication to produce works as rich as *The Bill of Rights*. Moreover, nowhere in any of my writings or in *The Bill of Rights* is anything intelligent said about how foreign constitutional experiences should inform

118. *See* Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984).

American constitutionalism. In short, we need to create a community of constitutional scholars and students that transcends disciplinary boundaries if we are to begin to appreciate the full richness of constitutional life.

Finally, my perspective has been partial because, although this essay has included far more nitpicking than effusive praise, Professor Amar has clearly written 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 *The Bill of Rights*. My hope is that academic lawyers who read this essay will take a look at some of the literature on constitutionalism produced outside the legal academy. Perhaps one day, a leading law professor will assert that no one can claim to be an educated member of the constitutional community who has not read *On What the Constitution Means*,[119] *Liberalism and American Constitutional Law*,[120] *The Constitution Besieged*,[121] *Constitutional Rights and Powers of the People*,[122] and other works produced by this generation's leading political scientists. At a minimum, I hope that when pursing many of the fascinating lines of inquiry promised at the end of *The Bill of Rights*,[123] Professor Amar does not limit himself to constitutional law questions concerning the meaning of the Constitution, but considers questions concerning how the Constitution was expected to protect various liberties and how those liberties have actually been protected, if at all. Such an investigation will increase dialogue between our disciplines, and more important, help all citizens better understand, assess, and improve our constitutional order.

119. BARBER, *supra* note 30.
120. SMITH, *supra* note 32.
121. GILLMAN, *supra* note 34.
122. MOORE, *supra* note 28.
123. *See* AMAR, *supra* note 1, at 297-98.