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WE SOME OF THE PEOPLE: AKHIL REED AMAR AND THE ORIGINAL INTENT OF THE BILL OF RIGHTS

*Wythe Holt**

[T]he Leninist model [of working-class consciousness] and that of the Commons/Perlman [progressive] school of labor economists . . . have much in common [B]oth regard the intellectual as playing a crucial role in changing the workers' consciousness.¹

We have a wonderful national ideology of popular rights and popular freedom in the United States, one which has proved useful, indeed inspirational, for ordinary folk since the American revolution and even before.² This ideology, however, does not accurately reflect the actual facts of freedom and the pro-

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This essay is dedicated to those who are writing the real constitutional history of the working people of the United States, the labor law historians who include Kenneth Casebeer, Gary Minda, James Gray Pope, Amy Dru Stanley, and Lea S. VanderVelde. For some of their work, see LABOR LAW IN AMERICA: HISTORICAL AND CRITICAL ESSAYS 99-159, 231-59 (Christopher L. Tomlins & Andrew J. King eds., 1992), and citations in other footnotes to this essay.

1. Bruce Nelson, "*Pentecost*" on the *Pacific: Maritime Workers and Working-Class Consciousness in the 1930s*, in 4 POL. POWER & SOCIAL THEORY 141, 154 (1984). My use of the term "progressive" to describe the attitudes and historical origins and context of the Commons/Perlman (I would say Commons/Brody/Dubofsky) school of labor economics/historiography is taken from James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941, 945 *passim* (1997), where it is well contextualized and explicated. I take it that Leninist vanguard theory is too well known in the academic world to require citation.

2. See generally GARY B. NASH, THE URBAN CRUCIBLE: SOCIAL CHANGE, POLITICAL CONSCIOUSNESS, AND THE ORIGINS OF THE AMERICAN REVOLUTION (1979); DAUGHTERS OF FREE MEN (American Social History Project film 1987); Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437 (1989); Nelson, *supra* note 1, at 165-72. I cite references here and elsewhere in this essay in the chronological order of the events they portray, rather than according to the legalistic and ahistorical rules of the "bluebook."

tection of popular rights for most Americans; it is still only an aspiration. For the elites who tend to be in positions of political and economic power if not control the ideology is either disingenuous, an instrument of power, or subversive, depending on the context.

We tell ourselves a story that we live in a democracy, where we can all participate in our own governance, and where we have fundamental rights—especially for dissenters, for minorities, and for individuals beset by a strong government. And we point to our Constitution and especially to its protection for the writ of habeas corpus, the Bill of Rights, and the Reconstruction amendments as the principal proofs of the story.

The reality is that we do not live up to our ideals. And even the progressives among the elites are taking notice. In this *fin de siècle* era, progressives decry the tendency amongst laissez-faire³ jurists and federal judges to adopt paradoxically statist, antidemocratic approaches to the Constitution and its protections, and to advocate ever more pinched, often openly and absurdly oppressive interpretations and applications of our fundamental liberties. In one of the more persuasive and thorough progressive attempts to redeem our ideological stories of freedom, Akhil Reed Amar, a noted student of our constitutional history, redirects our attention back to our ideals and retells the story of the origins of both the Bill of Rights and the Reconstruction amendments in a way designed to give elite relief and to redress the balance, to move us away from statism and laissez-faire and back towards apparent fulfillment of the ideology of popular rights and popular freedom.⁴

Amar has apparently fine goals. The first half of the book is intended to demonstrate that the original intent of the Bill of Rights was to provide a meaningful response to the demands made in 1787-89 by The People (or at least by the multitudinous Anti-Federalist opponents of the original Constitution) for structural restrictions against possible tyranny by the newly centralized federal government. The second half shows that the protections of minority rights and individual liberties for which

3. See Pope, *supra* note 1, at 945 *passim*.

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

the Bill of Rights supposedly stands were actually effectuated in 1866-68 by the original intention of the Fourteenth Amendment, which (in Amar's shrewd and to me largely convincing view)⁵ selectively incorporated those provisions of the first eight or nine or ten amendments (plus other rights mentioned in the body of the original Constitution) which are privileges of individuals rather than of states or of the public at large, as bulwarks against tyranny. The People thus, in Amar's view, have in the Bill of Rights, plus certain sections of the original Constitution, both structural protections for majorities against oppression by the national government and protections for the liberties of individuals and minorities against both national and state governments.

Unfortunately, Amar's language as well as his history leave it extremely ambiguous whether, for him, "The People" is an all-inclusive category. As we have gotten further in time from the American and French Revolutions—as the culture exuded by industrial capitalism has come to dominate much of the world and has absorbed or destroyed not only the varied and often (if oddly) participatory premodern cultures of the Third World, but also its own antecedent, the culture of the Enlightenment⁶—as the vast atomized middle class is Taylorized, browbeaten, and anesthetized into low-wage television-driven stupefaction, and the even vaster underclass has any sense of caring, belonging, or future pounded out of its heart—as unredistributed wealth and as wealth disparities grow at amazing and, to me, alarming rates—the promise of democracy and of popular self-governance portended by those Revolutions and by the Enlightenment has faded.⁷

Progressives who seemingly promote democracy harbor grave doubts at heart about the ability of The People to govern themselves. Instead of "self-governance," "management" has come to

5. Most of my own historical research concerns the Founding Era, not the Era of Reconstruction, so I will leave to other historians the sharper critique of Amar's constitutional history of the Reconstruction amendments.

6. General support for this proposition may be found in the assumptions and arguments of postmodernism.

7. An arresting encapsulation of this change may be found in the story of the change in the meaning of "police" in CHRISTOPHER L. TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* 35-97 (1993).

be the primary paradigm of problem solution, and since the 1890s, progressive intellectuals have sought to control and manage democracy.⁸

By and large, progressives among American elites—whether they admit it or not—have accepted the truth of Marx's postulate that capitalism is fundamentally characterized by a working class with socioeconomic interests diametrically opposed to those of the propertied class. Imagining themselves not to be in the working class, both in their patterns of thinking and in their historical method they essentially ignore The real People, ordinary everyday working folk. They praise democracy and popular governance in the abstract, but the patterns of their thought reveal an erasure of The People, a fundamental tendency to manage popular activity for The People's own good.⁹ As the epigraph to this essay shows, this trait even characterizes many modern Marxist elites.¹⁰ By failing to imagine that ordinary folks can actually think for themselves, such intellectuals muffle the possibility of real change, of real democracy. While Amar's book has many virtues, not least of which is a powerful sense that in the United States the weak and the oppressed should and do have rights, *The Bill of Rights: Creation and Reconstruction* shares this typical modern progressive trait.

Bowling over the proliferating and, to both Amar and myself, dangerous and disgusting, narrow, statist theories of the Constitution and its protections which cloud our intellectual horizons these days, Amar exuberantly and boldly reasserts that popular sovereignty is the basis of our government, a popular sovereignty protected by a revived set of structural inhibitions

8. See generally, e.g., DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* (1971); Christopher L. Tomlins, *A Mysterious Power: Industrial Accidents and the Legal Construction of Employment Relations in Massachusetts, 1800-1850*, 6 *LAW & HIST. REV.* 375 (1988); Stephen A. Marglin, *What Do Bosses Do? The Origins and Functions of Hierarchy in Capitalist Production*, 6 *REV. OF RADICAL POL. ECON.* 33 (1974). This tendency has unfortunately not been confined to progressive liberals. See, e.g., EDWARD P. JOHANNINGSMEIER, *FORGING AMERICAN COMMUNISM: THE LIFE OF WILLIAM Z. FOSTER* 59-89 (1994); NELSON LICHTENSTEIN, *THE MOST DANGEROUS MAN IN DETROIT: WALTER REUTHER AND THE FATE OF AMERICAN LABOR* (1995); Pope, *supra* note 1, at 950-52, 956-57.

9. A much more nuanced, contextualized, and sophisticated explication of this observation (though not exemplified by the work of Amar), and one to which I am greatly indebted, may be found in Pope, *supra* note 1, at 946-58 *passim*.

10. See *supra* note 8.

against national tyranny as well as in a rejuvenated and possibly enlarged plethora of protections for individuals and minorities against state and national governmental overreaching. Amar claims to have written "not just for lawyers and judges but for ordinary citizens who care about our Constitution and our rights."¹¹ His ebullient and often inspiring prose is meant to brace us as it seemingly sanctions the right of popular insurgency as the last best assurance of government of, by, and for The People.¹² I suspect that some of my fellow essayists in this issue cheer and applaud.

An expectation of finding Amar next to oneself on the barricades, however, would likely be disappointed. What Amar really seems to mean by popular insurgency is quite genteel, to say nothing of legalistic, orderly, and managed: "[T]he most obvious and inalienable right underlying the Ninth Amendment is the collective right of We the People to alter or abolish government, through the distinctly American device of the constitutional convention."¹³ Redolent of the essentially Keynesian, top-down bureaucratic managerial style of the leadership of the CIO, for example, rather than of the open, jargonless but working-class-based, bottom-up democratic alternative unionism that Staughton Lynd and others have revealed to characterize much of the popular insurgency wrought by many American working folk during the awful crisis of the Great Depression,¹⁴ Amar's prose and assumptions do not leave much of a place for the ability of regular folk to think and act for ourselves. His words and approach to constitutional history seem to imagine, rather, a benevolent management of The People by the (progressive) intelligentsia. When his story is closely analyzed, The People fade into Amar's background. Popular insurgency, peoples' rights, a people-centered view of our history, government, and destiny are not really reaffirmed.¹⁵

11. AMAR, *supra* note 4, at 296.

12. *See id.* at 28, 47, 298-99.

13. *Id.* at 120.

14. *See* Staughton Lynd, *Introduction* to "WE ARE ALL LEADERS": THE ALTERNATIVE UNIONISM OF THE EARLY 1930S 1-18 (Staughton Lynd ed., 1996). *See generally id.* (other essays in the same volume); Nelson, *supra* note 1; Nelson Lichtenstein, *Auto Worker Militancy and the Structure of Factory Life, 1937-1955*, 67 J. AM. HIST. 335 (1980).

15. Amar might protest that he talks of "the decades of bitter toil that ultimately

For example, take Amar's explanation of what he is about.¹⁶ He begins with law teaching and moves to legal scholarship, the real audiences for his work—and he stops there. All is in the realm of elite ideology: nothing about popular understanding or erroneous popular theories is contemplated. He asserts that structural protection against government was “first in the minds of those who framed the Bill of Rights”¹⁷—it was not a response to popular needs or popular actions, but only an idea in elite minds. He focuses on what governments do, not what The People did.

In his catalogue of “paradigm cases” giving rise to the Bill of Rights—those “historical evil[s] that the drafting generation lived through and sought to destroy with a text”¹⁸—he refers to the actions colonial *governments* took to protect citizens from Parliament and actions colonial *legislatures* took to oppose British evils, instances of official action important to the members of the wealthy elites who controlled the Constitutional Convention. He ignores both popular participation in colonial government and the American Revolution,¹⁹ and popular insurgent pressures such as Bacon's Rebellion in Virginia in the 1670s,²⁰

bore much fruit in the harvest” of Civil War and emancipation, and of “the disarming of freedmen, the dragnet searches of black homes, [and] the Black Codes” which followed emancipation, so that he at least has brought The People into the second half of his story. AMAR, *supra* note 4, at 301. I am no expert on this period, so I will again leave others to judge the worth of such a claim. For the present, I will grant that his words describing the later period do seem more (if ambiguously) people-centered in this regard. I note, however, the following: (a) emancipation is over and done with, and neither the First nor the Second Reconstructions seems to have actually freed most people of color in any real economic sense; (b) slaves and ex-slaves are always spoken of by Amar as people of color, not as workers, and Amar has no sense that the failures of the two Reconstructions have anything to do with capitalism or class repression; (c) the Civil War/emancipation/Reconstruction was an “insurgency” led, completed, and limited by the government of the United States, not by blacks or abolitionists or some other definable insurgent segment of The People; (d) the changes Amar sees as having been wrought are entirely in the realm of ideology—legal rather than social or socioeconomic changes; and (e) nothing in the changes Amar finds to have been made in this later period was or is a challenge to capitalism.

16. See AMAR, *supra* note 4, at xi-xv.

17. *Id.* at xiii.

18. *Id.* at 301.

19. See generally NASH, *supra* note 2; STEVEN ROSSWURM, ARMS, COUNTRY, AND CLASS: THE PHILADELPHIA MILITIA AND THE “LOWER SORT” DURING THE AMERICAN REVOLUTION (1987); ERIC FONER, TOM PAINE AND REVOLUTIONARY AMERICA 107-44 (1976).

20. Cf. EDMUND S. MORGAN, AMERICAN SLAVERY AMERICAN FREEDOM: THE OR-

the crowd actions which peppered the 1760s and 1770s,²¹ and particularly the popular actions of the 1780s. These latter actions arose through the increased democracy installed in states' revolutionary constitutions and consequent heavy voting, and resulted variously in legislative action responsive to the new voters to relieve debts and put more money into circulation, challenges from popular conventions and associations of those still dissatisfied, and the clash of arms and the burning of public buildings to protest the pernicious effects of post-Revolution depression and debilitating debt during the 1780s by those who had lost faith in their governments.²²

Tellingly, Amar ignores the widespread resistance to the new Constitution and government best reflected in the Whiskey Rebellion (1791-95)²³ and finds his 1790s illustration of popular protest in the Virginia and Kentucky Resolutions of 1798—*legalistic protests* of “legislators in these two states [who] sounded the alarm when they saw the central government taking actions that they deemed dangerous and unconstitutional.”²⁴ The world of Amar is confined to the elites who think, understand, and move matters forward through the actions of government, and does not include popular insurgents. The People are not present, not thinkers or actors, and so they must be led by the hand and told what to do.

In a phrase, Amar writes about “popular-sovereignty theory”²⁵ rather than popular sovereignty, and he does so legalistically rather than historically. Rights, for Amar, do not arise out of popular activity and merit. They are brought into being in

DEAL OF COLONIAL VIRGINIA (1975).

21. See generally, e.g., DIRK HOERDER, *CROWD ACTION IN REVOLUTIONARY MASSACHUSETTS, 1765-1780* (1977); EDWARD COUNTRYMAN, *A PEOPLE IN REVOLUTION: THE AMERICAN REVOLUTION AND POLITICAL SOCIETY IN NEW YORK, 1760-1790* (1981); THE AMERICAN REVOLUTION: EXPLORATIONS IN THE HISTORY OF AMERICAN RADICALISM (Alfred F. Young ed., 1976).

22. See MERRILL JENSEN, *THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION, 1781-1789*, 259-345 (1950); DAVID P. SZATMARY, *SHAYS' REBELLION: THE MAKING OF AN AGRARIAN INSURRECTION* (1980); Wythe Holt, “*To Establish Justice*”: *Politics, The Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1440-53.

23. See generally THOMAS P. SLAUGHTER, *THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION* (1986).

24. AMAR, *supra* note 4, at 5.

25. *Id.* at 225.

the minds of elites and then enacted into law, where they repose—elites and law mediating popular needs and, in fact, acting to establish and protect them. Passing by important exercises of popular sovereignty, Amar claims that our rights “were broadened in the 1780s by American popular-sovereignty *theory*” which, for example, “extended to ordinary citizens the freedom of speech previously enjoyed only by legislators.”²⁶

This is crucial because Amar claims that he “seeks to realign the dominant legal narrative about the Creation . . . with the dominant historical narrative (as evidenced in history books written about history by history professors).”²⁷ The key word here is “dominant”—both in the sense of “mainstream,” and in the sense of “top-down.” When one searches his footnotes, one finds that very few “history books written about history by history professors” are actually cited, and that those cited are overwhelmingly from the Whiggish mainstream school of idealist historiography, a group which notoriously focuses on elites, elite activity, and elite words and theories, and which does not practice materialist history or understand The People to be at the center of history.²⁸

For example, Gordon Wood, one of the most important of Amar’s sources, consistently views the events of the Founding Period from the standpoint of the elites.²⁹ “[T]he major constitutional difficulty experienced in the Confederation period,” he says, was “the usurpation of private rights.”³⁰ The exercise of

26. *Id.* at 232 (emphasis added).

27. *Id.* at 302.

28. The overwhelming number of citations to secondary works in Amar’s footnotes dealing with the Founding Era are to law review articles, not to history articles or books. Moreover, so far as I am able to judge, in the first six chapters only one substantive citation is made to a law review article written by an author who sees class division and worker issues as fundamental, and who promotes and celebrates popular action, popular governance, popular jurisgenesis, and popular constitutional activity. See AMAR, *supra* note 4, at 322 n.37 (citing James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287 (1990)). One of my own articles is cited, but only for attribution of a quote. See *id.* at 339 n.42.

“Materialist” history deals with the material (socioeconomic) interactions of humans and their material surroundings and circumstances, while “idealist” history centers upon ideas and theory.

29. See generally GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 325-26, 394-95 (1969).

30. *Id.* at 412.

popular sovereignty in the 1780s to redistribute wealth by reducing or cancelling indebtedness—laws which Wood admits to have been “enacted by legislatures which were probably as equally and fairly representative of the people as any legislatures in history”—was, he judges, “popular despotism.”³¹

The solution the elites saw to what Wood calls “the vicious state politics of the 1780’s” was “to reverse the democratic tendencies of the early [state] constitutions.”³² Then, when “[b]y the middle eighties the whole of New England was beset by [popular] conventions,” western Massachusetts and portions of Virginia were overcome by those whom Wood repeatedly terms “mobs” and “rioters,” who rose “in spontaneous association, burning courthouses and stopping tax collections.”³³ Moreover, he concludes, the real underlying problems “were not actually the result of a scarcity of specie and the peculiar economic problems of the 1780’s” as the protesting populace and popularly-controlled legislators kept saying that they were; “[t]hey were rather a consequence and a symptom of the degenerate character of the people.”³⁴ The answer to this popular degeneracy was, Wood finds, a new national Constitution. Federalists, “not as much opposed to the governmental power of the states as to the character of the people who were wielding it,” wrote the Constitution “to restore and to prolong the traditional kind of elitist influence in politics that social developments, especially since the Revolution, were undermining.”³⁵ While this to me seems almost transparently elite-serving, it is better history than that of Amar, since it at least recognizes the existence of popular activity.

Both Amar and the historians upon whose work he solely relies for the Founding Era reject “the tradition of Charles Beard . . . [which] stresse[s] the importance of property protection in Federalist thought.”³⁶ As is shown by modern studies not so imbued with the elite perspective (even those which concern ideas and theory), protection of property against the

31. *Id.* at 404, 413.

32. *Id.* at 485, 437.

33. *Id.* at 325-26.

34. *Id.* at 416.

35. *Id.* at 507, 513.

36. AMAR, *supra* note 4, at 78.

kinds of redistributive onslaughts The People hurled against it in the 1780s was the chief concern of the Federalist leaders at the Constitutional Convention, especially for James Madison who later drafted and sponsored the Bill of Rights.³⁷ However, Amar disagrees with the Beardian perspective except with respect to Madison and asserts Madison's uniqueness: "Property protection, it seems, was more central to Madison than to some of his contemporaries."³⁸ The effect, if not the overt goal, of idealist history, focusing upon the words and ideas of elites, is to deflect attention from the property-oriented, redistributive desires and insurgent actions of The People, not to celebrate them.³⁹

37. See generally JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* (1990); STAUGHTON LYND, *CLASS CONFLICT, SLAVERY, AND THE UNITED STATES CONSTITUTION* (1967). See also JOSEPH A. ERNST, *MONEY AND POLITICS IN AMERICA 1755-1775* (1973); Marc Egnal & Joseph A. Ernst, *An Economic Interpretation of the American Revolution*, 29 WM. & MARY Q. (3d ser.) 3 (1972); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977). Amar cites none of the materialist historians I have cited, except for James Gray Pope and Eric Foner, and their work, so far as I can tell, is uniformly used by Amar for nonmaterialistic purposes. See AMAR, *supra* note 4, at 302 (providing Amar's back-of-the-hand dismissal of historians who find property to have been an important pivot of American constitutionalism, without so much as an argument). This clinches, for me, the ahistorical and antireformist nature of Amar's progressive message.

As the Israeli constitutional experience shows, the overriding purpose of all modern constitutions is to provide protection for private property. Israel has been adopting its constitution piecemeal since independence in 1948; it has put in place many provisions protecting property and privilege, but has balked at and come to impasse concerning provisions analogous to our Bill of Rights, failing to adopt rights for the poor, for the elderly, for workers, for anyone other than the rich and property owners. See Guy Mundlak, Professor of Law, Haifa University, Israel, Address at the Fourth Conference of the International Network for Transformative Employment and Labour Law, Cape Town (Mar. 19, 1999).

38. AMAR, *supra* note 4, at 79.

39. Amar makes only one passing reference to the importance of debt issues in the Founding Period, and that is to "diversity cases pitting creditor-state plaintiffs against debtor-state defendants." *Id.* at 91 (emphasis added). No citation is given to a discussion of such cases. Amar ignores research on the importance of debt cases and of alienage and diversity suits by creditors no matter what nation or state they were from. See Holt, *supra* note 22, at 1442, 1449-58; Wythe Holt & James R. Perry, *Writs and Rights, "clashings and animosities": The First Confrontation Between Federal and State Jurisdictions*, 7 LAW & HIST. REV. 89 (1989). Amar essentially ignores the problems of indebted states and the flood of suits by creditors. "Domestic creditors pressed, sued, and jailed their debtors with an enthusiasm rivaled by the most hardbitten of their British counterparts." Holt, *supra* note 22, at 1453. Amar also ignores the widespread protections state legislatures often adopted favoring debtors and causing the leading lights at the Constitutional Convention to demand that

The popular protests of the 1780s had significant effect upon the Bill of Rights—indeed, were its chief *raison d'être*. Yet Amar's discussion ignores this effect while discussing elite issues of British troop-quartering in colonial homes before the Revolution, the Zenger free-speech case of the early 1700s, the "protection of various intermediate associations—church, militia, and jury—designed to *create* an educated and virtuous electorate,"⁴⁰ and other issues of concern to American elites. Fear of popular uprising provoked if it did not directly lead to the Constitutional Convention, in turn provoking as its product many new national powers and prohibitions against the states. The Constitution was written to protect a minority, all right: the propertied. Upon learning of its provisions, The People, led primarily by dissident members of the elite, threatened to reject the new centralized governmental edifice and dominated many of the state conventions called to ratify—a domination which Amar significantly downplays.⁴¹ While the Federalists ultimately prevailed in a hard-fought struggle, the Anti-Federalists were probably more numerous than the Federalists, could have prevented ratification, and forced several state conventions to propose many amendments to the new governmental structure.

A Federalist-dominated First Congress did not wish to make any concessions to The defeated People. Led by an eloquent James Madison, however, who had promised during his election

states be prohibited from "coin[ing] Money; emit[ting] Bills of Credit; mak[ing] any Thing but gold and silver Coin a Tender in Payment of Debts; [or] pass[ing] any . . . Law impairing the Obligation of Contracts." U.S. CONST. art. I, § 10. It must be noted that Gordon Wood also ignores this issue. See WOOD, *supra* note 29, at 418.

40. AMAR, *supra* note 4, at xii (emphasis added).

41. See *id.* at 204. Amar notes the initial Anti-Federalist majority in four state conventions, but he ignores Anti-Federalist initial dominance in New Hampshire and the possibly underhanded methods of securing ratification there; he ignores the possible Anti-Federalist majority in the Pennsylvania convention and the overtly tyrannous measures taken against it by the Federalist delegates; he ignores the failure of many Anti-Federalist towns in Massachusetts to send delegates because of finances—delegates who might have ensured defeat of the Constitution there; he ignores Anti-Federalist control of a seventh state, Rhode Island; he ignores the fact that rejection of the Constitution by any three of the four giant states with likely or possible Anti-Federalist majorities in their conventions (Virginia, Massachusetts, New York, and Pennsylvania) would have defeated the Constitution by default since their joining was economically and politically necessary for the nation to continue; and finally, he ignores the fact that rejection by any five of the thirteen states would have scuttled the Constitution by its own terms. See Holt, *supra* note 22, at 1475-76.

campaign to bring forward amendments, and who realized how shaky and dubious the ratification actually was, Congress very reluctantly complied. Its Federalist majority watered down the Anti-Federalist demands, and sent to the states for ratification what they considered to be a set of sops to the relatively harmless demands of Anti-Federalist sentiment for guarantees of certain traditional rights—as Madison said, “limited to points which are important in the eyes of many and can be objectionable in those of none. The structure & stamina of the Govt. are as little touched as possible.”⁴² It worked, as soft Anti-Federalist fears were mollified, or as in the case of some wealthy or upwardly-mobile Anti-Federalist leaders like Samuel Chase of Maryland, Willie Jones of North Carolina, and Patrick Henry and Richard Henry Lee of Virginia, soft Anti-Federalists were converted to Federalism, so that the threat of internal dissension was greatly lessened and seemed, for a while, to disappear.⁴³

Along with rejection of other Anti-Federalist clamors, Federalists refused in what has come to be known as the Bill of Rights to limit federal court jurisdiction over cases dealing with debt. In the only real structural change made, Congress put forward the Seventh Amendment’s guarantee of civil jury trials.⁴⁴ Under common law rules at the time, juries awarded damages as judgments in debt suits, and had recently demonstrated themselves to be quite reluctant to render adequate verdicts for creditor plaintiffs; so the original Constitution had not guaranteed jury trials in civil suits and, in addition, had mandated United States Supreme Court “appellate Jurisdiction, both as to Law and Fact,” to allow revisory control over state court juries.⁴⁵ In a chapter remarkable for its able and convincing argument about the jury as a kind of “popular representa-

42. Letter from James Madison to Edmund Randolph (June 15, 1789), in 12 PAPERS OF JAMES MADISON 219 (R. Rutland & C. Hobson eds., 1979); see also Holt, *supra* note 22, at 1476-78 & nn.202, 206; *id.* at 1513-15 & nn.341, 342 & 346.

43. Protests by lower-class Anti-Federalists soon resumed. See *supra* note 23 and accompanying text.

44. See Holt, *supra* note 22, at 1514-15.

45. U.S. CONST. art. III, § 2, cl. 2; see also Holt, *supra* note 22, at 1468-69 & nn.175-76. See generally Holt & Perry, *supra* note 39. The potential for jury nullification of creditor claims was amply demonstrated by juries in the federal trial courts in the 1790s, as I will relate in a future article.

tion in the [federal] judicial branch"⁴⁶ Amar completely omits this story of actual popular American insurgency through the might of the jury. Indeed, his history of the Bill of Rights leaves out all the many Anti-Federalist proposals that were *not* enacted, thus giving an erroneous story of the degree to which Madison and the Federalists wanted the kind of state-centered government of by and for The People demanded by the Anti-Federalists.⁴⁷

While Amar seems correct that the amendments which Congress *did* pass were intended as majoritarian structural safeguards for The People against a possibly tyrannous national government, with the sole exception of the Seventh Amendment, none of them responded to an existing crisis or tried to solve a matter of great contemporary material dispute. The Federalists who grudgingly proposed them thought them essentially a necessary symbolic gesture to mollify enough of the probable majority of citizens who opposed the new government to enable it to get going. The issue, raised repeatedly by Amar, of the degree to which Madison was ahead of his time in understanding the protection to minorities that would be given by the Bill of Rights⁴⁸ seems both anachronistic, a tempest in a teapot viewed in a historical context full of crucial political battles and economic problems having little or nothing to do with either demands for structural change or the need for individual

46. AMAR, *supra* note 4, at 11, 81-118. To do him full justice, Amar's chapter on the Fourth Amendment, *see id.* at 64-80, also seems brilliant, cogent, and convincing as a legalistic analysis.

47. The Anti-Federalist leaders were only slightly more devoted to actual rule by The People than were the Federalists. As Wood notes, "many Antifederalists, especially in Virginia, were as socially and intellectually formidable as any Federalist" and "often possessed wealth . . . equal to that of the Federalists." WOOD, *supra* note 29, at 484-85.

. . . [S]uch 'aristocrats' as [Richard Henry] Lee or [George] Mason did not truly represent Antifederalism. . . . [T]hey could have no real identity, try as they might, with those for whom they sought to speak. . . . [M]any of the real Antifederalists, those intimately involved in the democratic politics of the 1780s . . . , were never clearly heard in the formal debates of 1787-88.

Id. at 485. During this period, elites confined notions of "The People" to those traditionally included within British classed notions of social competence, white male citizens of property; though, other persons were beginning to imagine themselves as responsible members of society too. *See generally* NASH, *supra* note 2. "The People" was then, as it is now, a contested notion.

48. *See* AMAR, *supra* note 4, at 22, 77, 79 n.*, 159-60, 268.

or minority protection,⁴⁹ and misleading, since Madison (along with most of his Federalist cohorts) *fully* understood that the new national government itself was designed in good republican fashion to protect the propertied against depredations by The People. The essential substantive meaninglessness in actual legal and social practice of the provisions of the Bill of Rights until, as Amar cogently shows, they were transmogrified into protections for individuals and minorities by the Fourteenth Amendment in 1868,⁵⁰ demonstrates the presentist, legalistic rather than historical concerns at the core of Amar's originalist endeavors.

Since Amar is essentially arguing in today's terms to today's Court, he calls a dispute concerning speech (the controversy in 1798-1800 over the Alien and Sedition Acts) "the new nation's first constitutional crisis."⁵¹ While this *was* a crucial constitutional crisis and did involve claims of violation of the First Amendment, no case brought the Sedition Act before the Supreme Court, no lower federal judge found it unconstitutional,⁵² and the words of the Constitution played a minimal role in resolving the crisis, as compared to ordinary political activity. Much more importantly, several other crises of a constitutional tenor rocked the union before 1800, some of which reached the Supreme Court for opinion.⁵³ Given the shaky acceptance both of the Constitution and of the nation itself in the 1790s, every crisis was a constitutional crisis. To call the Sedition Act crisis "the first" can only serve modern, legalistic, elite notions of word-centered constitutional debate and make the Bill of Rights more important than it was in the 1790s.⁵⁴

49. See generally WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH* (1995); STEWART JAY, *MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES* (1997).

50. Even then, as is well known, individuals and minorities received little protection from the Reconstruction amendments, while, paradoxically, corporations availed themselves of protections the federal courts offered through the Fourteenth Amendment. Even when apparently intended otherwise, property is protected by major constitutional change.

51. AMAR, *supra* note 4, at 6.

52. Amar recognizes this fact. See *id.* at 103.

53. See, e.g., CASTO, *supra* note 49, at 74-87, 98-105, 139-41, 175-78, 188-97, 213-46; Wythe Holt, "The Federal Courts Have Enemies in All Who Fear Their Influence on State Objects": The Failure to Abolish Supreme Court Circuit-Riding in the Judiciary Acts of 1792 and 1793, 36 BUFF. L. REV. 301, 322-24 (1987).

54. It also serves Amar's presentist concerns for him flatly to proclaim that "there

Unless law is put into its historical and political vortex of origin and effect, it is meaningless. Amar's history is an idealistic essay for our time, a challenge to raise the consciousnesses of an increasingly right-wing Court and a vociferous stable of laissez-faire jurists, in order to provide more protection to what right-wingers unkindly think of as the pointy-headed strangely-colored lesser folk, the sexual misfits and women's libbers and treehuggers, the ungrateful minorities and pinkos and lazy welfare moms who clutter the courts and the country with their demands for political correctness and special protection. *The Bill of Rights: Creation and Reconstruction* unfortunately does not expect any of these folks, much less these categories of folks, to make the appropriate changes. Rather, lawyers, judges, legislators, and other important people will do the job, the changes will all be to laws and constitutions rather than to underlying social and economic conditions, and justice will thereby somehow be served.

It is striking and crucial that workers are never mentioned among those Amar wishes to protect. We workers are a distinct majority, not a minority, and our insurgencies implicate the economic foundations of the capitalist republic. As with most progressives, Amar does not seem to want to deal with—nor, perhaps, to provoke—our sort of popular insurgency. His inattention to the interests and insurgencies of ordinary American working folk, his apparent unwillingness to accord regular people a place (much less a prime place) in the making and re-making of history, renders much less effective his otherwise laudable effort.

From the perspective of The real People, a different, more sanguine view of the Bill of Rights emerges: its continued ineffectiveness. It seems only the propagation of a national myth to urge that civil liberties receive something like their due, though

is no such thing as a federal common law of crimes," AMAR, *supra* note 4, at 102 (emphasis added), as though there never has been such and the matter was settled at the beginning, when the evidence clearly shows that many persons in the Founding Period thought that the Constitution provided for, or even mandated, a federal common law of crimes. See John D. Gordan III, *United States v. Joseph Ravara: "Presumptuous Evidence," "Too Many Lawyers," and a Federal Common Law Crime*, in ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789, 106 (Maeva Marcus ed., 1992); Stewart Jay, *Origins of Federal Common Law: Part One & Part Two*, 133 U. PA. L. REV. 1003, 1231 (1985).

the myth has been given some credence by the partial successes of recent popular insurgencies like the Civil Rights Movement, the Feminist Movement, the Antiwar Movement of the 1960s and 1970s, the Environmental Movement, and Gay Liberation; by some notorious cases decided in a progressive fashion by the Stone, Vinson, and Warren Courts; and by national rhetoric during a vicious Cold War against supposedly egalitarian socialist enemies who loudly propagandized that American devotion to the Bill of Rights was largely mythological. It is difficult to cite any important evidence that there is real protection for revolutionary dissenters under the First Amendment, or that the Fourth Amendment provides much real protection against the police,⁵⁵ or that striking, or unionizing, or even working workers can claim any sort of real legal protection against the powerful companies which beset them.

Given existing and growing power and wealth imbalances, it is difficult to perceive that the republican form of government guaranteed to us by Article IV of the original Constitution, or a democracy of The People (as Amar's story would have it), exists now, or is on any foreseeable horizon without systemic change. Popular insurgency, genteel or not, is the only thing that will alter this sad state of affairs. Amar's paean to individual liberties, minority rights, and popular governance may raise some consciousnesses and is surely a step in the right direction, but since his thinking and his history erase The People from the history of insurgency and from intellectual discourse as folks who can act and think, it is only a step. Since Amar is, like myself, a worker as well as a researcher, he may wish to recast his work and his lot with We The People, thereby aiding us all to take a giant leap forward.

55. The police are, my friend L.H. LaRue has convinced me, the very standing army of mercenaries against which our Founders cogently warned us.