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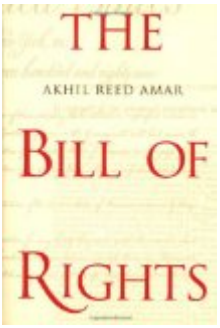
Akhil Reed Amar. *The Bill of Rights: Creation and Reconstruction.* New Haven: Yale University Press, 1998. xv + 412 pp. $19.95 (paper), ISBN 978-0-300-08277-7; $50.00 (cloth), ISBN 978-0-300-07379-9.



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One More from the Republican Revival

Law professors used to confine their scholarship almost exclusively to the pages of student-edited law journals. In recent years, though, it has become more common for them to write books as well. And if a law professor happens to teach at a first-tier law school – a Harvard, a Yale, a Stanford, a Chicago, an NYU, a Virginia (where I went) – the publication of a book is typically greeted with almost as much hoopla as a new Steven Spielberg film: conferences are organized, panel discussions are held, and symposia are issued (in the aforementioned student-edited law journals). However, unless a person subscribes to the view that simply because a particular law professor is fortunate enough to teach at a top-ranked law school that what he or she has to say is a priori significant – and I don't – most of the hoopla is ill-deserved. Bluntly stated, most law professors don't have advanced training in the field in which they are writing – history, for example – and it shows. To make the point another way, the phrase "law-office history" has become a cliche for a reason: it expresses the truth of the matter.

This said, *The Bill of Rights: Creation and Reconstruction* by Akhil Reed Amar of the Yale Law School deserves all the acclaim it has received (and it has received considerable acclaim indeed). Amar's book is well-written, provocative, and original. It is also probably wrong.

Amar's thesis is that the Founders did not enact the Bill of Rights primarily to protect individuals or minorities from the majority, but instead drafted the amendments to protect majority rule and states' rights against a potentially oppressive national government. It is the Reconstruction-era amendments, primarily the Fourteenth Amendment, Amar insists, that reconfigured the Bill as a protector of individual and minority rights.

Amar spends the first part of his book, the "Creation" half, trying to document historically his point about the Founders' Bill of Rights and the second part, the "Reconstruction" half, trying to prove his point about the Fourteenth Amendment. Although I agree with Amar – as do a number of other people (for example, David A. J. Richards of NYU Law School [1]) – that the Thirty-Ninth Congress was endeavoring to protect in the Fourteenth Amendment the *individual* (natural) rights of the American people in general and of the newly-freed slaves in particular, I believe that Amar is wrong to suggest that the framers of the original Bill were more republican than liberal in philosophical orientation. I will attempt to explain why I believe this to be the case by considering – in increasing order of generality – the Founders' conception of "property," the Ninth Amendment, and political theory itself. Obviously, I can do no more than sketch my argument in a book review, but my point would remain the same had I had more space in which to make it.[2]

Because I have only minor quibbles with the Reconstruction portion of Amar's book, I won't say anything more about that portion here. (Caveat: Readers should know that there are almost as many interpretations of what the Thirty-Ninth Congress meant to accomplish

with the Fourteenth Amendment as there are endowed professorships at the nation's elite law schools. In other words, there are *a lot* of different readings of the most famous of the post-Bill of Rights amendments.)

Turning first to the Founders' conception of "property," Amar maintains that James Madison's ability to secure the protection of private property – a quintessential individual right – in the Fifth Amendment was one of the few truly liberal components of the Bill of Rights. Amar writes:

"Following in the tradition of Charles Beard, many modern scholars have stressed the importance of property protection in Federalist thought. Both the Article I, section 10 contracts clause and Madison's now-canonical *Federalist* No. 10 do indeed evince hostility to redistributive legislation. But we must remember that the Bill of Rights grew out of a marriage between Madisonian Federalism and un-Madisonian Anti-Federalism, and many Anti-Federalists were suspicious of the 'aristocratical' tendencies of Federalists. Of the original thirteen colonies, only Massachusetts had a just-compensation clause in its state constitution in 1789; and Jefferson's famous Declaration of 1776 had spoken of 'life, liberty, and the pursuit of happiness' rather than 'life, liberty, and property.' Property protection, it seems, was more central to Madison than to some of his contemporaries." (78-79).

In addition to underestimating the importance of private property to the Anti-Federalists, Amar fails to appreciate that to the Founders in general "the pursuit of happiness" was synonymous with "property," when property is conceived in a broad sense rather than simply as the ownership of material goods.[3] According to John Locke – the liberal political theorist on whom the Founders most relied (more on this later) – "Property ... must be understood ... to mean that property which men have in their persons as well as goods." Locke added elsewhere that property involves men "united for the general preservation of their lives, liberties, and estates."[4]

That Thomas Jefferson was listing only "unalienable" natural rights in the Declaration of Independence provides another explanation for the absence of the word "property" from the famous clause at issue. As Locke mentions in the *Second Treatise*, man is the creation and, hence, the property of God.[5] As such, every man owes a duty to his Creator to fulfill himself or herself as an individual. To satisfy this duty, every individual must strive to protect his life, must strive to freely control the course of his life, and must strive to achieve a good and happy life. "Property" in the narrow sense of ownership of material goods is certainly indispensable if man is to satisfy his obligation to his Creator to preserve his life and liberty and to pursue his happiness. But as important as property is in this material sense, it is alienable. "Life, liberty, and the pursuit of happiness" are not, as Jefferson made clear in the Declaration. Finally, Jefferson was a wonderful writer. "Life, liberty, and the pursuit of happiness" reads more appealingly than "life, liberty, and property."[6]

A look at the Ninth Amendment provides additional insights into the shortcomings of Amar's project. Amar couldn't be clearer about his reading of this "forgotten" amendment.[7] He writes: "The Ninth is said to be about unenumerated individual rights, like privacy; the Tenth about federalism; and the Preamble about something else again. But look at these texts. All are at their core about popular sovereignty" (121). He then says that the "legislative history" of the Ninth Amendment "confirms" his collectivist interpretation of its text (*ibid.*). Here, too, I believe, Amar has gotten the story wrong. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." To me, this language means what it says: the Amendment was intended to protect unenumerated private rights. This fact is made even more obvious when one considers Madison's widely-cited June 8, 1789, speech to the U.S. House of Representatives advocating the adoption of the Bill of Rights:

"It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which are not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution [the Ninth Amendment]."[8]

Amar doesn't discuss this speech. He – like almost every other scholar I have ever read on the subject – also fails to discuss the draft Bill of Rights written in Roger Sherman's hand that suggests, at least to me, that the Ninth Amendment was designed to protect unenumerated natural rights. The Sherman draft reads: "The people

have certain natural rights which are retained by them when they enter into society."[9] Again, the text – and it is important to point out here that Amar claims to be a textualist – speaks for itself about the sanctity of natural rights.

The Sherman draft leads to the final point I wish to make about Amar's reading of the original Bill of Rights: he has gotten the political theory of American Founding wrong. As historians well know, scholars have been disagreeing for years over when republicanism was replaced by liberalism as the dominant ideology of American law and politics.[10] (The recent trend has been to describe the Founding as "liberal-republican" or some other amalgam.) Amar doesn't discuss this issue directly. Indeed, his textualist orientation makes it seem irrelevant to his way of thinking. Although I reject, for essentially common-sense reasons (for example, people are able to communicate with one another), the argument advanced by many proponents of the application of literary analysis to legal texts – that meaning cannot be extracted from legal texts, but can only be put into them, in other words, that the Bill of Rights means nothing and means anything – it is difficult to deny the more modest claim that "texts can be interpreted only in some 'context.' "[11] And that context, as I argue at length elsewhere, is the natural-rights philosophy of the American Revolution: a political philosophy that is far more Lockean liberal than classical republican.[12] In essence, then, Amar is merely the latest in a long line of law professors who teach at the nation's leading law schools – for example, Bruce Ackerman of Yale, Frank Michelman of Harvard, and Cass Sunstein of Chicago – who are trying to claim that the "republican revival" in the American regime lasted far longer than even the leading historians on the subject appear to believe.[13]

At the end of the day, though, my disagreement with Amar's reading of the original Bill of Rights has little practical significance, at least as a matter of constitutional adjudication (which is Amar's primary concern as a law professor). After all, Amar acknowledges in part II of his book that with the passage of the Fourteenth Amendment the bill became the benchmark of individual and minority rights that most of the rest of us have always thought it was. As he puts it in the book's last line: "From start to finish this book has aimed to explain how today's judges and lawyers have often gotten it right without quite realizing why"(307). How one of the nation's most celebrated law professors got to where he got on the meaning of the Bill of Rights is an equally fascinating story and one well worth reading.

Notes

[1]. David A.J. Richards, *Conscience and the Constitution: History, Theory, and Law of the Reconstruction Amendments* (Princeton: Princeton University Press, 1993).

[2]. For a more detailed discussion, see Scott Douglas Gerber, *To Secure These Rights: The Declaration of Independence and Constitutional Interpretation* (New York: New York University Press, 1995), Part I.

[3]. See Herbert J. Storing, *What the Anti-Federalists Were For* (Chicago: University of Chicago Press, 1981).

[4]. John Locke (Thomas Peardon, ed.), *The Second Treatise of Government* (New York: Macmillan, 1952), secs. 173, 123.

[5]. *Ibid.*, sec. 6.

[6]. The majority of the preceding two paragraphs is taken from Gerber, *To Secure These Rights*, 28-29.

[7]. See generally Bennett B. Patterson, *The Forgotten Ninth Amendment* (Indianapolis: Bobbs-Merrill, 1955).

[8]. As reprinted in Marvin Meyers, ed., *The Mind of the Founder: Sources of the Political Thought of James Madison*, rev. ed. (Hanover, NH: University Press of New England, 1983), 171.

[9]. See Scott D. Gerber, "Roger Sherman and the Bill of Rights," *Polity* 28 (summer 1996), 521-40, especially 530-31.

[10]. See, for example, Milton H. Klein, Richard D. Brown, and John B. Hench, eds., *The Republican Synthesis Revisited: Essays in Honor of George Athan Billias* (Worcester, MA: American Antiquarian Society, 1992).

[11]. Sanford Levinson and Steven Mailloux, eds., "Preface" to *Interpreting Law and Literature: A Hermeneutic Reader* (Evanston, IL: Northwestern University Press, 1988), xi, xii.

[12]. Gerber, *To Secure These Rights*, *passim*.

[13]. For more, see Scott D. Gerber, "The Republican Revival in American Constitutional Theory," *Political Research Quarterly* 47 (December 1994), 985-95. Even Gordon Wood, the leading figure in the republican synthesis, acknowledges that the Constitution was liberal. See generally Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill: University of North Carolina Press, 1969).

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