THE

AKHIL REED AMAR

BILL OF RIGHTS

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# of Rights

Reconstruction

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For Vinita

Acknowledgments

I am reminded of the exasperated barber who, after an hour's hard work, sighed that no matter how much he tried, the cut was still too short. My personal and intellectual debts are such that, no matter how much I work on my thank-you list, it will always be too short. To those whom I cannot name here, I say, you know who you are, and so do I. Bless you.

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I have been pondering the ideas in this book for almost a decade, and early versions of some of these ideas have appeared in articles published in volumes 100 and 101 of the *Yale Law Journal* and volume 2 of the *Roger Williams University Law Review*. Portions of this book derive from these articles and appear here with the permission of the Yale Law Journal Company and Fred B. Rothman and Company.

Introduction

The Bill of Rights stands as the high temple of our constitutional order—America's Parthenon—and yet we lack a clear view of it. Instead of being studied holistically, the Bill has been broken up into discrete blocks of text, with each segment examined in isolation. In a typical law school curriculum, for example, the First, Ninth, and Tenth Amendments are integrated into an introductory survey course on Constitutional Law; the Sixth, Eighth, and much of the Fifth are taught in Criminal Procedure; the Seventh is covered in Civil Procedure; the Fifth Amendment takings clause is featured in Property; the Fourth Amendment becomes a course unto itself, or is perhaps pushed into Criminal Procedure or Evidence (because of the judicially created exclusionary rule); and the Second and Third are ignored.[1]

When we move beyond law school classrooms to legal scholarship, a similar pattern emerges. Each clause is typically considered separately, and some amendments—again, the Second and Third—are generally ignored by mainstream constitutional theorists.[2] Indeed, no legal aca-

demic in the twentieth century has attempted to write in a truly comprehensive way about the Bill of Rights as a whole.[3] So too, today's scholars rarely consider the rich interplay between the original Constitution and the Bill of Rights. Leading constitutional casebooks treat "the structure of government" and "individual rights" as separate blocks[4] (facilitating curricular bifurcation of these subjects into different semesters), and the conventional wisdom seems to be that the original Constitution was concerned with the former, the Bill of Rights with the latter.

In Part One I challenge the prevailing practice by offering an integrated overview of the Bill of Rights as originally conceived, an overview that illustrates how its provisions related to each other and to those of the original Constitution. In the process I hope to refute the prevailing notion that the Bill of Rights and the original Constitution represented two very different types of regulatory strategies.

Conventional wisdom acknowledges that the original Constitution proposed by the Philadelphia convention focused primarily on issues of organizational structure and democratic self-governance: federalism, separation of powers, bicameralism, representation, republican government, and constitutional amendment. By contrast, the Bill of Rights proposed by the first Congress is generally thought to have little to say about such issues. Its dominant approach, according to conventional wisdom, was rather different: to vest individuals and minorities with substantive rights against popular majorities.[5] I disagree.

Individual and minority rights did constitute a motif of the Bill of Rights—but not the sole, or even the dominant, motif. A close look at the Bill reveals structural ideas tightly interconnected with language of rights; states' rights and majority rights alongside individual and minority rights; and protection of various intermediate associations—church, militia, and jury—designed to create an educated and virtuous electorate. The genius of the Bill was not to downplay organizational structure but to deploy it, not to impede popular majorities but to empower them.

Consider, in this regard, Madison's famous assertion in *The Federalist* No. 51 that "[i]t is of great importance in a republic not only to

guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part."[6] The conventional understanding of the Bill seems to focus almost exclusively on the second issue (protection of minority against majority) while ignoring the first (protection of the people against self-interested government). Yet as I shall show, this first issue was indeed first in the minds of those who framed the Bill of Rights. To borrow from the language of economics, the Bill of Rights was centrally concerned with controlling the "agency costs" created by the specialization of labor inherent in a representative government. In such a government, the people (the "principals") delegate power to run day-to-day affairs to a small set of specialized government officials (the "agents") who might try to rule in their own self-interest, contrary to the interests and expressed wishes of the people. To minimize such self-dealing ("agency costs"), the Bill of Rights protected the ability of local governments to monitor and deter federal abuse, ensured that ordinary citizens would participate in the federal administration of justice through various jury provisions, and preserved the transcendent sovereign right of a majority of the people themselves to alter or abolish government and thereby pronounce the last word on constitutional questions. The essence of the Bill of Rights was more structural than not, and more majoritarian than counter.

But if all this is so, how can we account for the conventional wisdom that the Bill of Rights is overwhelmingly about rights rather than structure—and individual, countermajoritarian rights at that? The answer, I believe, lies not in the 1780s and 1790s but in the 1860s—in particular in the letter and spirit of the Fourteenth Amendment. In Part Two I try to show how the Reconstruction Amendment transformed the nature of the original Bill of Rights, leaving us with something much closer to the Bill as conventionally understood today.

The relationship between the original Bill of Rights and the Fourteenth Amendment has typically been framed by the question of whether the latter "incorporates" the former against states, and if so, how. Although this is one of the most important questions in all of constitutional law, no dominant answer has emerged, and with good reason.

Each of the three main approaches—Hugo Black's "total incorporation" theory, William Brennan's "selective incorporation" model, and Felix Frankfurter's "fundamental fairness" doctrine—contains both a deep insight and a fatal flaw. I shall therefore propose a synthesis of their three divergent approaches to break the current stalemate.

This synthesis, which I shall call "refined incorporation," begins with Black's insight that *all* of the privileges and immunities of citizens recognized in the Bill of Rights became "incorporated" against states by dint of the Fourteenth Amendment. But not all of the provisions of the original Bill of Rights were indeed rights of citizens. Some instead were at least in part rights of states, and as such, awkward to fully incorporate *against* states. Most obvious, of course, is the Tenth Amendment, but other provisions of the first eight amendments resembled the Tenth much more than Justice Black admitted. Thus there is deep wisdom in Justice Brennan's invitation to consider incorporation clause by clause—or more precisely still, right by right—rather than wholesale. But having identified the right unit of analysis, Brennan posed the wrong question: Is a given provision of the original Bill a *fundamental* right? The right question is whether the provision guarantees a privilege or immunity of *individual citizens* rather than a right of *states* or the *public* at large. And when we ask this question, clause by clause and right by right, we must be attentive to the possibility, flagged by Frankfurter, that a particular principle in the Bill of Rights may change its shape in the process of absorption into the Fourteenth Amendment. This change can occur for reasons rather different from those that Frankfurter offered. (He, more than Black and Brennan, diverted attention from the right question by his insistence on abstract conceptions of "fundamental fairness" and "ordered liberty" as the sole Fourteenth Amendment litmus tests, and by his disregard of the language and history of the privileges-or-immunities clause.) Certain alloyed provisions of the original Bill—part citizen right, part state right—may need to undergo refinement and filtration before their citizen-right elements can be absorbed by the Fourteenth Amendment. And other provisions may become less majoritarian and populist, and more libertarian, as they are repackaged in the Fourteenth Amendment as liberal civil rights—"privileges or immunities" of

individuals—rather than republican political "right[s] of the people," as in the original Bill.

With the new analytic framework of refined incorporation in place, we can trace the ways in which various provisions of the original Bill are transformed when they come into contact with the Fourteenth Amendment. In area after area—freedom of speech and of the press, the right to keep and bear arms, the right of jury trial, the unenumerated rights retained, and so on—we shall chart how the gravitational pull of the Fourteenth Amendment has altered the trajectory of the original Bill. The point is true even more broadly; the general concept of a "Bill of Rights"—indeed, the very phrase itself—has been reshaped by the Fourteenth Amendment. Nowhere is this more obvious than in the writings of Hugo Black, whose Fourteenth Amendment theory of total incorporation required him to redefine the Bill of Rights as comprising only the first eight amendments, rather than the first ten.

In short: in Part One I contest conventional wisdom about the Bill of Rights by exploring its Creation, and in Part Two I confirm conventional wisdom about the Bill by explicating its Reconstruction.*

*A topic as vast as the Bill of Rights has obviously forced me to make hard choices to omit or downplay certain issues, themes, and approaches while emphasizing others. A few words about my criteria of selection are in order at the outset. (A more comprehensive and theoretical discussion of methodology appears in my Afterword.) This book aims to offer a general theory of the Bill of Rights—that is, an account that seeks to illuminate not simply individual clauses of the Bill but their relation to each other and to other constitutional provisions. Thus in Part One I pay special attention to questions obscured by the clausebound approach that now dominates constitutional discourse: Why are various clauses lumped together in a single amendment, and how do they interrelate? What themes connect amendments? What words, phrases, and ideas link the original Constitution and the Bill? How do structural ideas and rights fit together? And so on. In Part Two I examine the intricate interplay between the Bill and the later Fourteenth Amendment. This, too, is a topic obscured by dominant constitutional discourse. Frankfurter's followers deny that there is any logical link between the Fourteenth Amendment and the Bill of Rights as such, whereas incorporationists posit an essentially mechanical relationship that begs many of the most interesting questions.

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Part I

Creation

Overleaf, John Trumbull, *The Death of General Warren at the Battle of Bunker's Hill, 17 June 1775* (1786)
Yale University Art Gallery, Trumbull Collection

One

First Things First

The 1789 Bill of Rights was, unsurprisingly, a creature of its time. Yet because these eighteenth-century words play such an active role in twentieth-century legal discourse, we may at times forget that more than two centuries separate us from the world that birthed the Bill. Before we fix our gaze on this eighteenth-century document, let us briefly consider how nineteenth- and twentieth-century events and ideas have organized our legal thinking, predisposing us to see certain features of the Bill of Rights and to overlook others. And before we rush to examine the words that are first in our modern Bill of Rights, let us briefly consider the words that were first in the original Bill of Rights.

Modern Blinders

The Ideology of Nationalism We inhabit a world whose constitutional terrain is dominated by landmark Supreme Court cases that invalidated state laws and administrative practices in the name of individual constitutional rights. Living in the shadow of *Brown v. Board of Education*[1] and

the second Reconstruction of the 1960s, many lawyers embrace a tradition that views state governments as the quintessential threat to individual and minority rights, and federal officials—especially federal courts—as the special guardians of those rights.[2]

This nationalist tradition has deep roots. Over the course of two centuries, the Supreme Court has struck down state and local action with far more regularity than it has invalidated acts of coordinate national branches.[3] Early in this century, Justice Holmes declared, "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States."[4] Professor Thayer's famous 1893 essay on judicial review also embraced an expansive role for federal courts in reviewing state legislation, even as Thayer preached judicial deference to congressional acts of doubtful constitutionality.[5] Holmes and Thayer had reached maturity during the Civil War era, and they understood from firsthand experience that the constitutional amendments adopted following the war—particularly the Fourteenth Amendment—evinced a similar suspicion of state governments.

In fact, the nationalist tradition is far older than Reconstruction; its deepest roots lie in Philadelphia, not Appomattox. One of the Federalists' most important goals was to forge a strong set of federally enforceable rights against abusive state governments, a goal dramatized by the catalogue of rights in Article I, section 10—the Federalist forebear of the Fourteenth Amendment.[6] Indeed, the very effort to create a strong central government drew much of its life from the Federalists' dissatisfaction with small-scale politics and their belief that an "enlargement" of the government's geographic "sphere" would improve the caliber of public decision-making.[7] The classic statement of this view is Madison's *Federalist* No. 10.

Alongside this nationalist tradition, however, lay a states'-rights tradition—also championed by Madison—that extolled the ability of local governments to protect citizens against abuses by central authorities. Classic statements of this view include Madison's *Federalist* No. 46, his *Virginia Resolutions of 1798,* and his *Report of 1800*. Heavy traces of these ideas appear even in the work of the strong centralizer Alexander Hamilton.[8]