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Recommended Citation

Gary S. Lawson, *The Bill of Rights As an Exclamation Point*, in 33 *University of Richmond Law Review* 511 (1999).

Available at: https://scholarship.law.bu.edu/faculty_scholarship/1032

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THE BILL OF RIGHTS AS AN EXCLAMATION POINT

Gary Lawson*

Akhil Amar's *The Bill of Rights: Creation and Reconstruction* ("*The Bill of Rights*")¹ is one of the best law books of the twentieth century. That is not surprising, as it grows out of two of the best law review articles of the twentieth century² and was written by one of the century's premier legal scholars. I have been an unabashed Akhil Amar fan ever since our overlapping law school days more than fifteen years ago, and I am thrilled to have my perspicacity and good judgment vindicated by the publication of this remarkable work.

The profound insights provided by *The Bill of Rights* are numerous. Professor Amar enlightens us, just to pick a diverse sampling of items,³ on the structural themes interwoven into the original Bill of Rights, the role of "contrarian" sentiment in shaping the Fourteenth Amendment, the shifting importance of juries and judges as guardians of liberty, the original understanding of the Militia Clause of the Second Amendment, and the delicate textual interlocks among the original Constitution, the first ten amendments, and the Fourteenth Amendment. This book is a substantive and methodological masterpiece that, quite simply, sets the standard for constitutional scholarship into the next millennium.⁴

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

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

3. The enumeration in this essay of certain insights shall not be construed to deny or disparage others provided by Professor Amar.

4. For a more detailed account of some of the book's primary virtues and an engaging critique with which I largely agree, see Steven G. Calabresi, "*We Are All Federalists, We Are All Republicans*": *Holism, Synthesis, and the Fourteenth Amendment*, 87 *GEO. L.J.* (forthcoming 1999).

Professor Amar will not be surprised, however, to learn that I am not (yet?) prepared to incorporate his views jot-for-jot into my own. For example, while Professor Amar makes a compelling case for the proposition that the Fourteenth Amendment's Privileges or Immunities Clause provides substantial protection for many rights, including many of the rights mentioned in the original Constitution and the first eight amendments, I am not convinced that such protection consists of prohibitions on state interference with those rights rather than prohibitions on *discriminatory* state interference with those rights.⁵ To pursue such issues, however, would "take us rather far afield"⁶ from Professor Amar's principal project.⁷ Accordingly, I want to concentrate here on a more general methodological—or, perhaps more accurately, terminological—problem that may reflect a difference of emphasis rather than a difference of substance between us. As the rules of punctuation demonstrate, however, emphasis and substance are not always easily separable.

The Bill of Rights is the best sustained textualist analysis that I have ever read. But, to put it bluntly, does the book focus our attention on the correct texts? The ultimate object of constitutional inquiry, after all, is to determine what actions

5. John Harrison has persuasively argued that the Privileges or Immunities Clause is concerned—indeed, is paradigmatically concerned—with protecting against discriminatory state rules involving the private law of property, contract, and tort. See John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1416-24 (1992). In textual terms, this means that the term "abridge" in the Privileges or Immunities Clause has an antidiscrimination rather than prohibitionist meaning, just as it has in Section 2 of the Fourteenth Amendment and in the Fifteenth Amendment. If that is the correct meaning of the term "abridge" in the Privileges or Immunities Clause, then even if some of the rights declared in the Bill of Rights are among the "privileges or immunities of citizens of the United States," states are forbidden only to enact or enforce laws that *discriminate* with respect to these rights. See MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS: LAW OR POLITICS?* 124-27, 131-33 (1994).

Professor Amar responds that the term "abridge" might have a "two-tiered" meaning that embraces this antidiscrimination notion in connection with private law rights but calls for prohibitionism in connection with other kinds of rights. See AMAR, *supra* note 1, at 178-79 & n.*. It is not impossible for a constitutional term to have two different meanings in two distinct contexts, but I am not (yet?) persuaded that that is the best reading of the word "abridge" in Section 1 of the Fourteenth Amendment.

6. AMAR, *supra* note 1, at 178.

7. It would also require me to become a Fourteenth Amendment scholar, which is something that I have thus far studiously avoided.

the federal and state governments are and are not permitted to take.⁸ Is a close textual analysis of the Bill of Rights really a good vehicle for that inquiry? That is the question that I hope to raise here.

I. THE BIG BANG

The federal government operated for two years without the Bill of Rights. From 1789 to 1791, the original Constitution was the only legal document that formally empowered or limited the national government. How, if at all, did the legal landscape change in 1791? What was the legal effect of the ratification of the Constitution's first ten amendments?

Judging by their stances and comments during the two relevant periods of ratification, the Federalists' answer was "not very much." During the Constitution's ratification debates, opponents of the Constitution repeatedly objected to the absence of a Bill of Rights.⁹ The Federalists consistently responded that an extensive Bill of Rights was unnecessary and inappropriate because the national government's enumerated powers did not include the power to regulate speech, religion, or the press, to issue general warrants, to impose cruel and unusual punishments, and so forth.¹⁰

Patricia B. Granger and I have argued at length that the Federalists were right.¹¹ The various grants of power to Congress in the original Constitution did not include a "Speech Clause," a "Religion Clause," an "Arms-bearing Clause," a "Soldier-quartering Clause," a "General Warrants Clause," a "Takings Clause," a "Jury-abolishing Clause," and so forth. If Congress has the enumerated power to threaten the kinds of rights for which the Anti-Federalists wanted express constitutional protection, it must come from the Sweeping Clause of Article I,

8. The Thirteenth Amendment is, of course, the exceptional provision that speaks to private as well as governmental conduct.

9. More precisely, they objected to the absence of a Bill of Rights more extensive than the short one contained in Article I, Section 9. See AMAR, *supra* note 1, at 4.

10. For a compendium of these responses, see Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 315-23 (1993).

11. See *id.* at 325.

Section 8, Clause 18, which grants to Congress the power to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”¹² The case for a rights-threatening federal power must be that in the course of “carrying into execution” the enumerated powers, such as the power to regulate interstate commerce or to establish post offices and post roads, Congress might employ means of execution that infringe upon cherished rights. Perhaps Congress might seek to enforce compliance with the tax laws by means of general warrants, or Congress might seek to punish criticism of the government in order to make unpopular commercial regulations more effectual, or Congress might try to abolish trial by jury in suits against federal marshals. But under the Federalist vision, this is a false fear. The Sweeping Clause simply does not authorize these kinds of rights-threatening executory laws. The Sweeping Clause only grants to Congress the power to pass executory laws that are “*necessary and proper*” for executing federal power. The word “proper” in this context requires executory laws to be consistent with background principles of federalism, separation of powers, and individual rights.¹³ A law that sought to implement the commerce power by restricting the freedom of speech or by authorizing general warrants would be “improper” and, therefore, not within the enumerated power of Congress.

Thus, the provisions of the Bill of Rights that expressed such limitations in 1791 simply declared something that was already true in 1789. These provisions were, in essence, exclamation points. They identified certain (pre-existing) rights that were thought to be likely targets for an overreaching federal government and said to the government: “Don’t even think about it!”¹⁴ And, lest one try to interpret these rights-listing provisions as something more than exclamation points, the Ninth Amendment reminded everyone that “[t]he enumeration in the Constitution of certain rights, shall not be construed to deny or

12. U.S. CONST. art. I, § 8, cl. 18.

13. See Lawson & Granger, *supra* note 10, at 291-97.

14. Or perhaps, “Go ahead—make my day!”

disparage others retained by the people.”¹⁵ In other words, the formulations provided in the first eight amendments should not be construed as exhaustive, even within their own spheres.

That may be well and fine with respect to limitations on Congress, but what about the provisions of the Bill of Rights that apply to executive or judicial action? The Fifth Amendment’s Due Process and Grand Jury Clauses, for instance, aim squarely at executive and judicial action. The Eighth Amendment’s principal target is not Congress but the federal courts, which wield the “judicial Power”¹⁶ to impose sentences. The Sweeping Clause, with its requirement of propriety, deals only with the power of Congress. Might not a Bill of Rights have been necessary to provide protection against over-reaching federal executives and judges?

Here too, however, it is easy to overstate the legal effect of the Bill of Rights. The principle of enumerated powers applies to Article II and Article III as surely as it does to Article I. The President and the federal courts can exercise only those powers granted to them by the Constitution. The President is granted “[t]he executive Power”¹⁷ and a few odds and ends that might not fit within that description, such as the presentment power and a limited appointment power. The federal courts are granted “[t]he judicial Power.”¹⁸ Unlike the precise enumerations of congressional power, these grants are general. But “general” does not mean “unlimited.” Suppose that in 1790, before ratification of the Bill of Rights, the executive sought to implement a congressional statute by summarily executing anyone suspected of violating it.¹⁹ There is, at that point in time, no express constitutional provision assuring that deprivations of life, liberty, or property will be preceded by “due process of law.” Did the pre-1791 federal executive have an unlimited power to carry the laws into effect by any means whatsoever? Or did “[t]he executive Power” in 1789 mean something more limited, such as a

15. U.S. CONST. amend. IX.

16. *Id.* art. III, § 1, cl. 1.

17. *Id.* art. II, § 1, cl. 1.

18. *Id.* art. III, § 1, cl. 1.

19. We can make the example a civil statute to avoid the effect of the jury trial provisions of Article III, Section 2, Clause 3 of the Constitution.

power to implement statutes using means that are consistent with, for want of a better phrase, due process of law?

Similarly, federal judges in 1790 had the enumerated power to decide cases in accordance with governing law and to provide remedies and sentences as part of those decisions. Could they therefore impose the death penalty in a breach of contract suit, or was the grant of "[t]he judicial Power" understood in 1789 to be a limited grant of power? If the Article II and Article III Vesting Clauses are grants of limited power in this fashion, then the provisions of the Bill of Rights that operate on the executive and judicial powers again serve primarily as exclamation points.²⁰

What about the territories and the District of Columbia? Congress has power "[t]o exercise exclusive Legislation in all Cases whatsoever, over [the] District"²¹ and to "make all needful Rules and Regulations respecting the Territor[ies]."²² In these contexts, Congress is not bound by the "subject-matter jurisdiction" limitations that restrict its power to regulate matters within the states. Significantly, Congress does not need to invoke the Sweeping Clause in order to make its District and territorial powers effective. The District and Territories Clauses are self-contained grants of general legislative authority. Does the Bill of Rights at least operate to limit the power of Congress in the territories?²³

If the Bill of Rights has any significant substantive punch, it will appear in this context. It is clear that the federalism and separation of powers limitations built into the Sweeping Clause do not apply to territorial legislation.²⁴ But what about limita-

20. This analysis of the Vesting Clauses explains why free speech principles apply to the executive and judicial departments even though the First Amendment speaks only of "Congress." Cf. AMAR, *supra* note 1, at 233 (noting that restricting First Amendment principles to Congress violates the Ninth Amendment's non-exclusivity norm). For a thorough analysis of the Article I and Article II Vesting Clauses, see Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U.L. REV. 1377 (1994), and Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992).

21. U.S. CONST. art. I, § 8, cl. 17.

22. *Id.* art. IV, § 3, cl. 2.

23. For ease of exposition, I will henceforth use the term "territories" to include the District of Columbia unless the discussion calls for a distinction.

24. Limitations that are built into the original Constitution are another matter.

tions that involve personal rights? Could a pre-1791 Congress, for example, impose a regime of prior restraints on political speech in the territories or the District of Columbia? The answer is unclear. The drafter of the Territories Clause, Gouverneur Morris, rather plainly wanted to facilitate the holding of territories as colonies,²⁵ which may have required very broad federal powers beyond anything permissible in the states. On the other hand, it is not impossible that even phrases such as "exclusive Legislation in all Cases whatsoever" or "needful Rules and Regulations" may have been understood in 1789 to be limited rather than unlimited grants of power. Perhaps the very term "Legislation," for example, meant something other than formal compliance with procedural rules of enactment. In any event, the ratification of the Bill of Rights in 1791, including the Ninth Amendment's non-exclusivity reminder, eliminates any uncertainty on this score. By that point, if not before, congressional legislative power over the territories was limited by considerations of personal rights.²⁶

The Appointments Clause, for example, surely applies to legislation and executive action concerning the territories in the same way that it applies to the exercise of any other federal power. But because Congress does not need to invoke the Sweeping Clause to legislate for the territories, any separation of powers or federalism limitations that spring from that Clause will not limit Congress in a territorial context.

25. See Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CAL. L. REV. 853, 908 (1990).

26. Executive and judicial power in the territories were always limited, though ratification of the Bill of Rights prohibited congressional overriding of those limitations. To make the point clear, consider the nondelegation problem. The executive power includes the power of law interpretation, but does not include the power of lawmaking. If executive interpretation shades too much into lawmaking, the exercise of power is invalid. Outside of the territories, Congress cannot cure this defect by passing a statute that says, in essence, "the executive shall make the relevant laws." This statute would cure the nondelegation problem from the executive's perspective, as executive "lawmaking" would now be an act of pure execution, but the Sweeping Clause would not authorize the statute as a "proper" exercise of congressional authority. The limited character of the executive (and judicial) power works in tandem with the Sweeping Clause to impose a comprehensive nondelegation regime. In the territories, however, the Sweeping Clause does not operate, leaving Congress free to authorize executive actors, such as territorial legislators, to make law in a way that executive actors normally cannot.

Now consider the due process problem. The grant of the executive power does not (so I have argued here) authorize the executive to implement statutes in ways that defy traditional notions of due process. Outside the territories, the Sweeping Clause does not permit Congress to authorize such action by the executive. Could Congress pass a statute in the territories, however, that specifically empowers the executive to act in ways contrary to due process? Perhaps in 1790, but in 1791, the

What is the scope of those limitations? Obviously, the first eight amendments are a useful source of information concerning post-1791 federal power over the territories. But the texts of the first eight amendments are both over-inclusive and under-inclusive with respect to limitations on national power. They are over-inclusive because some of the provisions of the Bill of Rights are federalism provisions that have no bearing on federal power over the territories. The Establishment Clause, for example, protects state establishment decisions from federal interference; what sense does it make to apply this norm to the territories in any substantive way?²⁷ Accordingly, one needs a mechanism for sorting out those provisions of the Bill of Rights that concern personal liberty from those that relate to structural matters that do not restrict national power in the territories. The Bill of Rights provisions are under-inclusive in the obvious sense reflected in the Ninth Amendment: The Bill of Rights is not a comprehensive list of all of the personal liberties of persons or citizens, but rather serves as an exclamation point that highlights some of the rights that were seen in 1791 as the most likely targets of national attack. If the Bill of Rights confirms or establishes that territorial inhabitants have rights against Congress, one cannot define those rights by reference to the catalogue in the first eight amendments.

This territorial story is familiar to Professor Amar's readers. It neatly parallels Professor Amar's theory of refined incorporation, in which the ratification of the Fourteenth Amendment in 1868 makes some, but not all, of the privileges declared in the Bill of Rights applicable to the states, and in which the full content of the "privileges or immunities of citizens of the United States"²⁸ is not exhausted by this partial incorporation.

Students of constitutional history know, of course, that the nation took a somewhat different route than I have prescribed with respect to territorial governance. The Supreme Court had an "incorporation" debate of sorts in the early twentieth century following the acquisition of Pacific and Caribbean territories from Spain in the aftermath of the Spanish-American War of

Due Process Clause categorically forbids such action.

27. See AMAR, *supra* note 1, at 247-48.

28. U.S. CONST. amend. XIV, § 1.

1898.²⁹ The issue was whether Congress was limited by the Bill of Rights, including its distinctively Anglo-American procedural provisions, when legislating for territories whose inhabitants were not steeped in Anglo-American traditions. The Court's ultimate answer, after two decades of contentious litigation, was that congressional legislation for territories that were fully "incorporated" into the United States was limited by all relevant constitutional provisions. Legislation for "unincorporated" territories, which meant essentially territories that were not perceived as likely candidates for statehood because of the race of their populace,³⁰ however, needed to comply only with constitutional provisions that were "fundamental" to all mankind rather than specific to the Anglo-American tradition.³¹ In particular, the Court held that provisions concerning grand and petit juries were not "fundamental" in this sense.³² This doctrine was known as the "territorial incorporation" doctrine—long before "incorporation" became a standard term in Fourteenth Amendment parlance.

The territorial incorporation approach, of course, has little to commend it. The Court's guesses as to future statehood are irrelevant to the application of the Constitution, and the Constitution does not distinguish between "fundamental" and "nonfundamental" restrictions on national power. The Court's clause-by-clause analysis of the fundamentality of provisions of the Bill of Rights thus contributed to a major misunderstanding of congressional power from which we have not yet broken free. A correct assessment of federal power over the territories must look at the constitutional sources of, and limits on, national power, rather than the character of the inhabitants who are subject to federal authority. And, as is true of federal legislation outside the territorial context, the texts of the first eight amendments tell us something useful, but they are hardly the be all and end all of constitutional analysis.

29. See Lawson, *supra* note 25, at 871-74 (providing a slightly more detailed account of this story).

30. See *id.* at 872 & n.104 (providing some quite revealing statements by various justices highlighting the racist origins of the territorial incorporation doctrine).

31. See *id.* at 871-74 (providing an historical overview of several important Supreme Court cases resulting in the articulation of the territorial incorporation doctrine).

32. See *id.* at 874.

In the end, then, how much do we learn about the nature of federal power in 1791 by studying the text of the Bill of Rights? As the Federalists might have said, "not very much." Our primary text remains the Constitution of 1789, and our primary methodology remains a careful reading of the various power grants, including, and especially, the general-but-not-unlimited grants of power in the Sweeping Clause, the Article II and Article III Vesting Clauses, and perhaps the District and Territories Clauses. The Bill of Rights, of course, may serve to draw our attention to some of the most important limitations on the enumerated powers; after all, that is what an exclamation point is supposed to do. But the Bill of Rights is not an exhaustive compendium of the relevant limitations built into the enumerated powers. That is the clear teaching of the Ninth Amendment.

There may, of course, be ways in which the text of the Bill of Rights functions as more than a piece of punctuation. The very articulation of a norm can often shape or change it. For example, it is clear that the Sweeping Clause does not permit Congress to abolish civil juries. One can argue, however, that the articulation of that norm in the Seventh Amendment, which includes a twenty dollar amount-in-controversy floor,³³ subtly alters the character of the relevant right. Would there have been a small-case exception to the civil jury in the absence of the Seventh Amendment? If not, then one could invoke the Ninth Amendment to argue that the Seventh Amendment's twenty dollar floor is not controlling and that a civil jury is required in all federal cases. If there had been a small-case exception recognized in 1789, then perhaps the language of the Seventh Amendment serves to crystallize that exception in a form that might not otherwise have gained expression. This kind of legal role for the Bill of Rights is a very small one, however. The fact remains that a close textual parsing of the Bill of Rights is no substitute for a careful study of the enumerated powers and their corresponding background assumptions.

33. See U.S. CONST. amend. VII.

II. DECONSTRUCTION

Many of Professor Amar's most important claims concern the Fourteenth Amendment incorporation debate, involving the extent to which provisions in the Bill of Rights, or the original Constitution, bind the states by virtue of Section 1 of the Fourteenth Amendment. Professor Amar rejects the nonincorporation model (exemplified by Raoul Berger), the total incorporation model (exemplified by Hugo Black), and the partial incorporation model (exemplified by William Brennan), in favor of what Professor Amar calls "refined incorporation."³⁴ The vehicle for incorporation, argues Professor Amar, is the Privileges or Immunities Clause³⁵ of the Fourteenth Amendment. The relevant interpretative question is: Which rights, contained in the Bill of Rights or otherwise, are privileges or immunities of citizens of the United States, which the Fourteenth Amendment forbids the states to abridge? Professor Amar's answer is that whatever portions of the Bill of Rights reflect personal rights rather than structural provisions (the Establishment Clause and the Civil Jury Clause being the prime examples of structural provisions) are "incorporated" against the states after 1868.³⁶

I am not a Fourteenth Amendment scholar, but I am inclined to agree with the main thrust of Professor Amar's argument.³⁷ Indeed, Professor Amar's argument gains strength from reflection on the problem of territorial governance and the effect of ratification of the Bill of Rights on federal power over the territories. As is the case with the effect of the Bill of Rights on the national government, however, one needs to be very clear about the text that is actually being construed.

The operative language of the Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."³⁸ This language was enacted in 1868, and its meaning must be determined by reference to 1868 understand-

34. See AMAR, *supra* note 1, at 140, 215-30.

35. U.S. CONST. amend XIV, § 1.

36. See AMAR, *supra* note 1, at 221-23.

37. As noted at the outset of this essay, however, there are some serious questions about the proper meaning of "abridge."

38. U.S. CONST. amend. XIV, § 1.

ings and interpretative norms. Professor Amar constructs a powerful case for the proposition that an 1868 audience would have understood the Bill of Rights to be an important source of information concerning the “privileges or immunities of citizens of the United States” that are the subject of this Clause. This should not obscure the fact, however, that we are construing the words “privileges or immunities of citizens of the United States” rather than the words of the first eight amendments to the Constitution. As Professor Amar ably demonstrates, the 1868 understanding of various rights in 1868 was often different, if only subtly, than in 1791.³⁹ As far as the Fourteenth Amendment is concerned, the 1868 understanding would control. Instead of a close parsing of the text of the Bill of Rights, what is needed is a more general understanding of the kind of rights that an 1868 audience would have understood to be “privileges or immunities.” That understanding might or might not track the precise language of the Bill of Rights, and it might or might not track the precise scope of those rights as they operated against the federal government, but in either case any identity would be contingent.

This story, too, is familiar to Professor Amar’s readers; in fact, it is precisely Professor Amar’s story. The centrality of the “privileges or immunities” language and the need for sensitivity to the differences between 1791 and 1868 are two of his most important themes. Indeed, Professor Amar fully recognizes that “the very metaphor of incorporation may mislead.”⁴⁰ But in that case, Professor Amar, and the rest of us, ought to drop the incorporation metaphor altogether. It directs our attention to the language of the Bill of Rights instead of to the language of the Privileges or Immunities Clause. It makes it more difficult for us to envision rights applying to the states that do not appear in the Bill of Rights,⁴¹ and it induces us—perhaps quite wrongly—to apply precisely the same Bill of Rights rules to the states and the federal government. Do principles of individual rights have the same application to a government of limited and enumerated powers as they do to a government

39. See AMAR, *supra* note 1, at 163-74.

40. *Id.* at 222.

41. Professor Amar’s reluctance to discuss what kinds of enumerated rights might constitute “privileges or immunities” may unwittingly contribute to confusion here.

that is not so limited by the Federal Constitution? It may turn out, after careful analysis, that there is in fact no difference between the proper scope of many of the limitations built into the federal scheme of enumerated powers and many of the “privileges or immunities of citizens of the United States” protected by the Fourteenth Amendment. But that result needs to be the conclusion of an extended argument, not an assumption built into the structure of the law by an inapt metaphor.

The principles reflected in, or declared by, the Bill of Rights are surely among the primary determinants of the meaning of the phrase “privileges or immunities.” Our attention, however, should be directed to those principles as they were understood in 1868 rather than to the precise texts by which those principles were expressed in 1791. Whether or not one agrees with every detail of Professor Amar’s argument concerning the Privileges or Immunities Clause, he is pointing us in the right direction. But I fear that the metaphor of incorporation will continue to mislead us, even once Professor Amar’s analysis has demonstrated that the metaphor serves no useful purpose.

III. AFTERWORD

Whether we are talking about the powers of the national government or the state governments, the precise texts of the first eight amendments to the Constitution tell us some, but far from all, of what we need to know. In 1791, those texts were primarily exclamation points that highlighted preexisting limitations on the enumerated powers of the national government. In 1868, they might well have become something more than mere punctuation marks, but that something, as reflected in the Fourteenth Amendment, was both more and less than the sum of the relevant text. Professor Amar has brilliantly pointed the way to a sound understanding of many of the most difficult and contentious issues in constitutional theory. But to make the most of his roadmap, we need to look *through* the Bill of Rights more than we need to look *at* it.

