AKHIL AMAR AND THE ESTABLISHMENT CLAUSE

*Andrew Koppelman**

Does Akhil Amar's *The Bill of Rights: Creation and Reconstruction* ("*The Bill of Rights*") say anything about what the law should be today? The answer is not clear. The book is a study of the original meaning of the Bill of Rights and the transformation of that meaning by the Fourteenth Amendment.[1] Its project is archaeological rather than prescriptive. It focuses on what the Constitution meant in 1791 and in 1866, not what it means now. Amar acknowledges that he has "merely set the scene"[2] for an investigation into what impact twentieth-century (textual and other) developments have had on Constitutional Law. Steven Calabresi has thus concluded that *The Bill of Rights* "has few obvious immediate doctrinal implications."[3]

Yet the book implicitly criticizes existing doctrine as based on an inadequate understanding of the Bill. It attacks the intellectual foundations of the doctrine that now prevails in the Supreme Court, and calls for a radical reconstruction of those foundations. It would be surprising if such a radical reshaping of the base had no effect on the superstructure.

Amar is sensitive to the radical potential of his investigations, and so, in Chapter 11 of the book (entitled "Reconstructing Rights"), he attempts to show that, upon the more solid

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* Assistant Professor of Law and Political Science, Northwestern University. Akhil Amar taught me constitutional law when I was a first year student (and he was a first year professor) at Yale Law School in 1985. He has been characteristically generous in helping me develop the arguments laid out herein. This essay is affectionately dedicated to him.

1. Space does not allow me to enumerate the book's virtues here, but I incorporate by reference and join in Steven Calabresi's lengthy encomium in *We are all Federalists, We are all Republicans: Holism, Synthesis, and the Fourteenth Amendment*, 88 GEO. L.J. (forthcoming 1999) (reviewing AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998)).

2. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 299 (1998).

3. Calabresi, *supra* note 1 (manuscript at 23, on file with author).

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foundation he has laid, one may erect an edifice that looks quite a lot like the law that currently exists. Amar reassures us that his account would not entail any significant dilution of our liberties: "I have told a tale that, at the end of the day, ends up supporting most of today's precedent about the Bill of Rights."[4] While most of the book eschews evaluation of present doctrine, this is not true of the concluding sentence: "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."[5]

This comforting vision recalls T.S. Eliot's famous lines:

> We shall not cease from exploration
> And the end of all our exploring
> Will be to arrive where we started
> And know the place for the first time.[6]

However, the conclusions of Amar's chapter on reconstructing rights are not tightly bound to the rest of the book. "As with any general framework," he acknowledges, "my model might yield different results if worked by another hand."[7]

It appears to me that, in some important respects, his model has implications that are subversive rather than approving of existing doctrine. Those implications would carry the law in directions that neither Amar nor I find attractive. As one looks at these implications closely, the literary model that suggests itself is not Eliot's newly self-aware homecoming, but Ray Bradbury's tale of travelers who think that they have been reunited with their families only to discover too late that they are on Mars, and that Mars isn't a nice place.[8]

My worry about Amar's theory is that, while it promises to show us a new and more secure path home, it may instead, if accepted without modification, lead us to spend the rest of our lives on Mars.

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4. AMAR, *supra* note 2, at 307.
5. *Id.*
6. T.S. ELIOT, *Little Gidding*, *in* FOUR QUARTETS (1942).
7. AMAR, *supra* note 2, at 231.
8. *See* RAY BRADBURY, THE MARTIAN CHRONICLES 32-48 (1951).

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I begin at home, with where the law is now. I will focus on the Establishment Clause, because that is where Amar's theory seems to me to have the most mischievous implications. The Supreme Court has held much of the Bill of Rights to be a constraint upon the states, pursuant to the Fourteenth Amendment. Working from that premise, more than half a century ago the Court, in *Everson v. Board of Education*, announced the following truisms of contemporary constitutional law:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever from they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."[9]

Most of what the Supreme Court said in 1947 in *Everson* has become an unquestioned part of constitutional doctrine today—most, but not all; some of the language I have just quoted has produced controversial results. For example, the Court (unpersuasively) interpreted the prohibition on laws that "aid all religions" to mean that government must discriminate *against* religion when it provides generally available programs of assistance, for example, to private schools.[10] But these results cannot fairly be blamed on *Everson*, which *upheld* public funding of transportation of students to both public and parochial schools.[11] The Court also attempted, for some decades, to

9. Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947) (citations omitted).

10. *See* Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989, 991 (1991).

11. *See Everson*, 330 U.S. at 18.

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derive a rule of law from Jefferson's wall metaphor, but this attempt has now been largely abandoned.[12] These, however, are details. Even those who are least sympathetic to separationism have not been inclined to question most of the rules laid down by the Court in *Everson*.[13]

The Bill of Rights has only a few pages that deal with the establishment question. Those pages are, however, radical in their implications—far more radical than even Amar recognizes.

For many years, interpreters of the U.S. Constitution have debated whether, and to what extent, the guarantees of the Bill of Rights constrain state governments. Those guarantees originally only applied to the federal government, but after the Civil War, the question arose whether the Fourteenth Amendment, which was expressly directed against the states, applied the Bill of Rights to state governments.

For some decades, the Court was split between those, such as Hugo Black, who urged "total" incorporation, and those, such as William Brennan, who urged "selective" incorporation of only those rights which were "fundamental."[14] (*Everson* was the de-

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12. *See generally* Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230 (1994).

13. For instance, Justice Kennedy, who for some time wanted to reinterpret the Establishment Clause so that it would only prohibit coercion, nonetheless thought that some symbolic state action went too far. *See* County of Allegheny v. ACLU, 492 U.S. 573, 661 (1989) (Kennedy, J., concurring in part and dissenting in part). In concurring with the judgment of the Court in *County of Allegheny v. ACLU*, Kennedy explained:

> Symbolic recognition or accommodation of religious faith may violate the Clause in an extreme case. I doubt not, for example, that the Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall. This is not because government speech about religion is per se suspect, as the majority would have it, but because such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion.

Id. (footnote omitted).

14. There have also been other views that commanded the support of some Supreme Court justices. Some justices supported incorporation of the entire Bill of Rights plus some other "fundamental" rights not listed there; some thought that the Fourteenth Amendment included restrictions very much like, but not identical with, those contained in some clauses of the Bill of Rights. Another possibility is "no incorporation"—that the rights do not apply against the states at all—but this position has little support on the Court. *See* WALTER F. MURPHY ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION 135 (2d ed. 1995).

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cision that incorporated the Establishment Clause into the Fourteenth Amendment. The majority opinion was written by Black.) Ultimately, Brennan prevailed, though he reached almost all of the results sought by Black. Today, nearly every right enumerated in the first eight amendments applies to the states.[15] All of this was settled in the Supreme Court by the early 1970s, but scholars kept debating the incorporation question.

Amar's *The Bill of Rights* offers an original and distinctive approach to this debate, which he calls "refined incorporation." By a careful exploration of the debates leading up to the framing of the Fourteenth Amendment, as well as a careful parsing of its text, he concludes that the personal rights enumerated in the Bill of Rights are in fact protected against state intrusion. But, as against Black's view, he argues that not all of the provisions of the Bill protect personal rights. The right question to ask, with respect to any particular provision, is "whether the provision guarantees a privilege or immunity of *individual citizens* rather than a right of *states* or the *public* at large."[16]

To support this claim, Amar shows how the Bill of Rights, as originally understood by its Framers in 1791, was much more concerned with collective and public rights than with individual and private ones. The primary purpose of the Bill was to guarantee the rights of the electorate against overbearing and corrupt representatives. It "focused centrally on empowering the people collectively against government agents following their own agenda."[17] The Framers of the Fourteenth Amendment in the 1860s, on the other hand, had a far more individualistic view of rights, and their amendment "focused on protecting minorities against even responsive, representative, majoritarian government."[18] And it was this conception of rights, as the rights of individuals, that they incorporated into the Fourteenth Amendment. This two-step account of the antecedents of incorporation implies a logical limit on incorporation. Some of the

15. The only rights that the Court has not incorporated are the right to keep and bear arms, the right against quartering soldiers, and the rights to grand and civil juries.

16. AMAR, *supra* note 2, at xiv.

17. *Id.* at 215.

18. *Id.*

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rights in the original 1791 text were not, and could not be, individual rights, because they were by nature collective. It is these rights that should not be applied against the states, because it makes no sense to so apply them.

What happens to the *Everson* rules under this analysis? Amar concludes that the Establishment Clause of the First Amendment is one of the provisions that is not incorporable against the states. The argument is simple: As originally written, this Clause "is not antiestablishment but pro-states' rights; it is agnostic on the substantive issue of establishment versus nonestablishment and simply calls for the issue to be decided locally."[19] There is simply no way for this provision to be mechanically incorporated against localities, which logically must take some position on establishments, either having them or not having them.

This objection to incorporation of the Establishment Clause is not original with Amar; it has been made before by others, though Amar's historical scholarship provides it with added support.[20] The value that Amar has added to it is twofold. The first, already noted, is that he embeds the point in a more general, and extremely original, theoretical approach to the incorporation problem. The second is that, unlike his predecessors, he is not content to allow state establishments. He thinks that the Fourteenth Amendment does prevent establishment, though not via the straightforward route of incorporation. Rather, state establishments would violate "the animating Fourteenth Amendment ideals of liberty and equality."[21]

Here is how Amar would reconstruct the constitutional doctrine. He thinks that any principles of religious liberty that are not derivable from the Free Exercise Clause can nonetheless be inferred from "the equal-protection clause (which frowns on state laws that unjustifiably single out some folks for special privileges and relegate others to second-class status)."[22] Thus,

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19. *Id.* at 34.

20. *See* STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 17-34 (1995); William C. Porth & Robert P. George, *Trimming the Ivy: A Bicentennial Re-Examination of the Establishment Clause*, 90 W. VA. L. REV. 109, 133-40 (1987).

21. AMAR, *supra* note 2, at 254.

22. *Id.* at 254.

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for example, a noncoercive establishment, such as "a simple state declaration on a state seal proclaiming Utah 'the Mormon State,'" would be impermissible because it violates "norms of equal rights and privileges."[23]

To substantiate this claim, Amar offers the following analogy:

> Surely Alabama could not adopt a state motto proclaiming itself "the White Supremacy State"; such a motto would offend basic principles of equal citizenship and equal protection. And so a law that proclaimed Utah a Mormon state should be suspect whether we call this a violation of [] establishment principles, free-exercise principles, equal-protection principles, equal-citizenship principles, or religious-liberty principles. Once we remember that we are not incorporating clauses mechanically but reconstructing rights, we reach the unsurprising conclusion that our basic touchstones should be the animating Fourteenth Amendment ideals of liberty and equality.[24]

At the end of our journey, we have returned home, and know the place for the first time. We can now see, according to Amar, that the Court has gotten it right for the wrong reasons. Once the foundations are cleared up, our liberties will be more secure than they were before because their intellectual foundations will be less vulnerable to criticism.

It appears to me, however, that Amar's theory does not lead us where he thinks it leads, and that if we follow him, we will end up quite a long way from home. Amar's "Mormon State" analogy, in the discussion just quoted, does not work. The hypothetical Utah law is not offensive to *equality* principles in the same way as the hypothetical Alabama law. There is a problem with the Utah law, but it is not an equality problem.

The Alabama law declares, in essence, that one subset of its citizens is intrinsically, congenitally inferior to others—less worthy of concern and respect, their fates mattering less than the fates of whites. It partakes of the old idea, closely associat-

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23. *Id.* at 252.

24. *Id.* at 254 (footnote omitted). The omission from this quote signified by the brackets is the word "the," which Amar advises me is a typographical error that will be corrected in future prints of the book.

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ed with slavery, that blacks were "beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect . . . ."[25] It is thus inconsistent with egalitarian ideals that are at the root of representative democracy—the idea that everyone's vote counts the same, and that the government owes each citizen equal concern and respect.[26]

It would be unfair to describe the Utah law in this way. It does not presuppose that Mormons are intrinsically superior human beings; rather, it announces the value of a way of life that is, in principle, available to anyone.[27] Even if the law is understood to be a proselytizing law, which seeks to convert everyone to Mormonism, it does not offend against equality.[28] It does assert the existence of a certain sort of religious truth, but

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25. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857).

26. On the foundational importance of these ideals, see Andrew Koppelman, Romer v. Evans *and Invidious Intent*, 6 WM. & MARY BILL RTS. J. 89, 101-03 (1997) [hereinafter Koppelman, *Invidious Intent*], and ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 13-31 (1996).

27. One might challenge this point on originalist grounds. John Harrison suggests that the Framers of the Fourteenth Amendment regarded discrimination on the basis of religion as similar to racial discrimination. *See* John Harrison, *Reconstructing the Privileges and Immunities Clause*, 101 YALE L.J. 1385, 1461 (1992). On this basis, one could perhaps argue that even if it is an error to think that equality requires disestablishment of religion, this error was held by the Framers and so should be understood to be a rule laid down by the Amendment. Even if one accepted this variety of originalism, the historical claim on which it is based would require a lot more documentation than Harrison provides. He offers only two snippets from Congressional debates and both postdate the ratification of the Fourteenth Amendment. *See id.*

28. Amar has interpreted the Equal Protection Clause as analogous to the prohibition against ex post facto laws:

> Penal laws must punish persons, not for doing something that only later became legally wrong, but for doing something that was legally wrong when they did it. Such laws must be *prospective*, in that they announce a standard that will be enforced, thereby giving potential miscreants the opportunity to mend their ways. But many Jim Crow laws were designed to stigmatize blacks simply for who they were, which was certainly not something they could change.

Akhil Reed Amar, *Constitutional Rights in a Federal System: Rethinking Incorporation and Reverse Incorporation*, *in* BENCHMARKS: GREAT CONSTITUTIONAL CONTROVERSIES IN THE SUPREME COURT 71, 80 (Terry Eastland ed., 1995). But the hypothetical Utah law does not fit this description. I am not a Mormon, but I am sure that, if I decided tomorrow to convert to Mormonism, the Mormons would welcome me with open arms.

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that truth implies nothing about the relative worth of different citizens.[29]

There are, of course, objections to the Utah law, resting on the standard arguments for nonestablishment. One can say that such laws risk severe and politically destructive religious conflict. One can say that Mormonism itself will be corrupted if it becomes too cozy with political authorities. One can say that the law is insufficiently respectful of the conscientious convictions of citizens who are not Mormons. One can say that the law throws the state's weight on one side of a theological controversy in which it has no particular expertise and in which its intervention is unlikely to accomplish any good.

But none of these objections have anything to do with equality. You can disdain my beliefs and actions without necessarily

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29. Amar's discussion cites with approval Ira Lupu's argument that equality principles underlie nonestablishment. *See* AMAR, *supra* note 2, at 385 n.95 (citing Ira C. Lupu, *Keeping the Faith: Religion, Equality, and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739, 743 (1986)). Lupu argues in the cited passage that "[t]he exclusionary quality of a state religion would tend to create and reinforce the existence of" groups that are unusually vulnerable to prejudiced government action. Lupu, *supra*, at 743. He develops the point more fully elsewhere in the article:

> The most direct and obvious vice that would arise from the establishment of a national church would be the loss of equal liberty for other religious groups trying to attract and maintain adherents. A religious establishment supported by government appropriations would possess great competitive advantages over other churches. These advantages could include the security of material support, and the symbolic and emotional consequences that tend to flow from government endorsement and approval. An affirmative preference for one religious group would create and reinforce its dominance and would tend to inflict psychic as well as material injury on the adherents of the nonpreferred faiths.

Id. at 741-42. All of these would be bad results, but they are not the same kind of injury as that imposed by racial segregation. The inequality of groups, particularly groups defined by belief, is not the same as the inequality of persons, because the unequal valuation of beliefs is not logically inconsistent with the equal valuation of persons. The symbolic and emotional consequences that Lupu describes also ensue when government discriminates between astronomers and astrologers, but that discrimination does not violate the Equal Protection Clause.

To be fair to Lupu, he does not attempt to conflate equal protection and nonestablishment in the way that Amar does. Lupu does not need to, because his theory does not question the incorporation of the Establishment Clause into the Fourteenth Amendment. For an overview, see Ira C. Lupu, *To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 J. CONTEMP. LEGAL ISS. 357 (1996).

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disdaining me.[30] Equal citizenship was violated when the government maintained separate schools for whites and blacks,[31] but equal citizenship is not violated when the National Science Foundation provides funding for astronomers but not astrologers. (Unlike the segregation case, there is not even a pretense that the astrologers get separate but equal funding, but they still cannot state a constitutional claim.) In short, the equal protection principle that invalidates the Alabama law is not applicable to the Utah law.

The difficulty with any attempt to derive the Establishment Clause from other abstract norms is that the Establishment Clause is not an application of any larger abstract norm that can be defined without reference to the specific historical, political, and philosophical properties of religion. The Establishment Clause stands on its own base. And that means if you do away with it, you will find it hard to replace it with the doctrinal materials that are left over.

The upshot is that, if Amar's theory is accepted (and if we discard his unpersuasive attempt to defend the status quo, an attempt which is peripheral to his theory and which takes up only a few pages of his book), the present Establishment Clause constraints on the states must be abandoned.[32]

There are always two ways to resolve any inconsistency. Earlier writers who argued against incorporation of the Establishment Clause were willing to tolerate a good deal more sponsorship of religion than Amar is prepared to countenance, though, revealingly, none of them appear to be enthusiastic about state-sponsored establishments.[33] If Amar's theory, with

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30. I have, on this basis, disagreed with Professor Amar's interpretation of another Supreme Court decision, *Romer v. Evans*, 517 U.S. 620 (1996). *Compare* Akhil Reed Amar, *Attainder and Amendment 2:* Romer's *Rightness*, 95 MICH. L. REV. 203 (1996), *with* Koppelman, *Invidious Intent*, *supra* note 26, at 119-21.

31. Amar has argued this point in recent defenses of the Court's decision in *Bolling v. Sharpe*, 347 U.S. 497 (1954). *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 766-73 (1999); Amar, *supra* note 28, at 79-84.

32. I pass over without comment Amar's earlier attempt to defend one of the most important establishment holdings, the prohibition on state-sponsored prayers in public schools. *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1160 n.140 (1991). The argument there does not appear in the book, and Professor Amar advises me that he has abandoned it.

33. Porth and George would like to forbid religious establishments, although they

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the corrections noted above, dictates that establishment clause constraints upon the states be abandoned, then perhaps this is bad news for those constraints.

But it may instead be bad news for Amar's theory, at least if that theory is relied upon as a basis for drawing conclusions about present constitutional law. John Rawls noted long ago that when we argue about theories of justification, we seek "reflective equilibrium," in which we try to bring our principles into line with our considered judgments about justice.[34] If we seek a constitutional theory that preserves what is valuable in existing law, it is probably a mistake to start with principles that focus on text and original intent to the exclusion of precedent and prudence.

Amar is an admirer of the constitutional theories of Philip Bobbitt. So am I. Amar has written that Bobbitt's work was "absolutely formative in my own thinking" about refined incorporation.[35] Yet Bobbitt's universe of constitutional arguments is broader than that of *The Bill of Rights*. When Amar describes his debt to Bobbitt, he describes Bobbitt's insights into the interplay of text, history, and structure; but Bobbitt's taxonomy of constitutional arguments also recognizes that there is a place in constitutional law for doctrine, for ethical argument, and even for ordinary prudence.[36] This second half of Bobbitt's story is missing from Amar's book. It is because this part of the story is missing that I am, in the end, uncertain whether

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think that the present U.S. Constitution does not do this. *See* Porth & George, *supra* note 20, at 164. Smith is more willing to give the states broad freedom from judicial intervention, so long as there is not some concrete harm to the religious freedom of some identifiable person or group of persons. But he also thinks that non-establishment is a good thing, and that part of the argument for getting the Court out of this area is that its involvement is unnecessary: official state establishments were terminated, and prosecutions for blasphemy, heresy, and witchcraft abandoned, without the Court's help. *See* Steven D. Smith, *Unprincipled Religious Freedom*, 7 J. CONTEMP. LEGAL ISS. 497, 503 (1996).

34. *See* JOHN RAWLS, A THEORY OF JUSTICE 19-20 (1971).

35. Akhil Reed Amar, *In Praise of Bobbitt*, 72 TEX. L. REV. 1703, 1706 (1994).

36. *See* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982). For a brief summary, see PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 11-22 (1991). Amar has acknowledged elsewhere that considerations of this sort may sometimes override even the plain meaning of the Constitution's text. *See* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 153 (1997).

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Amar's theory, if fully stated, has the corrosive implications that I have just described.

The question that this book never addresses is how much the theory of incorporation really matters. The selective-incorporation approach that the Court ultimately adopted is intellectually unsatisfying. But the law is settled; the decisions about which parts of the Bill of Rights to incorporate were all made by the early 1970s.[37] None of these decisions has even come close to being overruled, and even the most aggressive originalists are not inclined to challenge them.[38]

A general problem with originalism, textualism, or any theory that abstracts from modern constitutional developments since the Civil War is that it may produce prescriptions that radically disrupt the status quo with no practical payoff other than greater fidelity to the theory.[39] Amar's theory, if taken as a complete theory of incorporation, would give no weight to the fact that, in some areas, the law is well settled and nobody is particularly anxious to change it. It would threaten to throw the law into chaos for no reason other than that that is what the theory itself dictates. But, as I have said, it is unlikely that Amar himself would read his theory this way. When his arguments have implied radical prescriptions, he has not been at all shy about making those implications clear.[40] There is no such clarion call in *The Bill of Rights*. Moreover, he acknowledges that he is constrained by the textual parameters of his subject matter: "I aim only to set the scene for future scholarship to pick up where I have left off."[41] So, in the end, I am not sure

37. For a catalogue of the relevant precedents, see MURPHY ET AL., *supra* note 14, at 133-34.

38. Thus, for example, Robert Bork has conceded that "as a matter of judicial practice the issue [of incorporation] is settled," *see* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 94 (1990), and Antonin Scalia has written that incorporation is "an extension I accept because it is both long established and narrowly limited." Albright v. Oliver, 510 U.S. 266, 275 (1994) (Scalia, J., concurring). Both perspectives are cited in David Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 922 n.104.

39. *See* Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J. L. & PUB. POL'Y 509 (1996).

40. *See generally, e.g.*, AMAR, *supra* note 36 (proposing a radical reshaping of an entire field of the law).

41. AMAR, *supra* note 2, at 300.

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whether the present essay is a critique of *The Bill of Rights* or merely of the implications that some readers, but not the author himself, might draw from the argument.[42]

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42. Professor Amar, in his response to this essay, attempts to show that even symbolic endorsement of religion violates the Free Exercise Clause. His argument depends on asserting the equivalence of the following three laws: (1) a one-penny tax on all nonCongregationalists; (2) the same tax, imposed on everyone, with a rebate to Congregationalists; and (3) a one-penny grant to every Congregationalist.

I am not persuaded of the equivalence, and there are analogous areas of constitutional law in which it is clear that the cases are not equivalent. The first law clearly and intentionally burdens some people for their religious exercise, in the same way that a one-penny tax on any publication advocating astrology would impermissibly burden the free speech of astrologers. But the third doesn't seem to target nonCongregationalists for a burden, and so would seem to be permissible under free exercise principles for the same reason that a subsidy for astronomers does not violate the free speech rights of astrologers. The Free Speech Clause of the Constitution does not, as a general matter, prevent the government from speaking, or from subsidizing speech that it likes.

The second law is a puzzle, resembling that presented to the Supreme Court in *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994). In *Healy*, Massachusettts taxed all milk sales in the state, and distributed the proceeds as a subsidy to Massachusetts milk producers. The Court invalidated the scheme because it was the functional equivalent of a tariff on out-of-state milk which was prohibited under the dormant Commerce Clause doctrine. *See id.* at 194-95. But there was a puzzle here: both a tax and a subsidy are, taken by themselves, permissible. Neither the Court nor the concurring and dissenting opinions suggested that nondiscrimminatory taxes or discriminatory subsidies were unconstitutional; it was the peculiar combination of them that was fatal. Similarly, even if Amar's second statute is unconstitutional, that does not settle the status of the third.

It is not clear, from Amar's brief discussion, how he would handle the problem presented by subsidies for certain kinds of speech, or the *Healy* problem. If he is going to insist on the constitutional equivalence of taxes and subsidies, then he would seem to be committed to the propositions that (1) states may not subsidize in-state producers and (2) neither states nor the federal government may pay for speech with which they agree. After reading the above sentences, Professor Amar has suggested that the law of nonpolitical speech and of the dormant Commerce Clause each have a different logic and shape than religion does, and so he is unpersuaded by the force of these analogies. We will surely continue this conversation in other fora.

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