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THE ROLE OF GOVERNMENT UNDER THE BILL OF RIGHTS

KATE STITH*

The conventional understanding of the Bill of Rights, Professor Akhil Amar tells us, is that it protects minorities and individuals from majority tyranny.¹ Professor Amar has done a great service in presenting the case for an alternative vision of the Bill's dominant purpose, the protection of *majority* rights (or what Professor Amar sometimes calls *collective* rights—a term that is ambiguous, if not downright mischievous). The primary focus of the Bill of Rights, Professor Amar argues, was to protect the popular majority against a possibly unrepresentative and self-interested Congress.²

There is much in Professor Amar's paper that is brilliant and important. Nevertheless, I would like to mention three ways in which his account may share some of the confusions, and dangers, of the conventional understanding of the Bill of Rights. I will end by noting several instances where I think Professor Amar may have been too quick to trumpet a populist motif in these constitutional provisions. Indeed, I believe there is a third theme in the Bill of Rights that neither the traditional account nor Professor Amar's account sufficiently credits.

I.

Professor Amar's account, like the conventional understanding, seems to lump together "individual rights" and "minority rights." Thus Professor Amar, like the others, places "majority rights" and "individual rights" in opposition.³ Individual rights, however, do not always, or even much of the time, stand in opposition to the sentiment of the majority. The essence of

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1. Akhil R. Amar, *Some Comments on "The Bill of Rights as a Constitution,"* 15 HARV. J.L. & PUB. POL'Y 99, 100 (1992) [hereinafter Amar, *Comments*]; see also Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1132 (1991) [hereinafter Amar, *Bill of Rights*] (explaining the proposition in more detail).

2. See Amar, *Comments*, *supra* note 1, at 100-02; Amar, *Bill of Rights*, *supra* note 1, at 1132.

3. See Amar, *Comments*, *supra* note 1, at 100. See generally RONALD D. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW §§ 14.1-14.5 (1986 & Supp. 1991).

an individual right is precisely that: It attaches whether the individual happens to be in the minority *or* in the majority.

The great danger of thinking of individual rights as synonymous with minority rights is that we are apt to abjure any reliance on democratic institutions to secure those rights. We will assume that we can vindicate them only by calling upon, say, the federal courts. We work ourselves into the wrongheaded notion that when a majority acts, through legislation or otherwise, it is almost invariably acting in opposition to individual liberties. But that is not so. Many threats to individual liberties come from outside of the legislature—indeed, from outside *all* agencies of government. Moreover, these threats may require legislative redress. We do well to recall that the Bill of Rights left intact the ability of shifting popular majorities to act—through the criminal law, for instance—to avoid tyranny by the few over the many.⁴

II.

A second and related concern I have about Professor Amar's account, among others, is the repeated invocation of the idea of "collective" rights.⁵ How, exactly, are so-called "collective" rights different from individual rights held by everyone?

A danger of labeling a constitutional right as a "collective" right, rather than an individual right, is that particular individuals may then be denied the exercise of that right on the ground that it is being exercised "collectively" by appropriate surrogates. For instance, the Supreme Court has in the last decade held that under the First Amendment⁶ there is a public right of access to criminal trials and to certain pre-trial proceedings, even where the defendant would waive his separate Sixth Amendment right⁷ to a public trial.⁸ Is this First Amendment

4. For example, enactment and enforcement of laws against theft, burglary, and tax evasion promote the individual liberty of the great majority of citizens.

5. See Amar, *Comments*, *supra* note 1, at 100-02; Amar, *Bill of Rights*, *supra* note 1, at 1152, 1164, 1175, 1200. *But see* Amar, *Comments*, *supra* note 1, at 110 (rebuttal).

6. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

7. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .").

8. Compare *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) and *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980) (finding a First Amendment right of access to criminal proceedings) with *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979) (holding that a defendant may waive the Sixth Amendment right to public trial).

right of access an individual right, or is it a “collective” right? The modern, organized media has on occasion argued that this right of access is a collective right, and that the press plays the role of a “mediating institution” exercising that right on behalf of all the people. If, therefore, there is limited space in a courtroom, the media should have first “dibs” at the seats.⁹

On the other hand, if this First Amendment right is truly an individual right, as I would argue, then it is held by *all persons*, and the limited seats in a courtroom should be distributed on some basis that treats individual claimants equally (for example, a lottery system or a first-come, first-served system). Although I quite agree with Judge Winter that the First Amendment is at the core of our liberties,¹⁰ I believe there is a danger in placing the organized press above the people in exercising that right.

Another consequence of playing down the individual rights motif of the Bill of Rights, in favor of “collective” rights, is well illustrated by the Fourth Amendment exclusionary rule.¹¹ Professor Amar, like Justice White before him,¹² has cogently explained that the touchstone of the Fourth Amendment is not the particular requirement that warrants be issued only on probable cause, but the broader principle that all searches and seizures be “reasonable.”¹³ With this much I wholeheartedly agree. But Professor Amar also seems attracted to the idea that the use of the words “the people” in the Fourth Amendment—“the right of *the people* to be free from unreasonable searches and seizures”—suggests that the right set forth in the Fourth Amendment is a “collective” right.¹⁴

9. This argument has not been directly addressed by the Supreme Court. See *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 795-802 (1978) (Burger, C.J., concurring) (rejecting a special right of access for the institutional press).

10. See Ralph K. Winter, *Coexistence and Co-Dependence: Conservatism and Civil Liberties*, 15 HARV. J.L. & PUB. POL'Y 1, 3 (1992).

11. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 655-57 (1961); *Weeks v. United States*, 232 U.S. 383, 398 (1914). The Fourth Amendment provides that

[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

12. See *Payton v. New York*, 445 U.S. 573, 620 (1980) (White, J., dissenting); *Camara v. Municipal Court*, 387 U.S. 523, 535 (1967) (White, J.).

13. See Amar, *Comments*, *supra* note 1, at 105-06; Amar, *Bill of Rights*, *supra* note 1, at 1178-81.

14. See Amar, *Bill of Rights*, *supra* note 1, at 1175-78.

Although Professor Amar does not pursue the idea that the Fourth Amendment states a "collective" right,¹⁵ others have done so. Professor Anthony Amsterdam, for example, has asserted that the Fourth Amendment says "the people" and is therefore about government structure, not the individual rights of affected persons.¹⁶ From this premise, Professor Amsterdam and others have sought to justify application of the exclusionary rule to Fourth Amendment violations and to relax standing requirements for raising Fourth Amendment claims.¹⁷

If, however, as I would contend, the Fourth Amendment right is an individual right, then the exclusionary rule is much more difficult to justify. Exclusion of probative evidence obtained by the police does nothing to remedy the violation of the defendant's right not to have been searched. Rather, as Judge Henry Friendly explained in his lament about transforming the Bill of Rights into a code of criminal procedure,¹⁸ the exclusionary rule gives the defendant a windfall at the expense of public security and the integrity of criminal trials.

Rather than excluding whatever evidence may be traced to an illegal search and seizure, the defendant should be permitted to obtain appropriate redress in civil proceedings under state or federal law. Moreover, the victim of an illegal search who is not thereafter charged with a crime should likewise be able to obtain redress. Indeed, the true significance of the term "the people" in the Fourth Amendment is that, unlike the Fifth and Sixth Amendments, the Fourth Amendment affords protection to all individuals, not just to those suspected of crime. The exclusion of evidence may be quite disproportionate to the severity of any Fourth Amendment violation in a particular case and is hardly the most efficient deterrent against unreasonable searches of suspects and non-suspects alike.

III.

A third concern I have with the conventional account and with Professor Amar's account of the Bill of Rights is that both

15. See Amar, *Comments, supra* note 1, at 110.

16. See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 367-72 (1974).

17. See *id.*; Yale Kamisar, *The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More than an "Empty Blessing,"* 62 JUDICATURE 337 (1979).

18. See Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 951-53 (1965).

read the Bill as largely designed to *disable* government—in particular, to disable the Congress and the President, acting in his legislative capacity. In the conventional account, the legislative branch is disabled when it would otherwise trample on the rights of minorities or individuals.¹⁹ In Professor Amar's version, the legislative branch is disabled where it would be unrepresentative or "self-interested."²⁰

Both of these visions have much to commend them, but both of them fail to credit another important theme of the Bill of Rights. Much of the Bill of Rights is *not* directed toward disabling or incapacitating Congress and the President; rather, it aims to protect every citizen from the arbitrary actions of bureaucrats, enforcers, tax agents, and other administrators of federal law. Moreover, the Bill of Rights recognizes the significant role that the federal legislative branch must play in thus protecting individuals from unresponsive officialdom. The rights laid down in the Bill of Rights are, to a significant extent, dependent on law—"law" in the very specific sense in which it is defined in the original Constitution: a bill passed by both Houses of Congress, which is agreed to by the President or which achieves congressional override,²¹ and which is neither *ex post facto* nor a bill of attainder.²²

The Due Process Clause of the Fifth Amendment²³ is, of course, the greatest example of how the Bill of Rights relies on law—which means reliance on our republican, representative institutions. A law *may* deprive a person of life, liberty, or property, but *only* a law may do so—not government officials acting without or outside of the law. Less significantly, the Third Amendment recognized the importance of having Congress decide in advance, by law, the manner in which soldiers may be quartered in a time of war.²⁴ Similarly, under the Sixth Amendment, Congress and the President in his legislative capacity

19. See generally ROTUNDA ET AL., *supra* note 3, at §§ 14.1-14.5.

20. Amar, *Comments*, *supra* note 1, at 104; Amar, *Bill of Rights*, *supra* note 1, at 1145-46.

21. See U.S. CONST. art. I, § 7, cl. 2.

22. See U.S. CONST. art. I, § 9, cl. 3.

23. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . .").

24. U.S. CONST. amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.").

shall decide the districts for federal criminal jurisdiction.²⁵

Even the First Amendment can be seen as *enabling* Congress to do the bidding of the people.²⁶ As Professor Amar's account suggests, although he does not elaborate on this point, a petition by the people might well present the need for government *protection* to enhance the security of the people.²⁷ The people may petition the government for the purpose of action, not merely for the purpose of preventing it from acting.

James Madison certainly recognized this third idea, the need to permit government to act with due regard for the desires of the people, even as he recognized the danger of "overweening" majorities and the danger of "attenuated" representation.²⁸ As Madison stated in a 1788 letter to Thomas Jefferson, regarding the Bill of Rights (in a passage *not* quoted by Professor Amar):

It has been remarked that there is a tendency in all Governments to an augmentation of power at the expence [sic] of liberty. But the remark as usually understood does not appear to me well founded. Power when it has attained a certain degree of energy and independence goes on generally to further degrees. But when below that degree, the direct tendency is to further degrees of relaxation It is a melancholy reflection that liberty should be equally exposed to danger whether the Government have too much *or too little* power²⁹

The point I am making—that the Bill of Rights does *not* always seek to disable our republican institutions—is obviously related to the proposition I asserted at the outset: Protection of

25. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law").

26. The First and Seventh Amendments are the only amendments specifically directed at confining the federal legislature. The First Amendment states that "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. The Seventh Amendment provides that "[i]n Suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

27. See Amar, *Bill of Rights*, *supra* note 1, at 1156 & nn.120-23.

28. See *id.* at 1156.

29. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 THE PAPERS OF JAMES MADISON 295, 299 (Robert A. Rutland et al. eds., 1977) (emphasis added); see also *id.* at 298, quoted in Amar, *Bill of Rights*, *supra* note 1, at 1148 n.78 (quoting Madison for the proposition that invasion of private rights arises "from acts in which the Government is the mere instrument of the major number of the constituents.").

individual rights may also be protection of the rights of majorities. When a law enforcement agent engages in an unreasonable search of one's home, this action is government oppression, but it is not the oppression of an unrepresentative or self-interested Congress and President, as Professor Amar's model would suggest. Nor do most unreasonable searches represent the tyranny of a majority over an oppressed minority, as the conventional model would suggest. Rather, the source of the problem may simply be a government agent quite unresponsive *both* to elected officials and to popular sentiment.

IV.

Finally, I have some reservations about Professor Amar's suggestion that the grand jury presentment under the Fifth Amendment³⁰ and the petition under the First Amendment³¹ are great populist devices for exposing abuse by self-dealing representatives.³² To repeat: In the Bill of Rights there is *more* individual rights protection, *more* enablement of government, and *less* populism than Professor Amar suggests.

The notion of grand jurors as "populist protectors" is confused. Professor Amar has quoted James Wilson and cited the grand jury presentments protesting the 1816 Congressional pay raise as examples of the "populist" grand juries that the Framers envisaged.³³ Such popular protest, however, is not the role of the grand jury that is enshrined in the Bill of Rights. The Fifth Amendment secures a very different function for the grand jury: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury"³⁴ The Fifth Amendment thus refers to a specific type of presentment, not to the great variety of reports that grand juries from time to time may have presented. The presentment to which the Fifth Amendment refers, like the indictment to which it refers, was an accusation of criminal wrongdoing. The difference was that an indictment

30. See U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury").

31. See U.S. CONST. amend. I, *supra* note 6.

32. See Amar, *Bill of Rights*, *supra* note 1, at 1155-56, 1184.

33. See Amar, *Bill of Rights*, *supra* note 1, at 1184 n.235 (quoting James Wilson, *Lectures on Law: Of the Constituent Parts of Courts—Of Juries*, 2 THE WORKS OF JAMES WILSON 537 (Robert G. McCloskey ed., 1967)); *id.* at n.236.

34. U.S. CONST. amend. V.

was an accusation initiated by a prosecutor that the grand jury had endorsed as "true," whereas an accusatory presentment was made by the grand jury on its own knowledge of local events, without the benefit of a prosecutor.³⁵ Moreover, the grand jury was hardly composed of "the people," or even of "citizens." In some states, property requirements or other qualifications for grand jurors were higher than for petit jurors or voters.³⁶

In sum, the Fifth Amendment's grand jury provision affords a specific procedural protection to an individual accused of crime. It seems to me highly doubtful that the grand jury envisaged in the Fifth Amendment was ever ordained as a free-wheeling popular voice on public affairs, and even less likely that current law would countenance this species of political vigilantism.³⁷ In any event, even if these were important functions of the grand jury at one time, they were not the functions that the Framers of the Bill of Rights believed warranted constitutional protection.

Nor were "petitions" necessarily populist devices, although I agree with Professor Amar that neither were petitions always the work of lonely dissenters against an "overweening" majority.³⁸ Since the Middle Ages in England, the petition had been a traditional means of informing the legislature of local conditions that required attention.³⁹ This was true in the colonies as well. To take an example from one of the sources cited by Professor Amar: In the 1670s, certain Connecticut petitioners

35. See 4 WILLIAM BLACKSTONE, COMMENTARIES 301-302; 2 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 374-80 (photo. reprint, Arno Press 1972) (1796); RICHARD D. YOUNGER, THE PEOPLE'S PANEL 1-2 (1963).

36. See, e.g., 1 THE FIRST LAWS OF THE STATE OF DELAWARE 241-43 (photo. reprint, Michael Glazier, Inc. 1981) (1797) (directing that a sheriff select grand jurors from "most able, sufficient and substantial" landowners of county, while petit jurors need only to have been "most discreet and judicious" freeholders); OCTOBER 1777 MD. LAWS ch. 16 (Annapolis, Md., Frederick Green 1777), microformed on Early Am. Imprints, ser. 1, no. 15395 (Readex Microprint) (requiring that jurors be freemen "having a freehold of fifty acres of land . . . or property in [the] state above the value of three hundred pounds"; grand jurors also had to be "of the most wisdom and experience"); 1 SWIFT, *supra* note 35, at 69, 118-19, 124, 130 (requiring that grand jurors be elected by town meeting; grand jurors, together with selectmen and constables, directed to select "able and judicious" freeholders as petit jurors; jurors had to own real property assessed at 50 shillings, while suffrage also extended to men with real property assessed at 40 shillings or with 40 pence personal estate).

37. Cf. *In Re New Haven Grand Jury*, 604 F. Supp. 453, 459-60 (D. Conn. 1985) (doubting that "runaway" grand juries would be permissible under federal law).

38. See Amar, *Bill of Rights*, *supra* note 1, at 1156.

39. See Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 145, 151-55 (1986).

asked that roads be built for them to reach their meetinghouse on the Sabbath. This petition in turn was opposed by other petitioners who complained that road construction would destroy their pasture lands.⁴⁰

These competing petitions did not involve a dispute between “the people” and their agents, as Professor Amar’s notion of petitions suggests. These petitions represented neither more nor less than a dispute between competing interests of different people. Indeed, we may think of such petitions as having served a governmental function similar to that served by lobbying today; the people (assuming there are real people behind lobbyists) rarely speak in a single voice, and Congress must decide which of many conflicting voices it will heed.⁴¹

In sum, the “redress of grievances” sought by a First Amendment petition does not necessarily refer to a populist antagonism toward the Congress and President. It refers also to antagonisms among the people—antagonisms that the legislative branch, thanks to the Framers, is there to resolve.

40. *See id.* at 154 n.82.

41. Moreover, petitions for public legislation were closely connected with petitions asking the legislature to resolve private disputes. Colonial legislatures, like the British Parliament before them, regularly decided private disputes initiated by petition. Sometimes this jurisdiction was even formally adjudicative; until 1818, the Connecticut General Court (now the General Assembly) retained original jurisdiction in all equity cases where the amount in controversy exceeded 1500 pounds, and appellate jurisdiction in most other equity cases. *See id.* at 147; 1 SWIFT, *supra* note 35, at 73-80.

