

# Textualism and the Bill of Rights

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In my remarks today, I propose to reflect on the method and scope of my recent book on the Bill of Rights. In the course of these reflections, I hope to note some of the debts that I owe to scholars who have come before and to flag some of the opportunities that I foresee for scholars who will come after.

The tale I try to tell in my book is, in some important ways, textual. It takes as its subject the set of words—the text—that we call the Bill of Rights, namely, the first ten amendments and the interlocking Fourteenth Amendment designed to apply the Bill to the states. The text of the Bill shapes both the book's basic architecture and much of its internal analysis. Thus, the order of the chapters basically tracks the textual order of the amendments themselves (I-X, and then XIV); and within each chapter the specific words of the Bill oft loom large.

This textual emphasis surely limits my tale, but it also helps empower it. (The foul lines in baseball limit the field of play but also make the game possible.) As we consider various possible accounts of this amendment or that one, or of the Bill of Rights as a whole, we should be willing to measure these accounts against the text itself in order to see which ones best fit the precise words that eventually became the supreme law of the land. The status of the Bill as law reinforces the importance of textualism. Granted, lawyers and judges must often go beyond the letter of the law, but the text itself is an obvious starting point of legal analysis. Is it even possible to deduce the spirit of a law without looking at its letter?

A textual analysis of the Bill of Rights can also illuminate patterns and thus cast light on the true spirit of the law as a whole. Throughout my tale I try to show how various words in the original Constitution repeat themselves in the Bill of Rights; how various textual motifs recur within the first ten amendments; and how the Fourteenth Amendment's key sentence features remarkable and revealing textual cross-references to the original Constitution and Bill. An important aspect of our Constitution, I suggest, is its intratextuality.<sup>1</sup>

Another feature of our Bill of Rights might be termed its intertextuality—the illuminating ways in which it both builds on and deviates from the precise texts of such earlier landmarks of liberty as the English Bill of Rights, the Declaration of Independence, and various state constitutional declarations of rights. This, too, is a key part of my story.

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1 For an extended discussion of this theme in constitutional interpretation more generally, see Akhil Reed Amar, *Intratextualism*, 112 *HARV. L. REV.* (forthcoming 1999).

Thus far I have offered a few points on behalf of textualism that might appeal to lawyers. But mine is a book written not just for lawyers and judges but for ordinary citizens who care about our Constitution and our rights. And here, I think, lies perhaps the strongest reason for offering an account of the Bill of Rights that takes text seriously. The American people—outside courtrooms, outside law offices—confront, and lay claim to, the Bill of Rights as a text. Its grand phrases “the freedom of speech,” “the right to keep and bear arms,” “due process of law,” and so on—define a basic vocabulary of liberty for ordinary citizens. “We the People of the United States,” in whose name the Bill speaks and to whom it speaks, speak in the words of the Bill. James Madison and John Bingham would no doubt be pleased by this fact of modern life; both understood that a Bill that did not live in the hearts and minds of ordinary Americans would probably, in the long run, fail.

Had I set out to write a less textual, less constrained book about liberty in America—“these are a few of my favorite rights”—I must confess that I might have been tempted to avoid all mention of the right to keep and bear arms. (Today’s Justices and most of today’s constitutional scholars have apparently yielded to a similar temptation to keep mum about arms.) But in a textualist book about the first ten amendments, I was obliged to confront the stubborn text that stands between the words of Amendments I and III; and in a textualist book about the core privileges and immunities of national citizenship affirmed by the Fourteenth Amendment, I was constrained to consider how the Second Amendment’s text was reglossed by a later constitutional text. In the process, I was forced to confront the Second Amendment, a text that—in part because it *is* a text appearing in every American’s copy of the Bill of Rights—abides in the hearts of millions of ordinary citizens.

Textualism has helped shape not only what my book includes but also what it excludes. Perhaps the most troubling exclusion is this: the book gestures toward, but fails to offer a systematic account of, many of the liberty-bearing provisions of our Constitution that lie outside the Bill of Rights. The protection of habeas corpus and the bans on bills of attainder, *ex post facto* laws, and titles of nobility in Article I, Sections 9 and 10; the narrow definition of treason in Article III; the grand guarantee of republican government in Article IV; the prohibition of religious tests for public office in Article VI; the toweringly important abolition of slavery in the Thirteenth Amendment; the sweepingly inclusive voting amendments (the Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth)—all these and other important provisions receive little attention. In both ordinary language and legal doctrine, these provisions lie outside the text of the Bill of Rights and so I have pushed them off stage. My narrow spotlight on the first ten amendments and Section 1 of the Fourteenth Amendment has the practical virtues of (1) constraining authorial selectivity; (2) easing exposition and making the overall project less vast and more tractable; and (3) taking seriously both legal and ordinary understandings of the Bill as a coherent and self-contained entity. But my narrow focus has the theoretical vices of (1) obscuring the centrality of other liberty-bearing provisions; (2) unintentionally undercutting a central thesis of the book—the interconnections between the Bill and many of the other clauses, and among these other clauses themselves; and (3) encouraging read-

ers to think of words more than things—to organize their understanding around the Bill rather than around, say, the concept of “liberty.”

These are substantial vices, and they point the way for future scholars to press ahead on at least two fronts where I have fallen short. First, a great book remains to be written on what might be called the diaspora of rights—those scattered provisions before and after the Bill of Rights that could be viewed as a companion Bill of Rights in exile. Such a book, could well (though it need not) be textualist in ways similar to my own, but it would take different constitutional texts as its subject. Second, there is still room for a great book on rights organized around concepts rather than words—“liberty,” “equality,” “democracy,” “privacy,” and so forth. Such a book could well (though it need not) be textualist in its ultimate aspiration—to account for the words that are actually in our Constitution—but not necessarily in its organizational structure. The exposition, in other words, might be structured around concepts rather than clauses.

A conceptual book on “liberty” might well devote more space than I do to the idea of unenumerated rights. In both the Ninth Amendment and the Privileges or Immunities Clause, the written Constitution seems to gesture beyond itself, toward rights not textually specified in the document itself. But what, exactly, are those rights, and how to find them? In my book, I use (among other things) a couple of textual techniques—of intra- and intertextuality—to (partially) answer these questions. Surely, I suggest, the rights of the people in the Ninth Amendment should be read in connection with the Preamble’s proclamation (and enactment) of the right of “the People” to “ordain and establish . . . Constitution[s],” and in tandem with the Declaration of Independence’s affirmation (and enactment) of “the Right of the People to alter or abolish . . . Government.” Surely, I argue, judges confronting the open-ended language of the Fourteenth Amendment should consider the legal texts of other charters of liberty—Magna Charta, Petition of Right, the English Bill of Rights, state constitutions, and the like—as helpful sources. I do not mean to suggest that, methodologically, these intra- and intertextual techniques exhaust the repertoire of legitimate interpretive approaches to unenumerated rights or that, substantively, other kinds of unenumerated rights should be ruled out. But to have pursued fully all possible nontextual approaches to nontextual rights would be to have written a very different kind of book. My strategy, instead, has been to focus tightly on the enumerated rights; we need a good account of these rights before we can use open-ended language to interpolate between and extrapolate beyond these textual rights. Even if the unenumerated rights are not merely gap fillers and handmaidens of enumerated rights, at times they may play these roles;<sup>2</sup> hence the need for a close examination of the letter of enumerated rights so that we may properly vindicate their spirit with the open-ended clauses.

If rights can be unenumerated, is it possible to imagine entire constitutional amendments that are unwritten? Bruce Ackerman has powerfully argued that our Constitution today is largely the product of the interaction of three great constitutional moments—the Founding, the Reconstruction, and

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<sup>2</sup> See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* 87-88 (1980).

the New Deal.<sup>3</sup> Thus the need, on Ackerman's account, for constitutional interpretation that "synthesizes" the meanings of all three moments. For Ackerman, the incorporation of the Bill of Rights raises paradigmatic questions of "one-two" (that is, Founding-Reconstruction) synthesis; and much of my book is an effort to try to do the kind of detailed interpretive work that Ackerman at a more abstract level has called for. But what about Ackerman's third moment (the New Deal)? How is it to be integrated into the analysis?

I have not even tried to answer this question; I have merely set the scene. Given that Ackerman's third moment left no textual trace in the Constitution, its proper interpretation and synthesis might call for rather different interpretive techniques from the ones I have featured. And, I confess, I have not studied the history of the New Deal carefully enough to take a final position on Ackerman's arresting thesis about a third constitutional moment in the 1930s.

There is another, more textualist, account of twentieth-century constitutionalism that perhaps warrants consideration as a possible alternative to Ackerman's. One great strength of Ackerman's account is its recognition that Americans in the early twentieth century transformed the eighteenth- and nineteenth-century document that they inherited. One obvious weakness is that Ackerman's New Deal Amendment does not appear in the text of the Constitution in the same way that, say, the Bill of Rights and the Fourteenth Amendment do. Because of this, ordinary citizens and lawyers alike may have trouble accepting Ackerman's bold theory. But early twentieth-century Americans did amend the Constitution in a variety of "progressive" ways in the 1910s, with a series of textual amendments. All these amendments drained power from state governments—the Sixteenth by authorizing a national income tax, the Seventeenth by eliminating state legislative election of U.S. Senators, and the Nineteenth by mandating a federal rule for women's suffrage even in state elections.<sup>4</sup> The Sixteenth Amendment was also profoundly redistributive, authorizing a "progressive" income tax that would take more proportionately from the rich than the poor. Given that two of the central themes of Ackerman's nontextual New Deal Amendment—increased national power and the increased permissibility of economic redistribution—are also central themes of the textual Progressive-era amendments, is it truly necessary to postulate an unwritten amendment in the 1930s to account for a more nationalist and redistributive constitutional regime in the twentieth century?

I repeat that I do not seek to answer such questions; I aim only to set the scene for future scholarship to pick up where I have left off. And on the main topic of my book—"one-two" synthesis—my conclusions generally reinforce Ackerman's. Modern scholars and citizens attribute too much of

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<sup>3</sup> See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 40-41 (1991).

<sup>4</sup> I omit here the Eighteenth Amendment, enacting Prohibition, as this amendment was of course later repealed by the Twenty-first Amendment. Note also that, technically, the Nineteenth Amendment was not ratified until 1920, though it was proposed by Congress in 1919.

modern constitutionalism to the Founding (“one”), and not enough to the Reconstruction (“two”).

A final note on my particular brand of textualism. In pondering the words of our Bill of Rights, I have been powerfully influenced by certain theoretical claims advanced by my colleagues Bruce Ackerman, Jed Rubenfeld, and Jack Balkin. Beneath the words of a constitutional clause, Ackerman reminds us, there often lie years of embodied struggle by public-minded citizens working to transform their ideals into enduring higher law. In parsing the texts of the Bill of Rights and the Fourteenth Amendment, I have tried to locate these texts in the context of the broader struggles of the Revolutionary and Reconstruction generations, respectively. The story of the original Bill of Rights must flash back to critical events in the 1760s and 1770s, and the story of the Fourteenth Amendment cannot ignore the decades of bitter toil that ultimately bore much fruit in the harvest. Next, consider Rubenfeld’s elegant insight that at the core of many a constitutional text lies a paradigm case—a specific, historical evil that the drafting generation lived through and sought to destroy with a text that in effect proclaimed “never again!”<sup>5</sup> I have been on the lookout for possible paradigm cases at work—the prosecution of Zenger, the imperial assault on Massachusetts minutemen, the Boston Quartering Act, the searches and seizures in *Wilkes v. Wood*,<sup>6</sup> the vice-admiralty courts, the Hoar affair, the suppression of abolitionist speech, the disarming of freedmen, the dragnet searches of black homes, the Black Codes, and so on. Finally, Balkin has used semiotic theory to show that a text—like any other sign—can mean different things in different contexts.<sup>7</sup> Thus, the same set of words could mean one thing when proclaimed in 1789 and something slightly different when reglossed in 1866. In his work, Balkin tries to show how this fascinating phenomenon is possible in theory; in my book, I try to show how such a thing happened in fact.

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<sup>5</sup> See Jed Rubenfeld, *Reading the Constitution As Spoken*, 104 YALE L.J. 1119, 1169-73 (1995).

<sup>6</sup> 98 Eng. Rep. 489 (C.P. 1763).

<sup>7</sup> See J. M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987); see also J. M. Balkin, *Ideological Drift and the Struggle over Meaning*, 25 CONN. L. REV. 869 (1993) (discussing related concept of “ideological drift”). The theoretical work of Larry Lessig is also quite important here, illuminating the ways in which meaning is produced by an interaction of text and context. See, e.g., Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993); Lawrence Lessig, Note, *Plastics: Unger and Ackerman on Transformation*, 98 YALE L.J. 1173 (1989).