

THE CREATION AND RECONSTRUCTION OF THE BILL OF RIGHTS

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I would like to challenge the conventional way twentieth-century lawyers and legal academics have tended to think about, write about and talk about the Bill of Rights. First, a methodological point. Twentieth-century academics and lawyers tend to focus on individual clauses in doing their scholarship and in talking about the Bill of Rights. Perhaps, at their most expansive moments, they will write about an entire Amendment but very rarely do they focus on the Bill of Rights as a whole. Second, a substantive point. In the course of talking about the Bill of Rights, clause by clause or as a whole, twentieth-century scholars tend to see the Bill as overwhelmingly about individual substantive rights — counter-majoritarian rights against popular majorities. That's also the conception that most lawyers today and most ordinary Americans today have of the Bill of Rights. I'd like to offer a different way of thinking about the Bill of Rights, an approach that perhaps is not the complete picture but that nevertheless reveals things obscured by the conventional approach.

Let me begin with a few words about methodology. The conventional approach, focusing as it does on individual clauses, often tends to overlook altogether certain provisions that may be disfavored today among legal academics. Sandy Levinson, for example, has written quite persuasively about how mainstream constitutional scholars have tended to pay very little attention to the Second Amendment even though it's part of our Bill of Rights. Even less attention, I think, has been devoted to the Third Amendment. Not only are these provisions important in their own right, but examination of them may help inform us about the rest of the Bill. What's more, when we focus on the scholarship that's been done about individual provisions, quite often some of the best scholarship

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around suggests that a provision may have encompassed more than just an individual rights vision. But so long as discourse proceeds clause by clause, the insights that are generated tend to be dismissed altogether or at least discounted in debates about other clauses.

A few examples would be useful. Many scholars who have studied carefully and written about the First Amendment, have suggested that the Amendment was in important respects a federalism provision — Congress simply had no enumerated power over speech and press. That interesting and illuminating insight tends to get lost because of the conventional wisdom that the rest of the Bill of Rights isn't about federalism, but rather about individual counter-majoritarian rights. Some Establishment Clause scholars have suggested that the clause may have been a federalism provision designed in part to protect state churches from being disestablished by the federal government, but this suggestion likewise tends to be dismissed because it's not connected to a broader theory of the Bill of Rights as a whole. The notion that the Seventh Amendment may resonate in important respects with principles underlying *Erie* — states' rights principles — is yet another illustration of the phenomenon.

We see still another example in previous articles about the Ninth Amendment. There has been discussion about the possible connections or lack thereof between the Ninth and Tenth Amendments. There is even a very nice discussion of the phrase, "the people," and how that phrase appeared in both Amendments. I applaud that effort to examine one clause in light of another, but I want to extend that methodology. I want to suggest, for example, that the phrase "the people" appears not only in the Ninth and Tenth Amendments but also in the First, Second, and Fourth, and if we widen the frame even further, it appears in the Preamble and in Article I as well. What are we to make of the pattern of this phrasing? Professor McAfee's federalism-based reading of the Ninth Amendment, I believe, would be strengthened by understanding how federalism may have fit in to the rest of the Bill of Rights and not just the Tenth Amendment. So what I'd like to do is to focus on the Bill of Rights as a whole.

So much for my methodological point. Now for my substantive point: whether we examine the Bill clause by clause or as a whole, we will see more than just individual counter-majoritarian rights against popular majorities. We will see that the original Bill of Rights was quite attentive to, and informed by principles of federalism, populism and majoritarianism. The Bill of Rights as orig-

inally drafted is much more of a states' rights and much more of a popular rights and much more of a majoritarian rights document than we have recognized. It's also much more about Constitutional structure — about things like bicameralism, amendment, and representation, not to mention federalism — than the conventional account suggests.

Now, if all of that is so — as I will try to show in the first part of my remarks — I think the question that would be raised is how we've come to receive in the twentieth century a rather different understanding of the Bill of Rights — an understanding that the Bill of Rights is not very much about structure and populism, but about individual rights *against* majorities, rather than rights of majorities. I believe that the conventional understanding of the Bill of Rights is much more owing to the Fourteenth Amendment and the way that it transformed our understanding of the Bill of Rights than it is owing to the original Bill of Rights as originally drafted. So although I will try to suggest in the first part of my remarks that twentieth-century lawyers have missed central aspects of the original Bill of Rights, in the second half of my remarks I'll try to suggest how twentieth-century lawyers have probably ended up in pretty much the right place — but without very much self-consciousness about what's really doing the analytic and narrative work in the argument. I believe what's doing the work is the heretofore invisible gravitational pull of the Fourteenth Amendment. Hence, the title of my article: *The Creation and Reconstruction of the Bill of Rights*.

I. THE CREATION

One global way to frame the issue would be to start with Madison's analysis in *The Federalist No. 51* where he distinguishes between two different problems in setting up a government. One problem is protecting the ruled from the rulers — protecting the people generally from government. If you are setting up a corporation, you have to be concerned that the managers of the corporation — the board of directors, and the officers and employees that are going to be running the corporation day to day — may try to run the entity in their own economic interest and bilk the shareholders. That same insight applies when you're setting up a government. You have to be worried about how agents in government may pursue their own interest at the expense of the shareholders of the USA, Inc.: We, the People of the United States.

Economists would call this the “agency” problem of government or the problem of “self-dealing.” It’s a problem of unrepresentative, unaccountable self-dealing government agents. That’s one problem that Madison identifies in *The Federalist No. 51*. Then he talks about a second problem: protecting a minority of the community from a majority of the community. He sees these as distinct problems, and I think it’s helpful for us to separate the two. I suggest that if we focus on the original Bill of Rights, we will see far more attention to that first issue — protecting the people generally, even a majority of the people, against a possibly unrepresentative self-interested government — than we will see protections of minorities against a majority of the people. (That’s going to change, of course, during Reconstruction, and that change gives us the Constitution that we have today.)

Let me begin by reminding you that there are actually twelve initial amendments that were proposed by the first Congress, not ten. If all twelve had been ratified, I think it would have been much more difficult for us to miss the structural aspects of the Bill of Rights as originally written. The most prominent structural amendment in the ten that were ratified comes at the very end, the tenth amendment, and it seems rather discontinuous with the rest under a conventional account. It’s about states’ rights and the rest (according to convention) aren’t. It’s about structure and the rest (according to convention) aren’t. But the original first amendment of the twelve, was a very clear structural provision. It provided that Congress should be larger than the original Constitution required. The concern here is that if Congress is too small, the agents in government might lose a sense of sympathy with, connectedness to, and representativeness of, their constituents. So the concern is, if Congress is too small it will be a group of elitists — aristocratic folk who have very little in common with their constituents. Congress is not going to identify with their constituents, and the constituents are not going to identify with Congress. Congress will tend to become distant and removed from the people — even geographically, way off in Washington D.C., hundreds of miles and weeks away from their constituents. Representatives will start to pursue policies in their own interests and ignore the interests and desires of their constituents. Congress therefore will tend to pursue policies that the folks back home won’t like, and Congress will have to rely on standing armies and the like to enforce those policies. Congress will become as distant and removed as the imperial British Empire had become distant and removed way off in London,

inattentive to popular concerns. This original first amendment comes very close to being adopted. Ten states ratify it, one rejects it. And had it been ratified, our Bill of Rights would have begun with an obviously structural provision protecting a majority of citizens — the large body of Americans — from a possibly unrepresentative Congress, a Congress that might be inclined toward self-dealing. So that's the original first amendment, and the only state that rejects it while ratifying the last ten amendments is Delaware because Delaware wants a small House of Representatives. (The smaller the House of Representatives is, the larger Delaware's proportion.)

The second amendment that's originally proposed also isn't ratified. It's a rather interesting provision in light of developments of the last few years. It says that Congress will not be allowed to vote itself a pay increase until there has been an intervening election. Now this is an amendment centrally dealing with issues like representation — structural issues — as was the original first amendment. It's not about individual counter-majoritarian rights so much as it is about protecting the people generally against possible government self-dealing — the agency problem of government. So those are the first two amendments, and when we look at those and then start to look at the others in the light of those we can see things that conventional wisdom has tended to obscure. Now let's move on to the provisions that we are more familiar with today.

Our First Amendment is of course the first Congress's third amendment, not their first amendment, so they don't begin with our First Amendment at all. They begin and end with structural provisions. Let's focus, however, on the first word of our First Amendment, Congress. "Congress shall make no law . . ." The absolutism of this phrase, "Congress shall make no law," in part resonates in federalism. The idea here is at least in part that Congress may simply lack enumerated power over speech, press and religion because these things are given to states. So to that extent, the First Amendment is just like the Tenth. It simply says there are certain things that are beyond congressional power. That's a reading of the first that we tend to ignore because we focus more on a rights-based rather than a structural or federalism-based approach to the Bill of Rights.

Now let me point out another thing about that phrase. The fact that Congress is restrained, and not the states, suggests that the real concern here is not concern about majority tyranny squelching minority speech. If *that* had been the dominant concern, we would expect that principles of speech, press, etc. would have

applied against the states as well, because of what Madison points out in *The Federalist No. 10*. If the framers of the Bill of Rights had been primarily concerned about protecting minorities from majorities, they would have been most concerned about protecting these rights against state governments, which are much more likely to be populist, majoritarian governments than Congress, which is more likely to be somewhat filtered, distant, elitist, aristocratic, and removed. That is, of course, the entire theory of *The Federalist No. 10*: the state governments are going to be more majoritarian than the federal government, and Madison was more concerned about majority tyranny at the state level. The fact that the First Amendment doesn't apply against states — nor does the rest of the Bill of Rights for that matter — suggests that its primary concern is not majority tyranny, but unrepresentative government. There is a special concern that Congress, precisely because it may be unrepresentative, may be tempted to suppress speech. The central concern was protecting the speech of the citizenry generally — even a majority — against a possibly unrepresentative self dealing Congress. Madison himself wanted to protect speech and press rights against states, but he failed to persuade the first Congress. So for the moment I suggest that the Bill of Rights that emerges from the First Congress and that's ratified is not fully Madison's Bill of Rights. It's a Bill of Rights that applies only against the federal government and is centrally concerned about government self-dealing.

Let me now remind you about the 1798 Sedition Act controversy. What is the Sedition Act? It's an act that makes it a crime for challengers to criticize incumbent officials in Washington, D.C., but that does not make it a crime for incumbents to criticize their challengers who are out of office. This is classic government self-dealing: the officials in power pass rules to entrench themselves even though the constituents might want otherwise. So the act implicates a core of concern of the First Amendment.

One final way to put the First Amendment point is to remind you of the historic connection between freedom of the press and jury trial. This is a connection that we see in debates in England and America about sedition laws and a connection that's also exemplified by the historic rule against prior restraint. Prior restraints are things that judges can impose before someone publishes, and there is concern about judges who are appointed and paid by the government being able to do that. Any subsequent punishment, however, that does not involve prior restraint is necessarily going

to involve the intervention of a jury. And a jury is more populist than a federal judge or any executive officer of the federal government. So the core of the original First Amendment vision protects people who are saying relatively popular things against perhaps an unrepresentative or unpopular government, whether it was off in England under the colonial experience or off in Washington, D.C. under the new Constitution. So someone like Zenger wants to get to a jury because a jury is a relatively popular body, well constituted to vindicate relatively popular speech. During the Sedition Act controversy, defendants tried to make constitutional arguments to a jury because the jury wasn't on the government payroll, and hadn't been appointed by John Adams and company, as had federal judges. This is a somewhat different understanding of speech and press than we have today. It is an older understanding that emphasizes federalism and populism (which are combined in the jury idea), that fears government self-dealing, and that focuses on local governments as vindicators of speech rather than threats to it. (The Virginia and Kentucky resolutions of free speech emerged from state legislatures. The phrase "freedom of speech," of course, goes back to earlier documents talking about freedom of speech and debate in the legislature. So it's again a structural idea of sorts. This is the Meiklejohn theory of the First Amendment.)

Now let me talk about the rights of petition and assembly. These are rights that are described as rights of "the people," and I want to suggest that although these rights do encompass rights of minority groups to get together — the right of us to assemble in this room — the core of this provision is the right of We the People — that same phrase that we have seen in the Preamble — collectively to *assemble* in *conventions*. That's the paradigmatic meaning of "assemble" — to alter and abolish our government by a majority rule the same way conventions alter and abolish their existing governments in ratifying the Constitution and changing the basic ground rules. One way to think about the original First Amendment vision is to think about Eastern Europe today. Eastern Europeans will have to attend to minority rights, but they also want to protect the people generally against a possibly self-interested government. A similar backdrop existed in America in the 1780s, a backdrop against which our first amendment was originally drafted.

The rule that Congress shall make no law respecting the establishment of religion is also a federalism provision, at least in part. It prevents Congress from disestablishing state churches just as much as it prevents Congress from creating a national church. In

that respect, it's like the Tenth Amendment. It simply says the issue of religion is beyond Congress's enumerated power, and religion and speech are put together in the First Amendment largely on federalism-based grounds.

Now I'll go through more quickly some of the other provisions of the original Bill, and then I'll try to get to Reconstruction. Our Second Amendment is about protecting against a central standing army that's going to be used by a national government to impose perhaps unpopular policies on a resistant populace. The core ideas of the Second Amendment are federalism and populism — the right of state militias and again the right of "the people" collectively to prevent government tyranny. It's not in its essence as originally written centrally about *individual* rights to keep and bear arms. I don't want to say that that's not included. That may be a part of it as well. I just want to suggest that all the individual rights discourse has obscured the federalism and majoritarian or populist cores of various clauses.

Today we tend to think the Third Amendment is about privacy. It nowadays gets invoked in connection with the Fourth and the Ninth Amendments, which are also read in a libertarian way as protecting individual privacy. In its original context, however, the Third is much more about the possibility of military overreaching, about a possibility once again of an unrepresentative government using the military to repress its citizenry. That's why the Third Amendment is always associated with the Second. It's always linked to the Second Amendment, which is about military subordination and civilian supremacy and never, for example, with the Fourth, which is about protection of homes and the like. None of the state conventions links the Third with the Fourth. They always link it with the second. (That's going to change during Reconstruction, and the third amendment during Reconstruction is going to become much more closely associated with libertarian ideas like privacy and protection of the home.)

The Fourth Amendment is centrally about rights of juries, as our First Amendment is also intimately connected with juries. Juries are once again populist institutions. They are local institutions. The idea here is *not*, as the modern Supreme Court has said, that a warrant is required for a search. There is no warrant requirement in the Fourth Amendment. Read those words carefully. They never say you have to have a warrant in order to search. That wasn't the common law rule. It's not the rule in Blackstone. It's not the rule that was followed in America at the time. The rule that's embodied

in the Fourth Amendment is that the search has to be reasonable. Now, who generally is a judge of reasonableness in American adjudication? Typically, that's a jury issue not a judge issue. I argue that it is also a jury issue under the original Fourth Amendment. Again, I'm offering an account at odds with current conventional wisdom.

The Fifth through Seventh amendments all talk about juries — grand juries, criminal juries, civil juries. This jury idea summarizes the populist and localist accent of the original Bill of Rights. Even provisions that at first might not seem to be about jury trial really are — like the First Amendment and like the Fourth. The Eighth Amendment is also a jury idea of sorts. Why do we have to be concerned about bail and sentencing? Because in setting bail and in sentencing defendants to punishment, judges are often acting without juries, and judges are appointed and paid by the federal government. When you look at the Fifth and the Sixth Amendments, once again, you will find provisions that at first might not seem as if they're about a jury trial really are. Double jeopardy protects the integrity of the initial criminal jury verdict from being overruled by a judge, just as the last clause of the Seventh Amendment protects a civil jury's judgment on an issue of fact from being overruled by a judge. The core meaning of due process of law from Lord Coke on was indictment and presentment by good and lawful men — namely, a grand jury.

The jury idea was not simply about defendants' rights to a jury trial, at least on the criminal side. It was about the people's participation in government. The Sixth Amendment, to be sure, talks about the right of the accused to a jury trial. The core language to remember is the language of Article III that says "the trial of *all* crimes *shall* be by jury." That is understood as not waivable. It's not just the defendant's right; it involves the citizen's right to participate on the jury. Put another way, jury trial is about judicial bicameralism. It's a kind of structural idea in which you have the lower house of the jury directly representative of the people, and the upper house of the bench more removed from popular forces. Juries, at least originally in the criminal law, are understood as judges of both law and fact. So if you think a federal law is unconstitutional you can try to argue not just to the judge but to the jury as well, and if the jury is convinced that, say, the Sedition Act is unconstitutional, they're suppose to acquit you. At least, that's what many defense attorneys tried to argue during the Sedition Act controversy. They are cut off at the knees by federal judges

like Samuel Chase, who was later impeached for an ensemble of rulings and just barely escaped conviction by the Senate. So this jury idea is, in large part, not about defendant's interest but about political participation and education of the citizenry. This is how they learn the rights and responsibilities of government, how they participate in government. It's a structural idea about democracy.

So too, the Ninth and Tenth Amendments with their language about the rights "of the people" and powers reserved "to the people" resonate with popular sovereignty. They also have, as Tom McAfee and others have pointed out, important federalism dimensions.

So much for the original vision of the Bill of Rights, a vision that has a lot more populist and federalism and structural aspects, I think, than conventional wisdom recognizes. I don't want to suggest that the Bill is not about individual rights, too. I haven't given a complete account of all the Clauses, although let's remember once again that none of the Bill of Rights applies against the states — which suggests that the central concern is unrepresentative government rather than majority tyranny. That's an overall implication of the original Bill, a regime epitomized by *Barron v. Baltimore*.

II. THE RECONSTRUCTION

The Fourteenth Amendment repudiates *Barron* and incorporates most of the provisions of the Bill of Rights against the states. I can't really defend that large claim before you here, but I will try to do so in some writing that will appear next year. What I want to suggest is that the Reconstruction Amendment, the Fourteenth Amendment, has profoundly transformed our understanding of not just individual provisions but the Bill of Rights as a whole.

I will provide a few examples. Once you make the Bill of Rights applicable against the states and once you overrule *Barron*, then it becomes clear that there is concern about majoritarian governments as well as elitist governments. Freedom of speech becomes paradigmatically, more than about the right of relatively popular publishers saying relatively popular things against a relatively unpopular government. After Reconstruction, freedom of speech goes beyond Zenger and the Sedition Act publishers, and becomes paradigmatically a right of despised or unpopular groups — abolitionists, freedmen, Unionists, especially in the South — to criticize not just government but dominant social institutions.

Let me put that point doctrinally. If your new understanding of freedom of speech and the press is centrally about minority

speech and protecting that speech against dominant majority sentiment, the jury may not be the best protector of those rights. If you are concerned about Unionists criticizing local practices rather than states' rights folks criticizing the federal government, maybe you're going to trust a federal carpetbagging judge appointed in Washington, D.C. more than a local good old boy jury. And modern First Amendment doctrine has moved all sorts of issues away from juries towards judges in part because of an intuition that the First Amendment is centrally about minority speakers.

The problem is that the ACLU, in defending Jehovah's Witnesses or Communists, tries to tell a story about Zenger, or a story about the original Bill of Rights rather than telling a narrative and analytic tale about the Reconstruction, about the abolitionists who are, after all, much better examples of unpopular religious and political groups. Abolitionists, not Zenger and company, really are the forbears of Communists and Jehovah Witnesses in the twentieth-century cases.

New York Times v. Sullivan, the landmark First Amendment case of our time, talks very thoughtfully about the original First Amendment, quotes Madison, and reflects on the meaning of the Sedition Act controversy. But there's not a word in the opinion about Reconstruction except a throwaway reminder that the Fourteenth Amendment incorporates the Bill of Rights. Yet the facts of *New York Times v. Sullivan* cry out for comparison with Reconstruction. On its facts, the case involves southern followers of the Reverend Martin Luther King criticizing dominant social practices in the South by using a northern newspaper and being socked with massive damages by a good old boy Alabama jury. The Supreme Court responds by fashioning doctrinal rules to reign in juries, but you don't get support for that attempt by talking about the Sedition Act controversy over the original first amendment. You get support from Reconstruction.

So too, in the Second Amendment, the NRA tries to tell an individual right story about the right to keep and bear arms. They try to tell a story, however, that focuses on the original Second Amendment and on framers like George Mason and Elbridge Gerry. Yet those folks were concerned about federalism in large part, and they were talking about militias. The NRA would be much better off if it instead focused on how the right to keep and bear arms was transformed during Reconstruction into a much more libertarian and individual-rights oriented idea that blacks, especially had to have guns to protect their homesteads. Hence, individuals have the

right to keep and bear arms. The NRA itself was founded after the Civil War by a group of ex-Union army officers, and yet is today it is utterly unselfconscious about the history of its own organization. Once again, I believe, it's that history that generates the individual rights vision of the Second Amendment.

During Reconstruction, the Third Amendment starts to be associated in a way that never was before with ideas of privacy, and is yoked much more with the Fourth. So too, in the First Amendment, religion and speech in the 1860's are understood as connected, not so much for reasons of federalism, but because of a libertarian theory of freedom of all expression. *Uncle Tom's Cabin*, of course, is religious, artistic, and political as well. And so the First Amendment now comes to embody a broad libertarian understanding of free expression. So the very same words of the First Amendment are now interpreted in a somewhat different historical context and with much more of a libertarian gloss. Juries are much more suspect because they are local. They may be hostile to congressional Reconstruction, and so their role in the new Constitutional order is profoundly diminished — which is why most people today don't see juries as central to the Bill of Rights in the way that, I think, they were central to the Founding.

During the 1860's Reconstruction Republicans didn't want local juries to be judges of law because they would invalidate all the Reconstruction acts, and that would be a bad thing, so it was thought. Republicans don't want to talk about the people's right to serve on a jury as opposed to the rights of defendants to have a jury, because if Republicans talk about the rights to serve on a jury and talk about that as part of the Fourteenth Amendment, then all that talk would suggest that the Fourteenth Amendment is about political rights for blacks, and that is a very divisive issue before the Fifteenth Amendment. And so instead the right of jury trial is recharacterized as a civil right rather than a political right, a right that everyone has to be tried by a jury. (Women have a right to be tried by a jury even though they don't have a right to serve on the jury.) So once again we see words in the original Bill being subtly redefined. And, of course, the Sixth Amendment eases all that by its emphasis on the rights of the accused. (But remember the language of Article III that says the trial of all crimes shall be by jury.)

Finally, let me say something about the Ninth Amendment. Textually, the phrase rights "retained by the people," I believe, can be understood as a federalism idea per Professor McAfee. As

McAfee has mentioned, however, that phrase could also be understood as a popular sovereignty, social compact idea, not just a federalism idea. If you look just at the text I don't think it's clear which of these two possibilities — which are, of course, not mutually exclusive — is the best textual meaning. Let's assume, however, that we're going to look not just at the text, but the legislative history. Here, I think, Professor McAfee has lots of evidence from the legislative history of the Ninth Amendment to support his federalism reading. So maybe if we are just looking at the original Bill of Rights, although the text is somewhat unclear, the legislative history that he points to would incline us towards the federalism reading. Also telling is McAfee's observation that state constitutions don't have any Ninth Amendment counterpart written in similar language.

Now, however, let's go forward in time. (And this is a response to David Mayers' point about when the libertarian reading of the Ninth Amendment is lost and when it's recaptured). During the Reconstruction, there are lawyers who read this phrase about rights, "retained by the people", in a much more libertarian way. They read it as much more about individual rights to privacy and the like, rather than collective rights of the people generally. That's a plausible interpretation of these same words.

These same words are being understood in a very different way by folks like Senator John Sherman. If we now focus on the new gloss, the new legislative history of this same phrase as it is in effect being readopted by the Fourteenth Amendment and incorporated into the Fourteenth Amendment, then we have a very different kind of legislative history on the same set of words. In effect, the same words and the same phrase may come to mean something very different when uttered in this different historical context. So too, freedom of speech and the press comes to mean something a little different. The right of jury trial comes to mean something a little different.

To put the Ninth Amendment point one final way, after the Ninth Amendment is adopted, but before the Fourteenth, various state constitutions do adopt Ninth Amendment lookalikes which wouldn't make any sense under the federalism-based reading of the Ninth Amendment. Now these provisions are perhaps not good evidence of what the Ninth Amendment, as originally written, meant. But they may be very good evidence about how people during Reconstruction may have understood this very same phrase and may have understood that it is not about only federalism. So

there is at least a possibility for McAfee to be right as to the original understanding of the Ninth Amendment, but for Mayer to be right about the current day implications of the Ninth Amendment. At least it's analytically possible.

I don't want to suggest that that's what my research has definitively proved because I need to do more work on the Ninth Amendment.

In conclusion, I do want to suggest that many of our modern intuitions about the Bill of Rights are really much more owing to Reconstruction than they are to the original Bill. Even the very phrase "the Bill of Rights" has been redefined by Reconstruction. Today we often think of the Bill of Rights as being the first Eight Amendments or maybe the first Nine Amendments. This would be a little odd to a lot of the folks who wanted a Bill of Rights to protect state rights because the modern definition excludes one of the most important provisions of the original bill, the Tenth Amendment. Why have we redefined the Bill of Rights as the first Eight or the first Nine Amendments? Well, in part, because Hugo Black has convinced us that we should incorporate the Bill of Rights against the states, and it doesn't make any sense to incorporate the Tenth Amendment against the states. And so the incorporation debate has actually changed the very understanding of the words of this phrase, "the Bill of Rights." The Bill has come to mean the first Eight or the first Nine and not the Tenth Amendment.

In short, Reconstruction has transformed the very phrase "the Bill of Rights," and, I suggest many many aspects of our understanding of that Bill. To understand our Bill of Rights, we must study not just its creation, but its reconstruction.