

2000 DANIEL J. MEADOR LECTURE:
HUGO BLACK AND THE HALL OF FAME

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Baseball fans endlessly debate the comparative statistics of hall-of-famers. Who was the greatest of all time—Babe Ruth or Willie Mays? What about Hank Aaron and Ted Williams (to say nothing of Barry Bonds and Ken Griffey, Jr.)? We law professors play a similar parlor game among ourselves, rating judges and Justices.¹ Who was the greater Chief Justice, John Marshall or Earl Warren? Which twentieth-century judge never to sit on the Supreme Court would have made the best Justice? Was Justice Holmes really all that he was cracked up to be? Who was the most underrated Justice? Who was the greatest player on Earl Warren's team—Warren himself, or one of his teammates?

I do not wish to press the analogy between the Supreme Court and a baseball team too hard, but might it be worth pondering the magic number nine? The Constitution itself does not specify the size of the Supreme Court, or require that the size stay fixed. Indeed, over the first century of its existence, the Court's size oscillated from five to ten. Is it, then, mere coincidence that the idea of a Court fixed by tradition at nine members took root at the same time that the nine-person game of baseball was taking root as the national pastime? Or that the idea of changing that number in the 1930s proved unthinkable to many traditionalists, in precisely the same era that is now seen as baseball's Golden Age?

But let us put aside all fanciful speculation. The number nine is hardly the most important thing about our constitutional order. Far more important is the set of liberties that all nine of the current Jus-

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1. In observing this similarity, I am of course indebted to my late teacher and friend, Robert Cover. See Robert M. Cover, *Your Law-Baseball Quiz*, N.Y. TIMES, Apr. 5, 1979, at A23.

tices, and almost all Americans, now take for granted as absolutely settled constitutional rights—rights that are, in effect, cast in concrete.

For example, Americans today cannot imagine that the Bill of Rights should apply against only the federal government and not against state and local officials. Indeed, ordinary citizens often express surprise when reminded that the First Amendment explicitly speaks only of rights against “Congress.”² Americans now assume that *of course* the rights of counsel and fair trial mean that all indigent defendants facing serious criminal charges must receive attorneys at public expense, in both state and federal trials. Nor can most Americans today look back on Jim Crow with anything but shame and incredulity; these governmental attempts to entrench White Supremacy into law, we now think, were *clearly* unconstitutional. Likewise, Americans across the current political and juridical spectrum view gross malapportionments of state legislatures or of Congressional districts as *plainly* impermissible; one person, one vote is a bedrock constitutional ideal. Similarly fixed as a constitutional polestar is the idea that government officials, state and federal, must never officially favor one religion over another. And from left to right, jurists and citizens embrace vigorous judicial protection of political expression; *obviously* we cannot allow federal or state officials to suppress political critics.

Yet in 1936—the year before the appointment to the Supreme Court of an important graduate of this great law school, Hugo LaFayette Black—none of these basic principles of our current constitutional order was cast in concrete, or at least in Supreme Court case law, even though the Constitution itself, when fairly read, strongly supports every one of them. Today, I propose to tell a few stories about how these basic principles came at last to become firmly embedded in Court case law and about how the Constitution itself came at last to be fairly read on these topics. My twentieth-century stories have, I hope, some abiding lessons for twenty-first century lawyers and citizens. My stories also have a hero—Justice Black—who, perhaps more than any other twentieth-century Justice, deserves credit for fixing these fundamental precepts in place. On my ballot, Justice Black ranks as one of the greatest constitutional jurists of the last century, a first-ballot hall-of-famer. I take special pleasure in publicly casting this ballot for Hugo Black here in his home state and at his alma mater.

2. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or 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.”).

I. A POWER HITTER: THE BILL OF RIGHTS AND THE STATES³

Perhaps the most striking feature of millennial constitutional jurisprudence is the leading role that the Bill of Rights now plays both inside courtrooms and beyond. It was not always so. A separate Bill of Rights was no part of James Madison's careful plan at the Philadelphia Convention of 1787, and the document that emerged there omitted an explicit Bill of Rights. When Anti-Federalist skeptics pounced on this omission during ratification debates, Federalists scrambled to defend the document with a jumble of counterarguments. Madison himself promised to revisit the issue once the Constitution went into effect. Although he kept his promise by shepherding a set of amendments through the First Congress, many of his colleagues viewed the exercise as a "nauseous" distraction from more important and immediate tasks of nation-building.⁴ Once ratified, the Bill played a remarkably small role during the Antebellum era—at least in court. For example, no federal judge invalidated the Sedition Act of 1798,⁵ which in effect made it a federal crime to criticize President John Adams or his allies in Congress. Only once in the entire Antebellum era did the Supreme Court use the Bill of Rights to strike down an act of the federal government—in *Dred Scott's* highly implausible and strikingly casual claim that the Fifth Amendment's Due Process Clause invalidated free-soil laws like the Northwest Ordinance and the Missouri Compromise.⁶ In a review of newspapers published in 1841, Dean Robert Reinstein could not find a single fiftieth-anniversary celebration of the Bill of Rights.⁷

Indeed, the Bill of Rights, as conventionally viewed in the Antebellum era, looked profoundly different from the Bill of Rights as widely understood today. Born in the shadow of a Revolutionary War waged by local governments against an imperial center, the original Bill affirmed various rights against the central government, but none against the states—a point the Marshall Court would later stress in *Barron v. Baltimore*.⁸ And the rights that the original Bill did affirm sounded more in localism than libertarianism. (Recall that Madison drafted the Bill, in large part, to ease the anxieties of Anti-Federalists.) Congress could not establish a national church, but neither could it *dis*-establish

3. Some of the material over the next few pages borrows from AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998), which seeks to provide extensive discussion and documentation for the claims I am summarizing today.

4. See Letter from James Madison to Richard Peters (Aug. 19, 1789), in *12 THE PAPERS OF JAMES MADISON* 346 (R. Rutland et al. eds., 1979).

5. (Sedition) Act of July 14, 1798, ch. 73, 1 Stat. 596 (expired 1801).

6. *Scott v. Sanford*, 60 U.S. 393, 450 (1857).

7. Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 *TEMPLE L. REV.* 361, 365 n.25 (1993).

8. 32 U.S. 243 (1833).

state churches. (Several of the states had officially established churches in the 1780s, and many other “non-establishment” states favored Protestant Christianity in some way or other.) Thus, as originally understood, the First Amendment rule that “Congress shall make no law *respecting* [that is, on the topic of] an establishment of religion” was less anti-establishment than it was pro-states’ rights.⁹ Religious policy would be decided locally, not nationally, in the American equivalent of the 1555 European Peace of Augsburg and 1648 Treaty of Westphalia. The Second Amendment celebrated local militias—the heroes of Lexington and Concord—and the Third Amendment likewise reflected wariness of a central standing army. Much of the rest of the Bill reinforced the powers of local juries. The Fifth Amendment safeguarded grand juries; the Sixth, criminal petit juries; and the Seventh, civil juries. Beyond these specific clauses, many other parts of the original Bill also championed the role of local and populist juries—who were expected to protect popular publishers in First Amendment cases, hold abusive federal officials liable for unreasonable searches in Fourth Amendment cases, and help assess just compensation against the federal government in Fifth Amendment cases. The only amendment endorsed by every state convention demanding a Bill of Rights during the ratification debates was the Tenth Amendment, which emphatically affirmed states’ rights. Madison himself wanted more—a Bill championing counter-majoritarian individual rights, and also protecting them against states—but in the First Congress he was swimming against the tide. His proposed amendment requiring states to respect speech, press, conscience, and juries passed the House (as the presciently numbered Fourteenth Amendment!) but died in a Senate that championed states’ rights.

Only after a Civil War dramatized the need to limit abusive states would a new Fourteenth Amendment and distinctly modern view of the Bill emerge, a view celebrating individual rights and preventing states from abridging fundamental freedoms. From the 1830s on, antislavery crusaders began to develop, contra *Barron*, a “declaratory” interpretation of the Bill of Rights that viewed the Bill not as creating new or merely federalism-based rules applicable only against federal officials, but as affirming and declaring pre-existing higher-law norms applicable to all governments, state as well as federal. On this declaratory view, for example, although the First Amendment directly regulated “Congress,” it also affirmed a pre-existing right to free expression. According to *Barron* contrarians, when the Amendment referred to “*the* freedom of speech,” it thereby implied a pre-existing legal freedom. Perhaps this legal freedom of speech could not be enforced against states in

9. See U.S. CONST. amend I.

federal court, some contrarians conceded, but the First Amendment reference to “the freedom of speech” was itself *evidence* that a true legal right against all governments existed, a right that states were honor-bound to obey even in the absence of a federal enforcement scheme. And what was true of the freedom of speech was also true of the other rights and freedoms explicitly declared in the remainder of the Bill of Rights—the First Amendment freedom of religious exercise, the Fourth Amendment right against unreasonable searches, the Fifth Amendment entitlement to just compensation, and so on. This declaratory theory took shape in a world where many Southern states had enacted extremely repressive laws to prop up slavery—censoring abolitionist speech and press, suppressing antislavery preachers, implementing dragnet searches of suspected fugitive slaves and slave-sympathizers, imposing savagely cruel punishments on runaway slaves and their allies, and indeed violating virtually every right mentioned in the federal Bill.

With the passage of the Fourteenth Amendment, contrarians sought to write their views into the Constitution itself, and to overrule *Barron*, just as they sought to overrule *Dred Scott*.¹⁰ By proclaiming, in Section 1 of the Fourteenth Amendment, that “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,” Reconstruction Republicans tried to make clear that henceforth states would be required by the federal Constitution, by federal courts, and by Congress to obey fundamental rights and freedoms—“privileges” and “immunities” of American “citizens.”¹¹ Where would judges find these freedoms? Among other places, in the federal Bill of Rights itself. Inclusion in the Bill of Rights was strong evidence that a given right—free speech, free exercise, or just compensation, for example—was indeed a fundamental privilege or immunity of all American citizens.¹²

10. The *Dred Scott* Court had appeared to hold that blacks, even if free, could never be American citizens. *Dred Scott v. Sandford*, 60 U.S. 393, 406 (1856). The first sentence of the Fourteenth Amendment repudiates that apparent holding: “All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” U.S. CONST. amend. XIV, § 1.

11. U.S. CONST. amend. XIV, § 1.

12. Given that the Privileges or Immunities Clause was designed to prevent states from abridging fundamental freedoms and rights such as those spelled out in the federal Bill, it might be asked why the Fourteenth Amendment went on to specifically ban states from depriving persons of due process of law. Wasn't due process (a right mentioned in the Fifth Amendment) a “privilege or immunity” already covered? For an answer to this puzzle, see AMAR, *supra* note 3, at 171-74 (explaining that the privileges or immunities clause speaks of the rights of “citizens,” whereas the adjoining due process clause sweeps more broadly, including aliens in its protections of all “persons”). Another question is why—if the Framers of the Fourteenth Amendment meant to hold states to the Bill of Rights, no more and no less—they did not say so more directly. My answer is that, strictly speaking, Reconstruction Republicans meant both more and less than the first eight amendments as such. See *id.* at 174-80. On applying the Amendment to protect funda-

Of course, by seeking to enforce these rights against state governments, Congressman John Bingham and his fellow Reconstructors were in effect turning the Founders' Bill of Rights on its head. The original Bill had reflected the localism of the American Revolution, whereas Bingham and company were animated by the nationalism of the Civil War. Images of British imperial misbehavior and local heroism had inspired the eighteenth-century Bill of Rights, whereas images of slave-state misconduct and national heroism hovered over the Thirty-ninth Congress that drafted the Fourteenth Amendment. For example, the original First Amendment was worded to emphasize that Congress simply lacked enumerated power to regulate religion or censor political expression in the several states. Note how its language—"Congress shall make no law"—echoed and inverted the language of the Article I, section 8 Necessary and Proper Clause: "Congress shall have Power . . . [t]o make all laws . . ."¹³ But Bingham's vision stripped away this original veneer of states' rights, stressing instead that henceforth *states* must not "abridge" (a word borrowed from the First Amendment itself) the freedom of speech or of the press or of religion. What had initially been drafted as an amendment to protect state autonomy in religious matters became, in Bingham's revision, a basis for nationalistic restrictions on states insofar as their policies violated the rights of their citizens to the free and equal exercise of religion.¹⁴

But the Court in the 1873 *Slaughterhouse Cases* strangled the privileges or immunities clause in its crib, rendering it, in the famous language of Justice Field's dissent, "a vain and idle enactment."¹⁵ As a result, later generations of judges often turned to the Due Process Clause, using it to accomplish many of the purposes originally intended for the privileges or immunities clause.

The first big step away from *Barron's* regime came in the 1897 *Chicago Burlington* case, which, like *Barron* itself, involved the norm of just compensation.¹⁶ Using language that nicely tracked the declaratory theory, the Court now held that states were indeed bound by the

mental rights beyond those specified in the Bill itself, consider the views of Justices Murphy and Rutledge, discussed *infra* note 30. And on the ways in which the Fourteenth Amendment might incorporate something less than the Bill of Rights as such, see *infra* note 34 (discussing "refined incorporation").

13. U.S. CONST. art. I, § 8, cl.1, 18. See generally AMAR, *supra* note 3, at 32-42; Akhil Reed Amar, *Some Notes on the Establishment Clause*, 2 ROGER WILLIAMS L. REV. 1 (1996).

14. For general theoretic discussions about how a given text or other sign can come to mean different things in different historical contexts, see J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987); J.M. Balkin, *Ideological Drift and the Struggle Over Meaning*, 25 CONN. L. REV. 869 (1993); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

15. *The Slaughter-House Cases*, 83 U.S. 36, 96 (1873) (Field, J., dissenting).

16. *Chicago, Burlington, & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897).

principle of just compensation laid down in the Fifth Amendment:

The [Fifth Amendment] requirement that the property shall not be taken for public use without just compensation is but “an *affirmance* of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down by jurists as a principle of universal law.”¹⁷

Standing alone, this case could be dismissed as a sport, reflecting the special solicitude for property on the turn-of-the-century Court. But over the course of the twentieth century, the Justices made clear that this case did not stand alone. By the end of the century almost all of the rights and freedoms specified in the Founders’ Bill had come to be applied against state and local governments. As we shall see, this process of application—of incorporation of the Bill against the states—owes a great debt to a great Justice, Hugo Black.

The process began, inauspiciously, in *Patterson v. Colorado*,¹⁸ with Justice Holmes writing for the Court. (I confess that as a Yale man, I have always viewed Holmes as overrated, at least in constitutional law; the Harvard graduates—Holmes was of course a Harvard man—have been stuffing the ballot box on this one.) In *Patterson*, Holmes proclaimed that “even if we were to assume that freedom of speech and freedom of the press were protected from abridgment on the part not only of the United States but also of the States,” the newspaper publisher in the case would still lose.¹⁹ On *Patterson*’s facts, this was a remarkably obtuse holding: The publisher had published material mocking the justices of the state supreme court. Unamused, the state court—sitting without a jury, proceeding without a specific statute authorizing punishment of nonlitigants, and in effect acting as judges in their own case—held the publisher in contempt and levied a fine on him.²⁰ The elder Justice Harlan (who had written the Court’s majority opinion in *Chicago Burlington*) dissented in *Patterson*, reiterating his view that the Privileges or Immunities Clause encompassed First Amendment (and other Bill of Rights) freedoms, and construing those freedoms far more robustly than had Holmes.²¹

By 1925, Holmes’ arguendo assumption in *Patterson* had evolved into a stronger assertion, given voice by Justice Sanford writing for the

17. *Chicago, Burlington & Quincy R.R.*, 166 U.S. at 236 (emphasis added).

18. 205 U.S. 454 (1907).

19. *Patterson*, 205 U.S. at 462.

20. Justice Black would later identify some of the obvious procedural problems with this kind of judicial contempt. See *infra* note 77.

21. See *Patterson*, 205 U.S. at 463-65 (Harlan, J., dissenting).

Court in *Gitlow v. New York*:

For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and “liberties” protected by the due process clause of the Fourteenth Amendment from impairment by the States.²²

Although Gitlow lost his case, this assumption soon hardened into a series of holdings invalidating state laws that impermissibly restricted speech, press, and assembly rights.²³ During this same period, however, the Court also held that other provisions of the federal Bill did not fully apply against states. Writing for the Court in the 1937 case of *Palko v. Connecticut*,²⁴ Justice Cardozo—in an opinion joined by the then-junior Justice Hugo Black—upheld a state law permitting the prosecutor to appeal from a legally erroneous acquittal in a criminal case. Assuming for the sake of argument that an appeal in a comparable federal case would be barred by the Fifth Amendment’s Double Jeopardy Clause,²⁵ Cardozo distinguished between those aspects of the federal Bill that were “of the very essence of a scheme of ordered liberty”²⁶ and those that were not. Unlike rights of free expression, the right in the case at hand fell into the latter category and should not be imposed on states, Cardozo argued. Applying this framework over the next few years, the Court in *Cantwell v. Connecticut*²⁷ and *Everson v. Board of Education*²⁸ held that the Fourteenth Amendment made the First Amendment’s free exercise and non-establishment principles, respectively, applicable against states.

The stage was now set for a great debate on the relationship between the Founders’ Bill of Rights and the Reconstructionists’ Fourteenth Amendment. In *Adamson v. California*,²⁹ Justice Black’s dissent

22. 268 U.S. 652, 666 (1925).

23. See, e.g., *Stromberg v. California*, 283 U.S. 359 (1931); *Near v. Minnesota*, 283 U.S. 697 (1931); *De Jonge v. Oregon*, 299 U.S. 353 (1937).

24. 302 U.S. 319 (1937).

25. Is this an attractive assumption? Why should our criminal justice system allow appellate courts to review and correct a legal error made by the trial judge if and only if that legal error leads to an erroneous conviction as opposed to an erroneous acquittal? If the defendant is entitled to appeal a legal error made against him, why should the prosecutor not have the same entitlement? Note that the issue here is arguably different from, say, rules concerning doubt about factual guilt; although reasonable doubts are to be resolved in defendant’s favor, are legal errors the same as factual doubts? For more discussion and analysis, see Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1838-48 (1997).

26. *Palko*, 302 U.S. at 325.

27. 310 U.S. 296 (1940).

28. 330 U.S. 1 (1947).

29. 332 U.S. 46 (1947).

put forth his now-famous theory of total incorporation.³⁰ On this view, the Fourteenth Amendment incorporated all the rights and freedoms of the federal Bill and made them applicable against states in precisely the same way as against the federal government. In a separate concurring opinion, Justice Frankfurter (another vastly overrated Harvard man, as I reckon career statistics)³¹ vigorously disagreed. On his view, the Reconstruction Amendment required that states obey principles of fundamental fairness and ordered liberty, principles that sometimes might overlap with the Bill of Rights but that bore no necessary logical or evidentiary relation to it.³²

Black may have lost the incorporation battle in *Adamson*, but he eventually won the war. With Frankfurter's retirement in 1962, the anti-incorporation logjam broke, and most of the previously unincorporated provisions of the Bill of Rights came to be applied against the states—though not via Black's theory. Rather, the Court pursued an approach championed by Justice Brennan, called selective incorporation, by which the Justices purported to play by Frankfurter's ground rules while reaching Black's results. Under this third approach, the Court's analysis could proceed clause by clause, fully incorporating every provision of the Bill deemed "fundamental" without deciding in advance (as Black would have it) whether each and every clause would necessarily pass the test. Methodologically, Brennan's approach seemed to avoid a radical break with existing case law rejecting total incorporation, and even paid lip service to Frankfurter's insistence on fundamental fairness as the touchstone of the Fourteenth Amendment. In practice, however, Brennan's approach held out the possibility of total incorporation through the back door. For him, once a clause in the Bill was deemed "fundamental" it had to be incorporated against the states in every aspect, just as Black insisted. And nothing in the logic of selective incorporation precluded the possibility that, when all was said and done, virtually every clause of the Bill would have been deemed fundamental. As things turned out, in applying this approach, the Warren Court almost always found that a given clause of the Bill did indeed

30. See *id.* at 68-123 (Black, J., dissenting). Justice Douglas joined Black's dissent, and two other dissenters—Justices Murphy and Rutledge—agreed with Black that the Fourteenth Amendment incorporated the Bill of Rights. Unlike Black, however, Murphy and Rutledge suggested that courts might also use the broad language of the Fourteenth Amendment to protect additional unenumerated rights beyond the Bill of Rights. *Id.* at 123-24 (Murphy, J., dissenting).

31. Robert Cover apparently shared this view. See Cover, *supra* note 1.

32. *Adamson*, 332 U.S. at 59-68. Note that Frankfurter's test is, in essence, the same test that the Court has often applied generally to so-called substantive due process cases. This similarity should not be surprising once we recall that incorporation of the Bill of Rights was itself viewed by many as a kind of substantive due process, in which judges used the language of the Due Process Clause to protect what were often substantive, nonprocedural rights such as freedom of expression and freedom of religion.

set forth a fundamental right. Today, virtually all of the Bill of Rights has come to apply with equal vigor against state and local governments.³³ The only major exceptions are the Second Amendment, the Third Amendment (which rarely arises in modern adjudication), the Fifth Amendment grand jury requirement, and the Seventh Amendment's rules regarding civil juries.

The Supreme Court's approach to incorporation has generated a vast amount of academic commentary.³⁴ This is hardly surprising, given

33. See, e.g., *In re Oliver*, 333 U.S. 257 (1948) (Sixth Amendment right to public trial); *Wolf v. Colorado*, 338 U.S. 25 (1949) (Fourth Amendment); *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusionary rule); *Robinson v. California*, 370 U.S. 660 (1962) (Eighth Amendment right against cruel and unusual punishment); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (Sixth Amendment right to counsel); *Malloy v. Hogan*, 378 U.S. 1 (1964) (Fifth Amendment right against compelled self-incrimination); *Pointer v. Texas*, 380 U.S. 400 (1965) (Sixth Amendment right to confront opposing witnesses); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (Sixth Amendment right to speedy trial); *Washington v. Texas*, 388 U.S. 14 (1967) (Sixth Amendment right to compulsory process); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (Sixth Amendment right to jury trial); *Benton v. Maryland*, 395 U.S. 784 (1969) (Fifth Amendment right against double jeopardy); *Schilb v. Kuebel*, 404 U.S. 357 (1971) (Eighth Amendment right against excessive bail) (dictum).

Apodaca v. Oregon, 406 U.S. 404 (1972), offers an interesting counterpoint. In *Apodaca*, four Justices (White, Burger, Blackmun, and Rehnquist) argued that the Sixth Amendment does not require that a criminal jury be unanimous to convict, while four other Justices (Douglas, Brennan, Stewart, and Marshall) claimed that the Sixth Amendment does require unanimity. Justice Powell cast the deciding vote to uphold Oregon's law on the theory that, although the Sixth Amendment does require unanimity, this aspect of Sixth Amendment doctrine should not be incorporated against states jot-for-jot.

34. For famous commentary harshly critical of Justice Black's position, see Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949). Fairman's scholarship was, in turn, sharply attacked in William Winslow Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986); and Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993). Elsewhere, I have attempted to synthesize the competing positions as follows:

This synthesis, which I shall call "refined incorporation," begins with Black's insight that *all* of the privileges and immunities of citizens recognized in the Bill of Rights became "incorporated" against states by dint of the Fourteenth Amendment. But not all of the provisions of the original Bill of Rights were indeed rights of citizens. Some instead were at least in part rights of states, and as such, awkward to fully incorporate *against* states. Most obvious, of course, is the Tenth Amendment, but other provisions of the first eight amendments resembled the Tenth much more than Justice Black admitted. Thus there is deep wisdom in Justice Brennan's invitation to consider incorporation clause by clause—or more precisely still, right by right—rather than wholesale. But having identified the right unit of analysis, Brennan posed the wrong question: Is a given provision of the original Bill a *fundamental* right? The right question is whether the provision guarantees a privilege or immunity of *individual citizens* rather than a right of *states* or the *public* at large. And when we ask this question, clause by clause and right by right, we must be attentive to the possibility, flagged by Frankfurter, that a particular principle in the Bill of Rights may change its shape in the process of absorption into the Fourteenth Amendment. This change can occur for reasons rather different from those that Frankfurter offered. (He, more than Black and Brennan, diverted attention from the right question by his insistence on abstract conceptions of "fundamental fairness" and "ordered liberty" as the sole Fourteenth Amendment litmus tests, and

the enormity of the stakes: the process of incorporation has utterly transformed the meaning of the Bill of Rights, and has defined modern constitutional law. Mid-twentieth-century critics of the idea of incorporation—like Justice Frankfurter and the younger Justice Harlan—argued that applying the Bill of Rights against state and local governments would ultimately weaken American liberty. If judges were to use the Bill against states, the argument went, these judges would be tempted to water the Bill down to take account of the considerable diversity of state practice; and then in turn, these judges would hold the federal government to only this watered-down version. But as Justice Black and fellow incorporationists anticipated, extension of the Bill of Rights against the states has, in general, dramatically strengthened the Bill, not weakened it, in both legal doctrine and popular consciousness. Unused muscles atrophy, while those that are regularly put to use grow strong.

In area after area, incorporation enabled judges first to invalidate state and local laws, and then, with this doctrinal base thus built up, to keep Congress in check. The First Amendment is illustrative. Before 1925, when the *Gitlow* Court began in earnest the process of First Amendment incorporation, free speech had *never* prevailed against a repressive statute in the United States Supreme Court. Within a few years of incorporation, however, freedom of expression and religion began to win in the Supreme Court in landmark cases involving states, like *Stromberg v. California*,³⁵ *Near v. Minnesota*,³⁶ *De Jonge v. Oregon*,³⁷ and *Cantwell v. Connecticut*.³⁸ These and other cases began to build up a First Amendment tradition,³⁹ in and out of court, and that tradition could then be used against even federal officials. Not until 1965 did the Supreme Court strike down an Act of Congress on First Amendment grounds, and when it did so, it relied squarely on doctrine built up in earlier cases involving states.⁴⁰ Consider also the 1989 and 1990 flag-burning cases of *Texas v. Johnson*⁴¹ and *United States v.*

by his disregard of the language and history of the privileges-or-immunities clause.) Certain alloyed provisions of the original Bill—part citizen right, part state right—may need to undergo refinement and filtration before their citizen-right elements can be absorbed by the Fourteenth Amendment. And other provisions may become less majoritarian and populist, and more libertarian, as they are repackaged in the Fourteenth Amendment as liberal civil rights—“privileges or immunities” of individuals—rather than republican political “right[s] of the people,” as in the original Bill.

AMAR, *supra* note 3, at xiv-xv.

35. 283 U.S. 359 (1931).

36. 283 U.S. 697 (1931).

37. 299 U.S. 353 (1937).

38. 310 U.S. 296 (1940).

39. See generally HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* (1988).

40. See *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

41. 491 U.S. 397 (1989).

Eichman.⁴² In the first case, the Justices defined the basic First Amendment principles to strike down a *state* statute and then, in the second case, the Court stood its ground on this platform to strike down an act of *Congress*.⁴³

The large body of modern legal doctrine concerning the Bill of Rights has rolled out of courtrooms and into the vocabulary and vision of law students, journalists, activists, and ultimately the citizenry at large.⁴⁴ But without incorporation, and the steady flow of cases created by state and local laws, the Supreme Court would have had far fewer opportunities to be part of the ongoing American conversation about liberty. Perhaps nowhere has the importance of incorporation in shaping American jurisprudence been more evident than in the field of constitutional criminal procedure. The overwhelming majority of criminal cases are prosecuted by state governments under state law; only after the incorporation of the Fourth, Fifth, Sixth, and Eighth Amendments did federal courts develop a robust and highly elaborate—if also highly controversial—jurisprudence of constitutional criminal procedure.

Before turning from this general topic to a few more specific examples of modern rights discourse, and of the impact of Hugo Black on that discourse, it's worth noting a few things about *Adamson* in particular, and about Black's approach to constitutional interpretation in general. First, although Black's *Adamson* dissent oversimplified somewhat,⁴⁵ it was basically right: The Framers of the Fourteenth Amendment did indeed intend to prevent states from violating *any* of the basic rights spelled out in the first eight amendments. This was in fact part of the core meaning of the Amendment.

Second, in insisting on this fundamental truth, Black stood against the received wisdom of his day. In 1947, no Court case clearly supported total incorporation, and a great many Court cases seemed to repudiate it. Before Black, no one on the Court had assembled the impressive historical case for this position. It was the product of years of study on Black's part, reading and rereading primary and secondary

42. 496 U.S. 310 (1990).

43. *Eichman*, 496 U.S. at 312; 18 U.S.C. § 700 (2000) (Flag Protection Act of 1989).

44. For an important argument expressing skepticism about the magnitude of impact of Supreme Court decisions generally, see GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

45. First, the dissent failed to offer a careful account of the respective roles of the Privileges or Immunities Clause and the Due Process Clause, *see supra* note 12. Second, the dissent never directly explained why, if the Fourteenth Amendment meant no more and no less than incorporating Amendments One through Eight, it did not say so more directly. (The best answer is that the Amendment meant both somewhat more and somewhat less than Black suggested, though the core of his account remains right in application, *see supra* note 34.) Finally, Black's mechanical approach to incorporation tended to downplay important ways in which the Reconstruction Amendment helped redefine the meaning of the original provisions of the Bill of Rights. For examples and illustrations of this redefinition, *see generally* AMAR, *supra* note 3.

sources that his fellow Justices had ignored or slighted. Thus Black was not simply carrying the insights of previous cases a small incremental step further. He was challenging the basic judicial order and showing how the game should instead be played: Judges should be bound not by wrongheaded Gilded Age precedent, but by the Constitution itself and its more admirable vision of liberty.

Third, and related, the dissent exuded a faith in ordinary Americans and expressed a certain skepticism of the judiciary. Black tried to move constitutional conversation away from the Court and towards the Constitution itself—a democratic document for a democratic culture.⁴⁶ The text of the document came from the people and can easily be read by them. It is after all a short document. Although his precise argument in *Adamson* sounded more in history than in pure textual argument, note its obvious virtues for a card-carrying textualist: Instead of the relatively open-ended words of the Fourteenth Amendment and its elaborate judicial gloss, Black proposed instead that judges simply attend to the somewhat more specific—and more democratically accessible—language of Amendments One through Eight. These words would give judges proper guidance and constraint, and resonate with the rights that ordinary citizens, with their pocket Constitutions in hand, would deem themselves entitled to.

Fourth, although Black's dissent tended to downplay the point, it contained the seeds of another large insight: In applying the Bill of Rights against the states, the Reconstruction generation actually redefined the Bill. The Framers' Bill of Rights, for example, included all ten Amendments, but Black's incorporated Bill only included Amendments One through Eight.

Finally, Black's towering contribution on incorporation exemplified

46. For my own efforts to follow in Justice Black's footsteps here, see Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000). For an earlier exposition of the significance of Black's methodological leadership, see PHILIP BOBBITT, *CONSTITUTIONAL FATE: THE HISTORY OF THE CONSTITUTION* 26-27, 31 (1982):

Black had one thing none of his colleagues had: Black had genius, a grasp of the effect of simplicity in the law and of the need for it and an understanding of how to make his contemporaries feel that need. It was this understanding that animated and gave to textualism a power that it had not had since the Marshall Court. It was Hugo Black who led constitutional argument out of the wilderness of legal realism. He accomplished this by his remarkable use of textual argument and his creation of a constitutional grammar for this use.

. . . .
Black developed the textual argument, and a set of supporting doctrines, with a simplicity and power they had never before had. . . . [A Blackian judge interprets the Constitution] on a basis readily apprehendable by the people at large, namely, giving the common-language meanings to constitutional provisions. This allowed Black to restore to judicial review the popular perception of legitimacy which the New Deal crisis had jeopardized.

an impressive mixture of humility, determination, and flexibility. As for humility, Black's dissent in effect required him to admit that he had erred early on in embracing Justice Cardozo's approach in *Palko*, which gave judges too much discretion to underprotect rights in the first eight amendments that they subjectively deemed unimportant. As for determination, Black's incorporation argument did not prevail in *Adamson* itself, where it was subjected to harsh criticism by former Harvard Professor Felix Frankfurter. Shortly thereafter, another Harvard product, Professor Charles Fairman, launched a savage attack on Black's masterpiece.⁴⁷ But here the Harvard men were wrong—they often are—and the humble son of Clay County stood his ground.⁴⁸ Eventually, the Court came around to Black's view of the matter, in effect if not quite in theory, via the compromise of selective incorporation. Here we see Black's flexibility at work. Selective incorporation was not quite right in principle, he thought, but he would go along with the approach whenever it reached the right result, making applicable against states previously unincorporated rights. If William Brennan—yet another Harvard man for those of you who are counting—could get five votes for the right result in a given case, Black would take the victory. Playing the game perfectly is very nice—but even more important is winning the big ones.⁴⁹

II. A COMPLETE ATHLETE: SOME MEMORABLE PERFORMANCES

So far, I have concentrated on Black's most epic achievement: successfully fighting to ensure that virtually all the individual rights of

47. See Fairman, *supra* note 34. Elsewhere, I have critiqued Fairman's critique, and suggested that he was a rather unfair man towards Justice Black. See generally AMAR, *supra* note 3, at 188-93, 198-207.

48. Other Justices may have been tempted to enlist proxies in the fight, but this was not Black's style. In 1992, Federal district judge Louis Oberdorfer recounted the following story to me, which illuminates several features of Black's character:

I was Justice Black's law clerk in the 1946 term when he wrote his dissent in *Adamson*. Although I don't claim any credit for the *Adamson* dissent (it was entirely the Justice's production), I was in a position to correct errors in it and the Justice would have been very receptive to my suggestions. I thought and still think that, given the limitations, the dissent was a monumental and accurately documented achievement. So you can imagine my chagrin when, two years later, I read Fairman's attack on the integrity of the dissent and its author. After reading Fairman, I went to see Justice Black and offered to respond. He firmly asked me not to do so. I have honored the request.

Letter from Louis F. Oberdorfer to Akhil Reed Amar (May 21, 1992) (on file with author).

49. Thus, despite Black's disagreement with certain features of Justice White's opinion for the Court in *Duncan v. Louisiana*, 391 U.S. 145 (1968), which incorporated the Sixth Amendment jury right against states, Black joined White and dismissed their zone of disagreement as "dictum." Had Black and fellow incorporationist William Douglas forced the issue, the case might have been resolved without a majority opinion, which would have left it a weaker precedent for the general idea of incorporation. For details, see AMAR, *supra* note 3, at 289 & n.*.

Amendments One through Eight would apply against states. Given the huge importance of this single overarching issue, and Black's indispensable role in its ultimate resolution, *Adamson* alone would qualify Black for the Hall of Fame—the judicial equivalent of Reggie Jackson's towering performance in World Series play. But Black did more than help make the Bill of Rights applicable against states; he also played a leading role in broadly construing many of these rights in ways that previous cases had not. To get a more complete picture of Black's career, let's quickly survey a few of his more fine-grained contributions, with special emphasis on themes evident early in Black's tenure, before the heyday of the Warren Court.

Begin with the First Amendment freedoms of speech, and of the press. Today, these rights are construed generously, especially to protect critics of government policy and government policymakers (including judges). But this was not always so; it has become so in large part because of Hugo Black. Recall that when Congress in 1798 made it a federal crime to criticize certain federal incumbents, Supreme Court Justices riding circuit cheerfully upheld this blatant constitutional violation. Years later, the antebellum South in effect criminalized all anti-slavery speech. In 1860, the Republican Party was virtually outlawed in the Old South. (Lincoln's name was not even allowed to appear on the ballot in Alabama or in any other state south of Virginia.) Yet the Supreme Court never stepped in to protect free expression against this repressive censorship. We have already seen Justice Holmes and his brethren, in the 1907 *Patterson* case,⁵⁰ blithely upholding punishment for a publisher whose only crime was criticizing judges; and in 1919, Holmes once again wrote for the Court, this time upholding an extended imprisonment of the political leader Eugene Debs, a man who received close to one million votes for President.⁵¹ Debs' crime? Giving a peaceful speech criticizing the federal government's war policy. Recall, once again, that before 1925, the rights of free expression had never—not once—prevailed in the United States Supreme Court.

The picture began to brighten with the accession of Charles Evans Hughes to the Chief Justiceship in 1930, but one of the clearest cases repudiating the repressive logic of *Patterson* and *Debs* was handed down on December 8, 1941—the day after the date which will live in infamy. The case, *Bridges v. California*,⁵² involved state judges who

50. *Patterson v. Colorado*, 205 U.S. 454 (1907).

51. See *Debs v. United States*, 249 U.S. 211 (1919).

52. 314 U.S. 252 (1941). I am indebted to many conversations with Professor Charles Reich, and to his penetrating essay on Justice Black, for highlighting the importance of *Bridges* and several other cases in Black's early oeuvre. See Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673 (1963). Reich clerked for Black, and one of the last books the Justice read before his death in 1971 was Reich's 1970 blockbuster book, *The Green-*

tried to punish publishers commenting on various state judicial proceedings. (Judges, as we saw in *Patterson*, can be very thin-skinned about those who criticize the judiciary itself.) Writing for a closely divided (5-4) Court, Justice Black insisted that the First Amendment protected far more than English common law:

[T]he substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. . . . For the First Amendment does not speak equivocally. It prohibits any law "abridging the freedom of speech, or of the press." It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.

. . . .
 . . . No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed.⁵³

Here, as in the later *Adamson* case, Black understood that freewheeling judges had not always been sufficiently sensitive to rights guaranteed in the Bill of Rights. Indeed, Black saw that several of the provisions of the Bill of Rights were themselves designed to protect against judicial overbearing.⁵⁴ Thus, he was far less impressed by Pattersonian precedents, and far less willing to defer to the thin-skinned state judiciary in the case at hand, than were his four dissenting colleagues, led by Felix Frankfurter.

Today, *Bridges* is not remembered as the landmark that it was. Most scholars instead point to a case like *New York Times v. Sullivan*⁵⁵—which arose right here in Alabama—as emblematic of the modern Court's generous protection of those criticizing government officials. But *Sullivan*'s spirit—that in America, "debate on public issues should be uninhibited, robust, and wide-open, and . . . it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"⁵⁶—was there in *Bridges*, almost a quarter century earlier. Indeed, only moments before this celebrated passage in *Sullivan*, the Court tipped its hat to Black's opinion in *Bridges*, quoting it as follows: "[I]t is a prized American privilege to

ing of America. A copy of this book, filled with the Justice's marginalia, may be found in the Justice's home study, now replicated in The University of Alabama School of Law library.

53. *Bridges*, 314 U.S. at 263, 265.

54. See, e.g., *Adamson v. California*, 332 U.S. 46, 70-71 (1947) (Black, J., dissenting); *Green v. United States*, 356 U.S. 165, 209 (1958) (Black, J., dissenting).

55. 376 U.S. 254 (1964).

56. *Sullivan*, 376 U.S. at 270.

speaking one's mind, although not always with perfect good taste, on all public institutions."⁵⁷ And just moments before announcing what it deemed "the central meaning of the First Amendment"—Americans must be free to criticize officialdom and thus, the 1798 Sedition Act⁵⁸ was obviously unconstitutional—the *Sullivan* Court once again told us that it was standing on the shoulders of Justice Black in *Bridges*:

Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision. *Bridges v. California*, 314 U.S. 252 . . . If judges are to be treated as "men of fortitude, able to thrive in a hardy climate," surely the same must be true of other government officials, such as elected city commissioners. Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.⁵⁹

There may be a larger lesson lurking here. Perhaps cases like *Sullivan* are now treated as more central, and cases like *Bridges* are often overlooked, because some of what Black sought to build in *Bridges* was washed away by the Court's more repressive First Amendment caselaw in the early Cold War period.⁶⁰ Black of course often dissented in these dark days; but when the Court in cases like *Sullivan* ultimately returned to the free speech path he had helped mark out earlier, this return may have seemed more of a fresh start than in fact it was.

In some academic circles it is fashionable today to link Hugo Black with First Amendment absolutism—"no law means no law"—and then to mock that absolutism with clever hypotheticals. But *Bridges* featured language that was not quite absolutist in tone: Black's statement that "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished"⁶¹ sounds rather like a balancing test, though one strongly weighted towards protecting expression. Thus, the main theme bridging *Bridges* and Black's later pronouncements was not so much absolutism as such, but rather the notion that political and religious expression deserve very strong

57. *Id.* at 269 (quoting *Bridges*, 314 U.S. at 270). Note Black's use of the telltale word "privilege" here—an early statement of his later elaborated view that free expression was indeed one of the Fourteenth Amendment's privileges and immunities.

58. Sedition Act, ch. 73, 1 Stat. 596 (July 14, 1798) (expired 1801); *Sullivan*, 376 U.S. at 274-77.

59. *Id.* at 272-73 (quoting *Craig v. Harney*, 331 U.S. 367, 376 (1947)) (citations omitted).

60. See, e.g., *Feiner v. New York*, 340 U.S. 315 (1951); *Dennis v. United States*, 341 U.S. 494 (1951); *Scales v. United States*, 367 U.S. 203 (1961).

61. *Bridges v. California*, 314 U.S. 252, 263 (1941).

judicial protection, especially when such expression condemns the established order. Indeed, Professor Charles Reich has argued that Black's absolutist trope was a rather late development—a tactical response, perhaps, to the Court's dilution of other speech-protective judicial doctrines in the McCarthy era.⁶²

Moreover, Black's later insistence on the grammatical absolutism of the First Amendment is far from the embarrassment that some scholars deem it to be. There are indeed ways of understanding the words of the Amendment to say what they mean and to mean what they say. As a matter of federalism, the words "Congress shall make no law" meant at the founding that political censorship and religious regulation in the several states simply lay beyond the proper Article I enumerated powers and purposes of Congress.⁶³ And as a matter of rights, Professor Meiklejohn has helped us see that the First Amendment is indeed an absolute of sorts: Within the realm of political discourse, government generally may not ban anti-government opinion, or censor political expression in viewpoint-discriminatory ways.⁶⁴ The amendment allows "speech" to be abridged, but not "the freedom of speech"—a system of discourse by which a democracy deliberates and governs itself, just as a legislature typically protects freedom of "speech and debate" on the legislative floor. In a well-functioning legislative assembly, "speech" in some sense may be abridged—say, by limiting each floor speaker to five minutes—but "the freedom of speech" should not be abridged: If speaker *A* is allowed to support Administration policy *X*, speaker *B* must be allowed to condemn that same policy. Similarly, Black in effect argued in cases like *Bridges* and *Sullivan* that because pro-government public speech was allowed, anti-government public speech should likewise be permitted. For redirecting us to the words of the Amendment itself, and for encouraging Americans to see how the words might be taken seriously and what principles might underlie them, Black deserves our thanks, not our sneers. Indeed, perhaps America's greatest First Amendment scholar, Harry Kalven, openly acknowledged the intellectual leadership of Alexander Meiklejohn,⁶⁵ who in turn tipped his hat to Justice Black in a classic article, entitled *The First Amendment is an Absolute*.⁶⁶ (Meiklejohn had rather harsher things to say about Justice Holmes's contributions to First Amendment theory and practice.)⁶⁷

62. See generally Reich, *supra* note 52, at 695-97.

63. See *supra* text accompanying note 9.

64. See generally ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1960).

65. See generally Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191.

66. Alexander Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245.

67. MEIKLEJOHN, *supra* note 64, at 29-50.

Although Black and Meiklejohn may not have agreed in all particulars, their views substantially overlapped, both in method—taking the words of the document seriously⁶⁸—and in substance, understanding the primacy of political expression and political dissent in a self-governing democracy.

In stressing the need to protect political expression, especially speech critical of government officialdom (including the judiciary itself), Black in *Bridges* was, as we have seen, ahead of many of his brethren. What he said in the 1940s and 1950s helped to lay the foundations for 1960s cases like *New York Times v. Sullivan*. A similar pattern is evident when we look beyond the First Amendment. On a wide range of issues, Black was a prophet who often began in dissent or in relative obscurity only later to prevail as ultimate and enduring Court orthodoxy.

For example, Black was one of the first on the modern Court to re-discover the Attainder Clause, and its possible use to protect political dissenters from legislative attack. The key case here was the Court's 1946 decision in *Ex parte Lovett*,⁶⁹ in which Black, writing for the Court over the objections of Felix Frankfurter, wielded the Constitution's Attainder Clause to strike down a congressional act disqualifying three named suspected subversives from federal employment. *Lovett's* vision laid the foundation for a later Warren Court classic, *United States v. Brown*,⁷⁰ authored by Chief Justice Warren himself (with some help from his law clerk John Hart Ely⁷¹), in which the Court prohibited Congress from heaping retrospective disabilities upon members of a named political party. Once again, note the obvious advantages, for a card-carrying textualist, of breathing life back into a dormant clause, and showing ordinary citizens how this clause connected to the larger themes of the document itself and the Framers' vision. The Attainder Clause had yet another advantage for an incorporationist like Black: the Constitution clearly held both state and federal government to the same standard here, with Article I, section 9 prohibiting all federal Bills of Attainder and Article I, section 10 likewise prohibiting state Bills of Attainder.⁷²

68. Indeed, Meiklejohn appeared to discover part of the textual basis for incorporation—the linguistic link between the First Amendment language prohibiting “abridg[ments]” and the similar language of the First Amendment—at the very historical moment that Justice Black was emphasizing this as the key clause of the Fourteenth Amendment. See MEIKLEJOHN, *supra* note 64, at 53. For more discussion of this linguistic linkage, see AMAR, *supra* note 3, at 165-66, 191.

69. 328 U.S. 303 (1946).

70. 381 U.S. 437 (1965).

71. See John Hart Ely, Note: *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330 (1962).

72. See U.S. CONST. art. I, § 9 (“No Bill of Attainder or ex post facto Law shall be passed [by Congress]”); *id.* § 10 (“No State shall . . . pass any Bill of Attainder, [or] ex post facto

Another prominent Black theme, expressed in many cases over the years, was the importance of the jury in both criminal and civil cases. Early in his career, Black had been a hugely successful lawyer practicing before Alabama juries; and his extraordinary empathy with ordinary citizens also served him well as a populist Senator. Black brought these sensibilities to the Court, where he brilliantly reminded his colleagues, in various contexts, of the central role juries were designed to play in the Bill of Rights. Three separate Amendments, after all, directly protect juries;⁷³ and several others offer indirect support. (The First Amendment rule against prior restraints was largely designed to privilege juries against judges, as was the Fourth Amendment's regime limiting warrants; and the Eighth Amendment imposed special restrictions on setting bail and sentencing criminals in part because in these contexts, judges would typically act on their own, unchecked by juries.)⁷⁴ Black instinctively understood how the jury was itself a great engine of democratic self-government, in which ordinary citizens in the lower house of the judiciary might help counterbalance a more elitist, and not always trustworthy, upper house of permanent judges. The contexts in which Black led the charge for the jury were varied: Should jury trial rights apply against state governments?⁷⁵ (The incorporation question.) Should there be a petty crime exception to the right of jury trial?⁷⁶ Should judicial contempt orders be upheld as a general exception to jury trial?⁷⁷ Should a jury acquittal on a greater charge be presumed to be an implicit acquittal on lesser-included offenses?⁷⁸ Black regularly found himself contesting Felix Frankfurter here, with Black often losing early battles only to win major victories later on, as the Warren Court gained steam.⁷⁹ He did not so much come to the Warren Court; the Warren Court came to him.

A final example of this dynamic involves the now-sacred right of

Law").

73. See *id.* amends. V, VI, VII (protecting grand juries, criminal petit juries, and civil juries respectively).

74. See generally AMAR, *supra* note 3.

75. See, e.g., *Adamson v. California*, 332 U.S. 46, 68-123 (1947) (Black, J., dissenting).

76. See, e.g., *Green v. United States*, 356 U.S. 165, 201 & n.11 (1958) (Black, J., dissenting); *Cheff v. Schnackenberg*, 384 U.S. 373, 386-93 (1966) (Douglas, J., dissenting, joined by Black, J.); *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 223 (1968) (Black, J., dissenting); *Baldwin v. New York*, 399 U.S. 66, 74-76 (1970). Cf. Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917 (1926).

77. See, e.g., *Sacher v. United States*, 343 U.S. 1, 14-23 (1952) (Black, J., dissenting); *Green v. United States*, 356 U.S. 165, 193-219 (1958) (Black, J., dissenting); *United States v. Barnett*, 376 U.S. 681, 724-28 (1963) (Black, J., dissenting).

78. *Green v. United States*, 355 U.S. 184, 190-91 (1957) (Black, J.).

79. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968) (incorporation); *Bloom v. Illinois*, 391 U.S. 194 (1968) (contempt); *Green v. United States*, 355 U.S. 184 (1957) (implicit acquittal). Cf. the Black dissents cited *supra* notes 75-77.

indigent criminal defendants to have court-appointed counsel. When Black took his seat on the High Court, the most obvious precedent on the topic was *Powell v. Alabama*,⁸⁰ the famous Scottsboro case. Black's home state had tried to hurry innocent men into a noose, in a kangaroo trial, but the Supreme Court had stepped in to insist that capital defendants must be given lawyers—at government expense, if necessary. But what about *noncapital* felony defendants? In its 1938 opinion in *Johnson v. Zerbst*,⁸¹ the Court, per Justice Black, found such a right for federal defendants in the Sixth Amendment right of counsel. But how about state felony defendants? Four years after *Zerbst*, in *Betts v. Brady*, Black crusaded to hold states to the same constitutional appointed-counsel rule as governed the feds, and indeed foreshadowed his *Adamson* position that *all* provisions of the Bill of Rights should apply against states with equal force.⁸² But Black was in dissent in *Betts*; Frankfurter and his allies had the votes. Of course, Black had the last laugh in *Gideon v. Wainwright*,⁸³ which overruled *Betts* and foreshadowed the incorporation revolution. Once again, Black had held true to his vision, and the Court finally came round.

III. THE TEAM MVP? HUGO BLACK AND THE WARREN COURT

Baseball features a nice blend of individual performance and cooperative team play. The same is true of the Supreme Court. Each of the nine members makes a distinct and often individually measurable contribution to an interactive group product. It is thus intelligible to ask the question: Who was the most valuable player on the Warren Court team?

An obvious answer is Warren himself. The great Chief was undoubtedly the team captain, its leader. But was he truly the greatest athlete on the field? Another obvious answer is William Brennan, who in the mid 1960s rarely found himself in dissent⁸⁴ and was often tapped to write the key opinions and keep the majority coalition together. But how much of Brennan's contribution was genuine intellectual leadership, and how much mere tactical adroitness? True, Black was in dis-

80. 287 U.S. 45 (1932).

81. 304 U.S. 458 (1938).

82. See *Betts v. Brady*, 316 U.S. 455, 474-80 (1942) (Black, J., dissenting). On incorporation generally, see *id.* at 474-75 & n.1.

83. 372 U.S. 335 (1963).

84. In the 1963 Term, out of a total of 77 dissenting opinions, Brennan wrote only 2; and out of a total of 320 dissenting votes, Brennan cast only 3. (Black wrote 14 dissents and cast 42 dissenting votes; Warren wrote 1 dissent and cast 10 dissenting votes.) *The Supreme Court, 1963 Term—Business of the Court*, 78 HARV. L. REV. 177, 182 (1964). In the 1964 Term, out of a total of 71 dissenting opinions, Brennan wrote only 1; and out of a total of 173 dissenting votes, Brennan cast only 2. (Black wrote 14 dissents and cast 39 dissenting votes; Warren wrote no dissents; and cast 5 dissenting votes.) *The Supreme Court, 1964 Term—Business of the Court*, 79 HARV. L. REV. 103, 108 (1965).

sent much more than Brennan during the high tide of the Warren Court—but as we have seen, judicial leadership often begins in dissent. Though law fans can endlessly debate the issue (that's part of the fun), I would like to suggest that a forceful case can be made for Hugo Black as the true intellectual leader—the most valuable player—of the Warren Court.

Consider the six most important achievements of the Warren Court. First is the incorporation revolution—making applicable against states many previously unincorporated provisions of Amendments One through Eight. Brennan himself labeled this “the most important [series of decisions] of the Warren era,”⁸⁵ and leading scholars have offered similarly sweeping assessments.⁸⁶ But as we have seen, although Brennan ultimately devised the tactical technique of “selective” incorporation, the big idea here was Black's, as powerfully presented in his towering *Adamson* dissent—authored six years before Earl Warren's accession and almost a decade before Brennan joined the team.

Second, and related, was the Warren Court's revolution in criminal procedure—many of the previously unincorporated rights were rights of criminal defendants.⁸⁷ At its best, this revolution sought to protect innocent defendants from unfair trials that might wrongly find them guilty.⁸⁸ Again, this was a powerful and consistent theme of Black's opinions long before the Warren Court even existed, in cases such as *Johnson v. Zerbst*⁸⁹ in 1938, *Chambers v. Florida*⁹⁰ in 1940, *Betts v. Brady*⁹¹ in 1942, and *In re Oliver*⁹² in 1948. And there is no more admirable exemplar of the Warren Court's revision of criminal procedure than

85. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardian of Individual Rights*, 61 N.Y.U. L. REV. 535, 535 (1986).

86. Professor Van Alstyne has written that “it is difficult to imagine a more consequential subject,” and Harvard Dean and Solicitor General Erwin Griswold declared that he could “think of nothing in the history of our constitutional law which has gone so far since John Marshall and the Supreme Court decided *Marbury v. Madison* in 1803.” William W. Van Alstyne, *Foreword to MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS*, at ix (1986); ERWIN N. GRISWOLD, *DUE PROCESS PROBLEMS TODAY IN THE UNITED STATES*, in *THE FOURTEENTH AMENDMENT* 161, 164 (Bernard Schwartz ed., 1970).

87. For a list of these rights, and the relevant cases, see *supra* note 33.

88. At its worst, the Warren Court provided overly strong protection for the guilty as such. See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961); *Massiah v. United States*, 377 U.S. 201 (1964). Elsewhere, I have offered detailed criticisms of these and other upside-down cases. See generally AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997).

89. 304 U.S. 458 (1938) (declaring a right to government-appointed counsel in federal criminal trials).

90. 309 U.S. 227 (1940) (invalidating highly doubtful confessions beaten out of black suspects rounded up in a dragnet sweep).

91. 316 U.S. 455, 474-80 (1942) (Black, J., dissenting) (voting to require government-appointed counsel in state felony trial).

92. 333 U.S. 257 (1948) (invalidating a secret punishment meted out by a self-interested judge).

Black's very own *Gideon v. Wainwright*.⁹³

A third major achievement of the Warren Court was its assault on Jim Crow. Part of the Court's criminal procedure restructuring was doubtless motivated by concerns about racial injustice; but of course the centerpiece of the Warren Court's commitment to racial equality was *Brown v. Board of Education*.⁹⁴ The great Chief spoke for the Court here and in *Brown's* companion case, *Bolling v. Sharpe*.⁹⁵ Warren showed remarkable leadership in keeping the Court unanimous in these cases. But we should not overlook Black's role here. Here was a Justice from the Deep South—the only Justice on the Court from this region—standing with his Yankee and border state colleagues. Black suffered more criticism for *Brown* from his social circle—from old friends in his home state—than did any of the other Justices. Yet he was among the Court's most stalwart crusaders for racial justice, confounding early critics who feared that this former Klansman would never join an opinion like *Brown*. (True, Black had been a Klansman early on—he joined many organizations as an ambitious young man seeking to further his political career—but he had never inhaled the toxic fumes of racial hatred.)

Fourth, let us ponder the reapportionment revolution, proclaiming an end to gross malapportionment. This campaign for equality—each person's vote should count the same—both reinforced and went beyond the Court's crusade for simple racial equality. Some of the grossest malapportionments of the era privileged Southern rural whites at the expense of urban blacks. But the one person, one vote principle swept beyond race and the South, affirming a broader equality ideal of national scope. The Court's two best remembered cases here are *Baker v. Carr*⁹⁶ and *Reynolds v. Sims*.⁹⁷ Justice Brennan spoke for the Court in *Baker*; Chief Justice Warren in *Reynolds*. But let us not overlook *Wesberry v. Sanders*,⁹⁸ which invalidated malapportioned Congressional districts. Here, Justice Black spoke for the Court—after *Baker* had been handed down, but before *Reynolds* had been decided. Construing the word "people" in strong populist fashion, Black insisted that when the Constitution provided that members of the House of Representatives must be elected by "the People of the several States,"⁹⁹ the animating principle was that "as nearly as is practicable one man's vote in a con-

93. 372 U.S. 335 (1963).

94. 347 U.S. 483 (1954).

95. 347 U.S. 497 (1954).

96. 369 U.S. 186 (1962).

97. 377 U.S. 533 (1964).

98. 376 U.S. 1 (1964).

99. U.S. CONST., art. I, § 2, cl. 1.

gressional election is to be worth as much as another's."¹⁰⁰ Black's specific textual and historical arguments were far from perfect—especially his effort to smuggle Reconstruction sensibilities into the Founding text without open acknowledgment.¹⁰¹ Nevertheless, his basic structural intuition seems sound: In a republic of equal citizens, votes should generally count equally, lest government be captured by an entrenched, self-perpetuating aristocracy of the electorate. One person, one vote is also a principle that layfolk can easily understand and that judges can easily enforce. Although *Wesberry* is often relegated to a footnote in modern casebooks showcasing *Baker* and *Reynolds*, *Wesberry* is perhaps the key conceptual case of the three. *Baker*, after all, had pointedly declined to lay down a one-person, one-vote rule, and merely ruled that the malapportionment claim was justiciable. Indeed, some Justices who joined the Brennan majority opinion in *Baker* explicitly disavowed one person, one vote as the constitutional benchmark.¹⁰² Thus, the first Court opinion to announce the rule in a legislative apportionment context of broad application was Black's in *Wesberry*.¹⁰³ *Reynolds* at key points merely echoed *Wesberry*—in effect, "incorporating" the federal rule against the states via the Fourteenth Amendment in keeping with Black's larger incorporationist framework. Indeed, *Reynolds* itself framed the issue in just this way:

Wesberry clearly established that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State. Our problem, then, is to ascertain, in the instant cases, whether there are any constitutionally cognizable principles which would justify departures from the basic standard of equality among

100. *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964).

101. On the importance of the ratification process of the Fourteenth Amendment itself and the implications of this birth logic for constitutional interpretation, see Amar, *supra* note 46, at 49-51, 67; Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, UTAH L. REV. (forthcoming 2002). Viewing the Founding through the lens of Reconstruction also blunts much of Justice Harlan's *Wesberry* dissent, which stressed that slavery and the three-fifths ratio complicated intrastate apportionment at the Founding—a point rendered moot by the Reconstruction amendments. In emphasizing the need to read this particular Founding text through a Reconstruction prism, I follow the lead of my great teacher and colleague Bruce Ackerman. See Bruce A. Ackerman, *The Common Law Constitution of John Marshall Harlan*, 36 N.Y.L. SCH. L. REV. 5, 12-18 (1991); Bruce A. Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1 (1999).

102. See *Baker*, 369 U.S. at 226 (suggesting a judicial standard invalidating only "arbitrary and capricious" apportionments); *id.* at 244 (Douglas, J. concurring) ("Universal equality is not the test; there is room for weighting" of votes); *id.* at 260 (Clark, J., concurring) ("[T]here is no requirement that any plan have mathematical exactness in its application.").

103. Cf. *Gray v. Sanders*, 372 U.S. 368 (1963) (striking down Georgia's rather unusual unit-system for electing single statewide officers, and distinguishing the narrow issue at hand from the much more wide-ranging and general issues of apportionment in multimember legislatures).

voters in the apportionment of seats in state legislatures.¹⁰⁴

Fifth, the Warren Court revolutionized the nature of public education by ousting government-led prayer from public schools. This too, is best understood as an equality idea—government should not be in the business of naming some voters or some races or some religions as better than others, or of openly segregating public school students along religious lines.¹⁰⁵ Here the lead Warren Court case is *Engel v. Vitale*,¹⁰⁶ and it was Justice Black who spoke for the Court. In doing so, he built on and refined his earlier opinion in *Everson v. Board of Education*,¹⁰⁷ authored well before Earl Warren or William Brennan had appeared on the scene. Black's implicit equality vision was far more admirable than the later strong separationist logic that later held sway in the Burger Court after Black's departure.¹⁰⁸ (The Rehnquist Court is now swinging back towards Black's view.)¹⁰⁹ Giving government-subsidized buses to all private nonprofit schools—both parochial and secular—was not special treatment for any one religion or even for all religions. It gave religion equal treatment, not special treatment, and Black led his colleagues to uphold this practice in *Everson* in an opinion that powerfully stressed this neutrality theme. The buses, Black repeatedly observed, were part of a "general program" that aided all private nonprofit schools and children "regardless of their religion."¹¹⁰ The First Amendment required neutrality, not hostility, towards religion: "State power is no more to be used so as to handicap religions, than it is to favor them."¹¹¹ Black's *Everson* opinion did contain some loose language in places, but its key logic was sound, as was its holding on its facts. Likewise sound was *Engel's* fundamental holding on its facts, striking down government-led prayer in public schools. Unlike the bus policy in *Everson*, *Engel's* facts flunked the equality/neutrality test: the very idea of government-led prayer privileged religion *as such*, and

104. *Reynolds v. Sims*, 377 U.S. 533, 560-61 (1964).

105. See generally Akhil Reed Amar, *Justice Kennedy and the Ideal of Equality*, 28 PAC. L.J. 515, 525-28 (1997).

106. 370 U.S. 421 (1962).

107. 330 U.S. 1 (1947). See also *McCullum v. Bd. of Educ.*, 333 U.S. 203 (1948) (Black, J.); *Zorach v. Clauson*, 343 U.S. 306, 315-20 (1952) (Black, J., dissenting). In both cases, involving public school systems of "release time," Black objected to governmental schemes that in his view aided religion as such, deployed coercion of mandatory school attendance laws to promote attendance at religious events, and openly separated students in public schools along religious lines.

108. See, e.g., *Meek v. Pittenger*, 421 U.S. 349 (1975), *overruled by Mitchell v. Helms*, 530 U.S. 793 (2000); *Wolman v. Walter*, 433 U.S. 229 (1977), *overruled by Mitchell v. Helms*, 530 U.S. 793; *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Aguilar v. Felton*, 473 U.S. 402 (1985), *overruled by Agostini v. Felton*, 521 U.S. 203 (1997).

109. See, e.g., *Agostini*, 521 U.S. 203; *Mitchell*, 530 U.S. 793.

110. *Everson*, 330 U.S. at 17-18.

111. *Id.* at 18.

indeed openly took sides among religions in an explicitly religious context.¹¹² In a notoriously marshy area of law, where so many Justices have gotten lost, Black surefootedly reached the right result in both cases and largely for the right reasons. The laws at issue in these two landmark cases were subtly but critically different—and Black acutely saw the difference, leading the Court to properly affirm one law while condemning the other.

Sixth and last, the Warren Court revived a broad right of political expression, in cases like *New York Times v. Sullivan*.¹¹³ Here, too, we might detect an equality theme, protecting outsiders from the repression of governmental insiders. In any event, as we have seen, the idea of strong freedom of political discourse, especially for dissenters, is one that Black had championed long before *Sullivan*—again, before there was even such a thing as the Warren Court.

But if all this is so, why is Black's leadership not widely noted today?¹¹⁴ Part of the problem, as I have repeatedly hinted, is that one of America's largest and most influential law schools, located across the river from Fenway Park, has tended to root for its own—Holmes, Brandeis, Frankfurter, and Brennan, most prominently. Far from being a Harvard man, Black was the leading antagonist of Harvard's celebrated professor, Felix Frankfurter. When Frankfurter's star began to fade, it was easier for many Harvard graduates to simply transfer their admiration to Brennan rather than to admit that Black had been right all along. Indeed, Black's homespun style made it easy for mandarins to dismiss him as simplistic. Also, most accounts of the Warren Court tend to begin with Warren's accession to the Court, thereby excluding Black's pre-Warren opinions from the frame of analysis.

Finally, some modern scholars might seek to expand my list of six major Warren Court themes to include the right of sexual privacy. The

112. See *Engel*, 370 U.S. at 436.

113. 376 U.S. 254 (1964).

114. At least one leading commentator grasped the truth of Black's intellectual leadership, but found both Black and the Warren Court, in general, less than admirable. See ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 9 (1975) ("The Warren Court in its heyday was Hugo Black writ large."). More recent commentators often miss Black's leadership altogether and misconstrue his vision and its implications. See, e.g., Morton J. Horwitz, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* (1998). According to Horwitz, Black in general had "extremely doctrinaire" and "dogmatic" views about constitutional interpretation which "enmeshed him in contradiction," *id.* at 5, 110; Black in particular "rejected any use of a 'balancing test' to decide First Amendment questions," and adhered to a "dogmatic" First Amendment "absolutism"—a position beset with "intellectual difficulties," *id.* at 67-68, 105; Brennan was "the most important intellectual influence on the Warren Court," *id.* at 8; and the key voting cases were *Baker v. Carr* featuring a "great scholarly opinion" by Brennan and Warren's *Reynolds v. Sims*, with Black and *Wesberry* unworthy of mention, *id.* at 82-85. Horwitz also claims that neither *Brown* nor one person, one vote could be supported by constitutional text, history, and structure and could only be defended by appeal to a "living Constitution" approach, *id.* at 110. But see Amar, *supra* note 46, at 49-51, 60-68.

key Warren Court case here is *Griswold v. Connecticut*,¹¹⁵ and it is hard to see Black as the Court's leader here—after all, he famously dissented.¹¹⁶ But a robust vision of sexual privacy—for unmarried heterosexuals and for abortion-seekers but not for gays engaged in sodomy—was the brainchild of the Burger Court more than the Warren Court.¹¹⁷ Whatever one thinks of these cases, wasn't there a kernel of truth in Black's anxiety in *Griswold* about judges using their own personal intuitions to invalidate acts of democratically accountable legislatures? Perhaps *Griswold* might have been better (or at least additionally) justified as an equality case, in keeping with the Warren Court's general equality theme: the contraception law at issue in *Griswold* imposed risks of pregnancy on women that men were not obliged to bear. No Connecticut woman had ever voted for such a law, which had been adopted long before woman suffrage came to my home state. A more democracy-sensitive opinion might have invalidated the old law and remanded the issue back to the state legislature, secure in the knowledge that modern women voters would not allow modern legislators to enact extreme anti-contraception laws. (Even though women did not yet have enough clout to remove the old law from the books, they could easily prevent the adoption of a new law.)¹¹⁸ Perhaps Black might have embraced such an approach, perhaps not. But even in dissenting in a case that seems to us so obviously right on its facts, Black has something valuable to teach us—namely, the desirability of anchoring judicial doctrine in the text, history, and structure of the document itself.

IV. STATS, STYLE, AND THE HALL OF FAME

It is time to sum up. As I score it, Hugo Black compiled impressive lifetime statistics, and deserves more credit than he has received for being the substantive leader of the Warren Court, giving it drive and focus. Above and beyond each of his many substantive contributions, we should not miss Black's general methodological insights and leadership. The Constitution is the people's document, not the judges'. It was ordained and established by "We the People" and amended over the years by the people, often at the behest of mass movements of ordinary citizens—abolitionists, the Woman Suffrage Movement, the Progressives, the 1960s Civil Rights and Youth Movements. Black read this populist document in populist ways, celebrating the rights of the people

115. 381 U.S. 479 (1965).

116. *Griswold*, 381 U.S. at 506-27.

117. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (unmarried heterosexual contraception); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Bowers v. Hardwick*, 478 U.S. 186 (1986) (gay sodomy).

118. See generally GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

and cautioning judges to not trust too much to their own wisdom. He believed in the Constitution—and he helped the rest of us believe in it, too. Like many of the great ones, he played the game with style.

Over the run of his extraordinary tenure on the Court, spanning five (!) decades, Black had many bad days, of course.¹¹⁹ So did all his colleagues. No Justice bats 1.000 or anything close to it. But very few have been as good as Hugo Black.

119. *See, e.g.*, *Korematsu v. United States*, 323 U.S 214 (1944) (Black J.) (upholding internment of Japanese-Americans during World War II).