BECOMING THE "BILL OF RIGHTS": THE FIRST TEN AMENDMENTS FROM FOUNDING TO RECONSTRUCTION

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The first ten amendments to the federal Constitution have no formal title. It is only by cultural tradition that Americans refer to these provisions as our national "Bill of Rights." Until recently, most scholars assumed that this tradition could be traced back to the moment of ratification. Over the last decade or so, however, a number of scholars have challenged this assumption. These "Bill of Rights revisionists" claim that Americans did not commonly refer to the first ten amendments as "the bill of rights" until the twentieth century. Prior to that, most Americans either did not believe they had a national bill of rights, or they would have more likely pointed to the Declaration of Independence as the country's "bill of rights." If the revisionists are right, then a substantial portion of constitutional historical scholarship is shot through with historical error, in particular scholarship supporting the incorporation of the Bill of Rights as part of the Fourteenth Amendment.

This Article conducts an exhaustive investigation of political, legal, and cultural references to the "bill of rights" from the time of the Founding to Reconstruction (and beyond). These references, most of which are presented here for the first time, prove that the revisionist claims about the first ten amendments are false. Long before the twentieth century, and decades before Reconstruction, Americans commonly referred to the 1791 amendments as "the Bill of Rights." These references vastly outnumber historical references to the Declaration of Independence as a "bill of rights," and indicate that nineteenth-century Americans were not at all confused about the meaning and content of their national "Bill of Rights." If any revision is in order, it is the need to revisit and revise our understanding of how post-Civil War Americans abandoned the

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original federalist understanding of the Bill of Rights and embraced a new nationalist understanding of their enumerated rights.

INTRODUCTION

Americans commonly refer to the first ten amendments to the federal Constitution as "the Bill of Rights." The amendments themselves, however, have no such title. Unlike the "Declaration of Rights" annexed to many state constitutions,[1] the ten amendments added to the federal Constitution in 1791 have no formal title at all.[2] It is only by cultural tradition that Americans refer to these provisions as our national "Bill of Rights." Until recently, scholars assumed that this tradition could be traced back to the moment of ratification.

Over the last decade or so, however, a number of scholars have challenged this assumption. These "Bill of Rights revisionists" claim that Americans did not commonly refer to the first ten amendments as "the Bill of Rights" until the twentieth century.[3] Prior to that, revisionists argue, most Americans either did not believe they had a national bill of

[1] See, e.g., Va. Const. art. 1 (drafted 1776, affixed to its constitution in 1830); Pa. Const. ch. I (1776); Mass. Const. pt. I (1780).

[2] For a transcription of the official copy of the 1791 amendments, including the message submitted with the original proposed twelve amendments, see The Bill of Rights: A Transcription, National Archives, https://www.archives.gov/founding-docs/bill-of-rights-transcript [https://perma.cc/5YP9-2EPP] (last visited Jan. 15, 2024). For a PDF of the actual document, see The Bill of Rights, National Archives, https://www.archives.gov/founding-docs/bill-of-rights [https://perma.cc/5K6S-4ZRD] (last visited Jan. 15, 2024).

[3] See, e.g., Randy Barnett & Evan Bernick, The Original Meaning of the Fourteenth Amendment: Its Letter and Spirit 326 (2021) ("[T]his phrase [the Bill of Rights] did not commonly refer to the first ten amendments until sometime in the twentieth century . . . . [E]ven after the first ten amendments were added to the end [of the Constitution], people often characterized the rights affirmed by the previously enacted Declaration of Independence as a 'bill of rights.'"); Ilan Wurman, The Second Founding: An Introduction to the Fourteenth Amendment 111 (2020) ("[T]he term 'bill of rights' was not used as a term of art for the first eight Amendments to the U.S. Constitution until well after the Civil War."); Gerard N. Magliocca, The Heart of the Constitution: How the Bill of Rights Became the Bill of Rights 6 (2018) ("The belief that the first ten amendments are the Bill of Rights did not become dominant until the twentieth century."); Michael J. Douma, How the First Ten Amendments Became the Bill of Rights, 15 Geo. J.L. & Pub. Pol'y 593, 609–11 (2017) (explaining that the term "Bill of Rights" was not defined as the first ten amendments prior to the late 1920s and early 1930s); Pauline Maier, The Strange History of the Bill of Rights, 15 Geo. J.L. & Pub. Pol'y 497, 506–11 (2017) (arguing that the "Bill of Rights" did not take on its current meaning as a reference to the 1791 amendments until the 1930s).

rights[4] or they would have pointed to the Declaration of Independence as the country's "bill of rights."[5] A number of revisionists insist that nineteenth-century Americans used the term "bill of rights" as an abstract reference to a variety of culturally important documents, including the Declaration of Independence and the entire federal Constitution.[6] These scholars maintain that the term "bill of rights" remained a "mass of linguistic confusion" until the twentieth century, when common usage finally coalesced around the 1791 amendments.[7]

If the revisionists are right, then a substantial portion of constitutional historical scholarship is shot through with historical error.[8] For more than a century, historians and legal scholars have presumed that, absent a specific signal indicating otherwise, nineteenth-century references to the American "bill of rights" referred to the rights listed in the 1791 amendments.[9] If this assumption is not correct, then this calls into

[4] Magliocca, supra note 3, at 5 ("[D]uring the nineteenth century, most people simply did not think that the country had a national bill of rights . . . .").

[5] Id. at 58–59 ("Until 1860, the first ten amendments lagged well behind the Declaration of Independence in the race for public recognition as the national bill of rights."); Maier, supra note 3, at 503 ("The most important statement of rights for early nineteenth century Americans—particularly those who opposed slavery—was not what we call the Bill of Rights but the Declaration of Independence."); see also Barnett & Bernick, supra note 3, at 326 (arguing that "even after the first ten amendments were added to the [Constitution], people often characterized the rights affirmed by the previously enacted Declaration of Independence as a 'bill of rights' ").

[6] Douma, supra note 3, at 600–01 ("[A] bill of rights was conceived of as an abstraction . . . . [I]n the early Republic, 'bill of rights' as a term was quite distinct from and referred to more than just the first ten amendments."); id. at 602 (noting that prior to the twentieth century, the term "Bill of Rights" was more often used as an "abstract concept" than a reference to a specific document); Randy Barnett & Evan Bernick, The Privileges or Immunities Clause Abridged: A Critique of Kurt Lash on the Fourteenth Amendment, 95 Notre Dame L. Rev. 499, 568–69 (2019) (first citing Magliocca, supra note 3, at 6, 90; then citing Douma, supra note 3, at 609–11; and then citing Maier, supra note 3, at 506–11) ("To begin with, recent scholarship has shown that the first eight or ten amendments to the Constitution were not commonly referred to as 'the Bill of Rights' until well into the twentieth century . . . . [As late as 1868,] 'the Bill of Rights' lacked a standard meaning.").

[7] Douma, supra note 3, at 598.

[8] According to Randy Barnett and Evan Bernick, "[a]ttributing the post-New Deal meaning of 'the Bill of Rights' to the pre-Fourteenth Amendment public is anachronistic. (Although, we admit, it was an understandable mistake to have made before this recent revisionist scholarship.)." Barnett & Bernick, supra note 6, at 568. Similarly, Michael Douma insists that "anachronistic" scholarly references to the 1791 amendments as the "bill of rights" "runs through the whole sub-field of constitutional history." Douma, supra note 3, at 596.

[9] A full list would fill libraries. Among some of the more influential works that would have to be revised or reevaluated would include 1 Joseph Story, Commentaries on the Constitution 276 (1st ed. 1833); Thomas Cooley, The General Principles of Constitutional Law in the

question a great body of historical scholarship on everything from the history of the original "bill of rights,"[10] to antebellum abolitionist efforts to enforce "the bill of rights,"[11] to Reconstruction Republican claims that the Fourteenth Amendment would apply "the bill of rights" against the states.[12] Moreover, since scholars and judges (including Supreme Court Justices) have relied on this scholarship in considering whether the Fourteenth Amendment incorporates the Bill of Rights, revisionist claims call into question the historical justification for contemporary incorporation doctrine.[13]

This Article examines the historical record in order to determine whether the claims of the Bill of Rights revisionists are correct. It presents the results of an exhaustive investigation of political, legal, and cultural references to the "bill of rights" from the time of the Founding to the end of the nineteenth century. These references, most of which are presented here for the first time, suggest that the central revisionist claims are false. Long before the twentieth century, and decades before Reconstruction,

United States 199–204 (1880); Edward Dumbauld, The Bill of Rights and What It Means Today vii (1957); Learned Hand, The Bill of Rights 1–2 (1958); Charles Fairman, Reconstruction and Reunion, 1864–88: Part One, *in* 6 The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States 1123–24 (1971); Bernard Schwartz, The Great Rights of Mankind: A History of the American Bill of Rights 165–67 (1992); Michael Kent Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights 1 (1986); Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction xi (1998); Leonard W. Levy, Origins of the Bill of Rights 1 (1999); Carol Berkin, The Bill of Rights: The Fight to Secure America's Liberties 1–3 (2015).

[10] See, e.g., Levy, supra note 9, at 1.

[11] See, e.g., Kent Curtis, supra note 9, at 51–54; Amar, supra note 9, at 161–62.

[12] See, e.g., 2 G. Edward White, Law in American History: From Reconstruction Through the 1920s, at 10 (2016).

[13] See, e.g., McDonald v. City of Chicago, 561 U.S. 742, 754 (2010); Adamson v. California, 332 U.S. 46, 70–72, 92–110 (1947) (Black, J., dissenting); *McDonald*, 561 U.S. at 828 (Thomas, J., concurring in part and concurring in the judgment) (discussing the history of the Fourteenth Amendment, including Justice Black's historical appendix in *Adamson*). Bill of Rights revisionism, if correct, also would require rethinking a number of additional common assumptions in legal historical scholarship, including the presumed shift from a federalist reading of the 1791 "bill of rights" to a more libertarian understanding at the time of Reconstruction. See Amar, supra note 9, at 190, 284. But see Maier, supra note 3, at 505 (specifically rejecting Amar's account). Revisionism also calls into question scholarship on the move from natural rights to a more positivist approach to legal rights during the nineteenth century. Presumptions that Americans came to view the Constitution with its "bill of rights" as representing a document of the unified American people rather than a federalist document of limited national power guaranteeing reserved powers to the states would also have to be re-envisioned since, again, much of this scholarship relies on antebellum discussions of the "bill of rights."

Americans commonly referred to the first ten constitutional amendments as "the Bill of Rights." References to the 1791 amendments as the national bill of rights vastly outnumber historical references to the Declaration of Independence as a "bill of rights," and nineteenth-century Americans were not at all confused about the meaning and content of the national "Bill of Rights."

Although antebellum Americans embraced the ten amendments as their Bill of Rights, their understanding of those amendments significantly changed between the Founding and Reconstruction. At the time of the Founding, most Americans viewed the national Bill of Rights as symbolizing a general theory of limited and enumerated federal power.[14] Over time, however, this federalist understanding of the Bill of Rights gave way to a more individual-liberty reading of the ten amendments.[15] By the time of Reconstruction, both Democrats and Republicans viewed the Bill of Rights as declaring the fundamental rights of American citizenship.[16] When John Bingham proposed the addition of an amendment enforcing the "Bill of Rights" against the states, his colleagues understood the proposal as an effort to enforce the personal rights listed in the 1791 amendments. To date, scholars have failed to recognize the significance of the Reconstruction-era vision of "the Bill of Rights" and the role it played in the original understanding of Section One of the Fourteenth Amendment.

* * *

This Article begins by briefly addressing the basic claims of Bill of Rights revisionists. Although not entirely uniform in their individual conclusions or theoretical approach, they share a number of common assertions. All insist that references to the ten amendments as a bill of rights were extremely rare between the time of the Founding and Reconstruction. This rarity, we are told, reflects the fact that the 1791 amendments lacked the essential characteristics of a bill of rights in late-eighteenth-century America—the amendments did not "look" like a bill of rights.[17] During the first half of the nineteenth century, revisionists

[14] See infra note 136 and accompanying text.

[15] See infra note 277 and accompanying text.

[16] See infra note 318 and accompanying text.

[17] See, e.g., Maier, supra note 3, at 500 ("Congress did not label the amendments it endorsed a Bill of Rights nor did they look like one to eighteenth century Americans."); Magliocca, supra note 3, at 37 ("[O]ne reason that the ten amendments ratified by the states in 1791 were

claim, almost no one referred to the 1791 amendments as a bill of rights.[18] Although some referred to the 1791 amendments as having "the *nature* of a bill of rights" or were "*equivalent* to a bill of rights," they avoided actually naming the amendments "*the* Bill of Rights."[19] Instead, antebellum Americans more often pointed to the Declaration of Independence as the nation's Bill of Rights.[20] Although some revisionists point to Reconstruction as the moment when Americans began to call the ten amendments a bill of rights, others insist that the term "bill of rights" remained an "abstract concept" that would not be clarified prior to the twentieth century.[21] Part I concludes by analyzing the empirical nature of the revisionists' claims and the manner by which such claims can be tested.

Subsequent Parts then take a deep dive into the historical record. Part II explores the meaning of the term "bill of rights" at the time of the Founding. Understood as simply an enumeration of constraints on government power, late-eighteenth-century Americans applied the term "bill of rights" to a number of historical documents, including the Magna Charta,[22] the English Petition of Right, the English Bill of Rights, and the states' "Declarations of Rights."[23] All of these otherwise distinguishable documents could be viewed as bills of rights because, according to

not seen as a bill of rights is that they did not match the eighteenth-century expectations of how one was supposed to look.").

[18] Magliocca, supra note 3, at 5 ("[F]or more than a century after the first ten amendments were ratified, hardly anyone called them *a* bill of rights, let alone *the* Bill of Rights.").

[19] Maier, supra note 3, at 502 (emphases added) (noting that such phrases were "more descriptive than [normative]"—"[t]hat is, they fell short of giving [the amendments] the name").

[20] Magliocca, supra note 3, at 58–59 ("Until 1860, the first ten amendments lagged well behind the Declaration of Independence in the race for public recognition as the national bill of rights."); Maier, supra note 3, at 503 ("The most important statement of rights for early nineteenth century Americans—particularly those who opposed slavery—was not what we call the Bill of Rights but the Declaration of Independence."); see also Barnett & Bernick, supra note 3, at 326 ("[T]his phrase [the Bill of Rights] did not commonly mean the first ten amendments until sometime in the twentieth century. . . . [E]ven after the first ten amendments were added to the end [of the Constitution], people often characterized the rights affirmed by the previously enacted Declaration of Independence as a 'bill of rights.' ").

[21] Douma, supra note 3, at 602.

[22] See, e.g., 1 Gazette U.S. (N.Y.C.), Dec. 30, 1789, at 299 (describing how guarantees of individual rights grew out of the conflict between King John and the rebel barons).

[23] Interestingly, late-eighteenth-century Americans did not refer to the Declaration of Independence as a bill of rights. This usage seems not to have occurred until much later, driven primarily by the rising abolitionist movement in the early decades of the nineteenth century, no earlier than 1817. See infra note 196 and accompanying text.

contemporary definitions, "a bill of rights" was nothing more than a list of enumerated rights or constraints on government power. Placement was not important: there is no evidence that Founding-era Americans believed "bills of rights" needed to be at the beginning or at the end of a constitution or attached to a constitution at all. Nor was the term "bill of rights" reserved for particular *kinds* of rights or principles—one might criticize a bill of rights for being incomplete, but still consider the incomplete list to be a "bill of rights."[24]

Part III explores antebellum legal and political rhetoric and the degree to which Americans during that period described the 1791 amendments as a "bill of rights." Although the amendments themselves lacked an official title, late-eighteenth- and early-nineteenth-century speakers, politicians, and legal commentators repeatedly described the first ten amendments as "*a* bill of rights," "*the* bill of rights," "*our* Bill of Rights," and the "*national* bill of rights." These references are found in everything from congressional speeches to children's schoolbooks. This common way of labeling the 1791 amendments became even more frequent in the decades prior to the Civil War. As the debate over slavery increasingly divided the country, both abolitionists and states' rights advocates invoked the national "Bill of Rights" in support of their theories of constitutional liberty. By the time of the Civil War, presidential speeches, abolitionist newspapers, essays by critics of the national government, and congressional debates are full of references to the first ten amendments as a (or *the*) "bill of rights." Although there are a few scattered references to the Declaration of Independence as a "national bill of rights," the historical record overwhelmingly indicates that the term "bill of rights" was most commonly used in reference to the 1791 amendments.

Part IV investigates the Civil War and Reconstruction Eras, including the period coinciding with the ratification of the Fourteenth Amendment. As had their antebellum counterparts, both Republican abolitionists and states-rights Democrats repeatedly pointed to the 1791 Bill of Rights in support of their particular legal and political goals. During the Fourteenth Amendment debates, members of both parties unambiguously referred to the 1791 amendments as the Bill of Rights. When Ohio Republican John Bingham announced his intention to pass an amendment enforcing the "Bill of Rights" against the states, his colleagues in the Thirty-Ninth Congress understood Bingham to be referring to the 1791 amendments

[24] Infra note 66 and accompanying text.

and his desire to apply those amendments against the states. Throughout the Reconstruction Congresses, members used the term "Bill of Rights" as a reference to provisions in the 1791 amendments. This practice continued from Reconstruction to the end of the nineteenth century.

The Article concludes by summarizing the historical evidence and considering the implications for future historical research on the national Bill of Rights and the original understanding of the Fourteenth Amendment. Although historians may confidently continue to presume that Reconstruction-era references to the national bill of rights were references to the enumerated rights of the 1791 amendments, it appears the public understanding of those amendments had changed between the time of the Founding and the Fourteenth Amendment. This has important implications for our understanding of the Privileges or Immunities Clause of the Fourteenth Amendment, a clause written by John Bingham, who described his efforts as an attempt to enforce the bill of rights as incorporated against the states.[25]

I. THE REVISIONIST CHALLENGE

In 2010, the late historian Pauline Maier became the first scholar to seriously question whether Americans commonly referred to the first ten amendments as a "bill of rights" at *any* point prior to the twentieth century.[26] In her book, *Ratification: The People Debate the Constitution, 1787–1788*, Maier claimed that "[t]he proposed amendments did not, in fact, look like a bill or declaration of rights as Americans of the late eighteenth century knew them."[27] For example, the amendments were placed at the end of the Constitution rather than at the beginning of the document like most state declarations of rights.[28] The amendments also lacked a broad opening statement regarding the "inherent rights" of men as was common in state constitutions.[29] Finally, as far as Maier could determine, neither James Madison nor any of his contemporaries called

[25] John Bingham, Speech on the Privileges or Immunities Clause of Section One of the Fourteenth Amendment, March 31, 1791, *in* 2 The Reconstruction Amendments: Essential Documents 620, 624 (Kurt T. Lash ed., 2021).

[26] Pauline Maier, Ratification: The People Debate the Constitution, 1787–1788, at 462 (2010).

[27] Id.

[28] Id.

[29] Id.

the proposed amendments a "bill of rights,"[30] nor did any member of the antebellum Supreme Court.[31]

In a 2013 speech, Maier went even further and insisted that Americans did not commonly refer to the 1791 amendments as the Bill of Rights until the twentieth century.[32] Although antebellum Americans occasionally used the term "bill of rights" in connection with the first ten amendments, Maier claimed that they did so only tentatively, describing them "as equivalent to a bill of rights or in the nature of a bill of rights"; this, Maier believed, "fell short of giving them the name."[33] Rather than the ten amendments, it was the Declaration of Independence that antebellum Americans viewed as "the functional equivalent of a national bill of rights."[34] It was not until the 1930s that the ten amendments attained their iconic status as the Bill of Rights.[35]

Unfortunately, Professor Maier passed away before formally publishing the research that formed the basis of her 2013 speech. Her ideas, however, inspired Professor Gerard Magliocca to further investigate the issue. In an article,[36] and later in a full-length book,[37] Magliocca canvassed the historical record and concluded that "during the nineteenth century, most people simply did not think that the country had a national bill of rights."[38] Expanding on Maier's claims that the original amendments did not look like a bill of rights, Magliocca agreed that the first ten amendments lacked the essential elements that late-eighteenth-century Americans expected in a bill of rights. For example, unlike the

[30] See id. at 460 (claims about Madison); id. at 463 (claims about his "contemporaries").

[31] Id. at 463.

[32] See Maier, supra note 3, at 506 (claiming that it was "[n]ot until the early twentieth century" that contemporary usage became standard).

[33] Id. at 502.

[34] Id. at 503.

[35] Id. at 507–08.

[36] Gerard N. Magliocca, The Bill of Rights as a Term of Art, 92 Notre Dame L. Rev. 231, 232 (2016).

[37] See generally Magliocca, supra note 3. Between the time that Prof. Magliocca published his article and his eventual publication of a book-length treatment on the subject, two other articles appeared making similar claims about the antebellum usage of the term "bill of rights," both published as part of the same symposium on the Bill of Rights. See Douma, supra note 3, at 593; Maier, supra note 3, at 502. In his book, Magliocca combines all of the evidence contained in these articles (with proper attribution) and adds his own additional research. Accordingly, Magliocca's book remains the primary source for historical evidence supporting the claim that the 1791 amendments were not understood as the Bill of Rights until after the Civil War. See Magliocca, supra note 3.

[38] Magliocca, supra note 3, at 5.

content and structure of influential documents like the Virginia Declaration of Rights, Madison's proposed list of amendments lacked an opening statement about natural rights, and his list was appended to the end of the Constitution rather than placed at the beginning.[39] Magliocca also echoed Maier's claim that James Madison never once referred to the ratified amendments as a bill of rights.[40] Instead, "[u]ntil the 1830s, there was almost no discussion on the first set of amendments" at all.[41] As had Maier, Magliocca claimed that antebellum Americans were more likely to name the Declaration of Independence as the Bill of Rights than they were the ten amendments.[42] In support, Magliocca cited Maier's "review of the history textbooks used in public schools" and her conclusion that "none of them told children that there was a national bill of rights until . . . 1888."[43] Although some Reconstruction-era politicians referred to the 1791 amendments as the Bill of Rights, those rare occurrences should be viewed more as a rhetorical strategy than as a representation of common practice.[44] In sum, Magliocca believed the history proved Maier correct: Americans did not commonly refer to the ten amendments as the Bill of Rights until the twentieth century.[45]

Pauline Maier's and Gerard Magliocca's work represents the first wave of Bill of Rights revisionism. Their claims focus on the first ten amendments and the idea that these amendments were not commonly called "the bill of rights" until long after Reconstruction. Recently, a second wave of revisionist scholarship has emerged that focuses on the term "bill of rights" and argues that the term remained a "mass of

[39] Magliocca, supra note 36, at 237 ("One trait that all but one of these bills of rights shared was that they came right before or after a preamble. The first set of amendments, by contrast, appears at the end of the Constitution, mainly because Roger Sherman argued that what was proposed in 1787 should be kept apart from any future changes. The other characteristic that stands out in the state bills of rights is that they made abstract claims about government. For example, Virginia's Declaration of Rights stated: [A]ll men are by nature equally free and independent . . . ." (alteration in original)).

[40] Id. at 239 n.49 ("Madison then discussed the case for and against a bill of rights . . . but without the prefix what he proposed was not a bill of rights, as indicated by his unwillingness to use that term for the first set of amendments after ratification.").

[41] Id. at 242.

[42] Magliocca, supra note 3, at 58–59.

[43] Id. at 69 (citing Maier, supra note 3); see also Maier, supra note 3, at 506 (discussing the emergence of the term "Bill of Rights").

[44] Magliocca, supra note 36, at 233.

[45] Id. at 232 ("James Madison never said that what was ratified in 1791 was a bill of rights, and that label was not widely used for those provisions until after 1900.").

linguistic confusion" prior to the twentieth century.[46] Professor Michael Douma, for example, claims that Americans in the early republic most often thought of the federal "bill of rights" as an "abstract concept," and "not as the amendments to the Constitution."[47] According to Douma, "linguistic evidence demonstrates that in the first half of the nineteenth century, 'the bill of rights,' usually in lower-case letters, was a general term that incorporated rights declared in the Declaration of Independence *and* in the Constitution."[48] As evidence, Douma cites early instances where speakers appeared to use the term "bill of rights" in reference to "the constitution," and not to constitutional amendments,[49] as well as instances where the term seemed to be used in reference to the Declaration of Independence.[50] These different references suggest to Douma that, even as late as Reconstruction, the meaning of the term "bill of rights" remained "contested," sometimes used in reference to something specific, but "more often . . . referring to a larger abstract concept."[51]

Relying on both first- and second-wave revisionist scholarship, Professor Randy Barnett and his co-author Professor Evan Bernick argue that it is "anachronistic"[52] and a "mistake" to understand Reconstruction-era references to the "bill of rights" as references to the 1791 amendments.[53] No one at the time would have necessarily done so since "amendments to the Constitution were not commonly referred to as 'the Bill of Rights' until well into the twentieth century."[54] When speakers during the Fourteenth Amendment debates referred to the "bill of rights," they were "referring to a variety of sets of rights," not just those listed in the first ten amendments.[55] Thus, when the author of the Privileges or Immunities Clause of the Fourteenth Amendment, John Bingham, declared that his efforts were directed at enforcing the "bill of rights"

[46] See Douma, supra note 3, at 598.
[47] Id. at 599–600.
[48] Id. at 601.
[49] Id. at 600.
[50] Id. at 600–01.
[51] Id. at 602.
[52] Barnett & Bernick, supra note 6, at 568.
[53] Randy Barnett & Evan Bernick, The Difference Narrows: A Reply to Kurt Lash, 95 Notre Dame L. Rev. 679, 698 (2019).
[54] Barnett & Bernick, supra note 6, at 568 (citing the works of Magliocca, Douma, and Maier).
[55] Barnett & Bernick, supra note 53, at 698.

against the states,[56] these revisionists insist that there is no historically persuasive reason to think he was referring to the 1791 amendments.[57]

To test the above claims, this Article utilizes what has become a fairly standard set of digitized judicial, scholarly, cultural, and newspaper databases, most relied upon by revisionists themselves.[58] This includes the Westlaw database for judicial opinions; the HathiTrust database for books, manuscripts, and pamphlets; and four separate databases for historical newspaper articles and transcripts of published speeches: Readex's America's Historical Newspapers, the Library of Congress's Chronicling America: Historic American Newspapers, Accessible Archives' collection of African American Newspapers and publications by abolitionists (e.g., *The Liberator*) and women's rights organizations (e.g., *The Revolution*), and the *New York Times*'s TimesMachine.

My conclusions are as follows: between the Founding and Reconstruction, one finds high-profile examples of Americans referring to the first ten amendments as *the* national Bill of Rights, and that such references were far more common than references to the Declaration of Independence as the Bill of Rights. These references can be found in everything from the most influential legal treatises to children's schoolbooks. This common understanding was shared both by James Madison, the author of the Bill of Rights, and by John Bingham, the author of the Fourteenth Amendment. In short, the revisionists are wrong.

II. THE CREATION OF THE 1791 AMENDMENTS

A. The Bill of Rights at the Time of the Founding

When Americans first considered whether to ratify the proposed federal Constitution, they did so against a background of multiple well-known documents that could be, and often were, described as "Bills of Rights." These included the 1215 Magna Charta,[59] the 1628 English Petition of Right,[60] the 1689 English Bill of Rights,[61] the 1774 Declaration

[56] John Bingham, Speech in the U.S. House of Representatives (Feb. 28, 1866), *reprinted in* 2 The Reconstruction Amendments, supra note 25, at 110.

[57] Wurman, supra note 3, at 111; Barnett & Bernick, supra note 53, at 698.

[58] See Douma, supra note 3, at 598 (describing Douma's use of digital databases).

[59] See, e.g., 1 Gazette U.S. (N.Y.C.), Dec. 30, 1789, at 299 (referring to the Magna Charta as "that boasted instrument called the bill of rights").

[60] The Petition of Right 1628, 3 Car. 1 c.1 (Eng.).

[61] 42 N.Y. J., June 13, 1788, at 2 (discussing "the bill of rights in the reign of king William").

and Resolves of the Continental Congress (the "Colonial Bill of Rights"),[62] the 1776 Virginia Declaration of Rights,[63] the American Declaration of Independence,[64] and the 1780 Massachusetts Declaration of Rights.[65]

These historical "bills of rights" were not constructed in exactly the same way, nor did they contain the same list of rights. The original Magna Charta, for example, spent more time defining feudal arrangements than declaring individual rights.[66] The 1628 Petition of Right is a mixture of claimed rights and asserted grievances addressed to the King.[67] The 1689 English Bill of Rights contains a list of grievances followed by a list of asserted rights.[68] The Colonial Declaration and Resolves follows the same structure as the English Bill of Rights and ends with a list of parliamentary acts declared to have violated colonial rights.[69] The 1776 Virginia Declaration of Rights was a stand-alone document containing a list of

[62] See Declaration and Resolves of the First Continental Congress, *reprinted in* 1 Journals of the Continental Congress 1774–1789, at 63, 63–73 (Worthington Chauncey Ford ed., 1904) (1774).

[63] See Virginia Constitution, Declaration of Rights, *reprinted in* 10 Sources and Documents of United States Constitutions 57, 58 (William F. Swindler ed., 1979) [hereinafter Virginia Declaration of Rights].

[64] 1818 appears to be the first example, and it is from an antislavery editorial. See 2 Christian Messenger (Middlebury, Vt.), May 6, 1818, at 3 ("It is the corner stone of our [C]onstitution, it is the first truth that meets the eye in our bill of rights, we pretend so highly to revere, 'that, *all* men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, *liberty*, and the pursuit of happiness.'"); see also Douma, supra note 3, at 600–01 (referring to the *Christian Messenger*).

[65] 1 Gazette U.S. (N.Y.C.), Feb. 10, 1790, at 348 (reporting the *Massachusetts Centinel*'s discussion of the "ninth article of the bill of Rights" in the Massachusetts Constitution); see also N.Y. Packet, Mar. 31, 1789, at 2 (reporting discussions in the Pennsylvania Assembly of the 1776 Pennsylvania Constitution's "bill of rights").

[66] See, e.g., Magna Carta 1215, c. 46, https://avalon.law.yale.edu/medieval/magframe.asp [https://perma.cc/5HRS-LE75] ("All barons who have founded abbeys, concerning which they hold charters from the kings of England, or of which they have long continued possession, shall have the wardship of them, when vacant, as they ought to have."). On the other hand, one particular passage of the Magna Charta would be echoed in many state constitutions, the Fifth Amendment, and ultimately in the Fourteenth Amendment:

> No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.

Id. c. 39.

[67] See The Petition of Right, supra note 60.

[68] See The Bill of Rights 1689, 1 W. & M. c. 2, https://avalon.law.yale.edu/17th_century/england.asp [https://perma.cc/T32V-BGAD].

[69] See supra note 62.

rights.[70] Mirroring the English Bill of Rights, the American Declaration of Independence contained a list of grievances and a list of rights, but reversed their order by beginning with a declaration of rights followed by a list of grievances.[71] Finally, the 1780 Massachusetts Bill of Rights presented a list of rights and established what became a standard state practice of making the "Declaration of Rights" an official part of the state constitution.[72]

Americans in the early republic understood all of these documents as having the nature of a bill of rights. It did not matter whether the document was formally titled a "Bill of Rights"—indeed, other than the English Bill of Rights, none of these famous documents bore such a title. Nor was it necessary for a bill of rights to be affixed to a constitution or adopted by anything other than common legislative action. The Virginia Declaration of Rights, for example, was not part of the Virginia Constitution prior to 1830.[73] The Maryland Declaration of Rights was simply a statute drafted and passed by the state assembly with no ratification by the people of the state.[74]

At the time of the Founding, it was not the addition of a formal title, a particular structure, or specific content that made something a "bill of rights." Commonly recognized bills of rights differed in all these respects. What made a document a "bill of rights" was an enumerated list of rights or constraints on government power. As the *Columbian Herald* explained in 1787, "a bill of rights" was simply "a declaration of the unaliened rights of each individual."[75] Rather than including a grand statement of the principles of natural and civil liberty, Thomas Paine wrote in 1777, "a Bill of rights should be a plain positive declaration of the rights themselves . . . ."[76] Similarly, a 1779 editorial in the *Boston Gazette*

[70] See Virginia Declaration of Rights, supra note 63, at 58. The Virginia Declaration of Rights was not affixed to the Virginia Constitution until 1830. Id.

[71] The Declaration of Independence (U.S. 1776).

[72] See Levy, supra note 9, at 10.

[73] See Virginia Declaration of Rights, supra note 63, at 57–58.

[74] See Md. Const. of 1776, https://avalon.law.yale.edu/17th_century/ma02.asp#1 [https://perma.cc/PZ5F-D79P]. The 1776 constitution and declaration of rights was never submitted to the people of the state for ratification. Id.

[75] Columbian Herald (Charleston, S.C.), Nov. 15, 1787, at 2 ("In these [original state] constitutions a bill of rights (that is a declaration of the unaliened rights of each individual) was proper.").

[76] Candid and Critical Remarks on a Letter Signed Ludlow, The Thomas Paine National Historical Association, https://thomaspaine.org/works/essays/american-revolution/candid-

advised the people of Massachusetts to adopt "a bill of rights" that "define[d] in plain language, the alienable and unalienable rights of the people."[77]

Although revisionists claim that an essential characteristic of early American bills of rights was a preamble declaring certain natural or inherent rights, no such definitional constraints appear in the historical record. As James Wilson explained in the 1787 Pennsylvania Ratifying Convention, "[a] bill of rights annexed to a constitution" was nothing more than "an enumeration of the powers reserved."[78] As Noah Webster explained in the 1828 edition of his influential dictionary, "[a] bill of rights is a summary of rights and privileges, claimed by a people."[79] According to the 1860 edition of Joseph Worcester's *A Dictionary of the English Language*, a "Bill of rights" was "a formal declaration in writing of popular rights and liberties."[80] That same year, Thomas Whittemore published an essay in the *Boston Trumpet* explaining that bills of rights, such as one finds in state constitutions, are "nothing more than a specification of the rights of the people."[81]

In sum, throughout the Founding and antebellum period, any written list of retained rights or constraints on government power fell within the common definition of a "bill of rights." Such a bill need not include particular language, nor be affixed to the beginning of a constitution, nor be affixed to a constitution at all.

B. The Original Call for a Federal Bill of Rights

On September 12, 1787, during the final hours of the Philadelphia Convention, Virginia's George Mason expressed his wish that "the plan had been prefaced with a Bill of Rights . . . . It would give great quiet to the people; and with the aid of the State declarations, a bill might be

and-critical-remarks-on-a-letter-signed-ludlow.html [https://perma.cc/N6DK-KRPE] (last visited Feb. 8, 2024).

[77] Bos. Gazette, Sept. 6, 1779, at 4.

[78] James Wilson, Remarks at the Pennsylvania Ratifying Convention (Nov. 26, 1787), *reprinted in* 1 Collected Works of James Wilson 178, 195 (Kermit L. Hall & Mark David Hall eds., 2007) (emphasis omitted).

[79] Noah Webster, An American Dictionary of the English Language (1828).

[80] Joseph E. Worcester, A Dictionary of the English Language 142 (Bos., Swan, Brewer & Tileston 1860).

[81] Thomas Whittemore, Reply, Trumpet & Universalist Mag. (Bos.), Feb. 6, 1830, at 2.

prepared in a few hours."[82] Congress rejected Mason's proposal and instead sent the Constitution to the states without an officially titled bill of rights.[83] Mason himself refused to sign the document and, following the convention, he continued to call for the addition of a bill of rights. In his "Objections to this Constitution of Government," Mason complained that "[t]here is no Declaration of Rights . . . . There is no declaration of any kind, for preserving the liberty of the press, or the trial by jury in civil causes (cases); nor against the danger of standing armies in time of peace."[84] Mason was not alone in his concerns. As historians have long noted, the failure to include a separate Bill of Rights was the most commonly raised objection to the proposed Constitution.[85]

The Federalist response was that no such declaration was needed to constrain the powers of the proposed federal government. As James Wilson explained:

> A bill of rights annexed to a constitution is an enumeration of the powers reserved. If we attempt an enumeration, everything that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government; and the rights of the people would be rendered incomplete.[86]

According to Wilson, it was better to risk failing to enumerate an important *power*, than it was to adopt a bill of rights and risk omitting an important *right*.[87]

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[82] James Madison (Sept. 12, 1787), *in* 2 The Records of the Federal Convention of 1787, at 587–88 (Max Farrand ed., 1911).

[83] See Proposed Amendments and Ratification 1789, *in* 5 The Founders' Constitution 40 (Philip B. Kurland & Ralph Lerner eds., 1987).

[84] George Mason, Objections to this Constitution of Government (Sept. 15, 1787), *reprinted in* 2 Records of the Federal Convention of 1787, 637–40 (Max Farrand ed., 1911).

[85] See Levy, supra note 9, at 30 ("The single issue that united Anti-Federalists throughout the country was the lack of a bill of rights."); see also John P. Kaminski, The Making of the Bill of Rights: 1787–1792, *in* Contexts of the Bill of Rights 30, 32 (Stephen L. Schechter & Richard B. Bernstein eds., 1990) ("The most serious Antifederalist concern in the [Virginia] convention was the lack of a federal bill of rights.").

[86] James Wilson, Pennsylvania Ratifying Convention (Nov. 28, 1787), *in* 2 The Documentary History of the Ratification of the Constitution 382, 388 (John P. Kaminski & Gaspare J. Saladino eds., 1993) [hereinafter 2 DHRC].

[87] See James Wilson, Comments at the Debates of the Pennsylvania Convention (Oct. 28, 1787), *in* 1 Collected Works of James Wilson 192, 195 (Kermit L. Hall & Mark David Hall eds., 2007).

Wilson's argument opened the door to a devastating response: If the framers of the Constitution were truly relying on the principle of enumerated power, then why did the Framers find it necessary to include the list of rights enumerated in Article I, Section 9? As antifederalist "Federal Farmer" pointed out, "the 9th and 10th Sections in Art. I. in the proposed constitution, are no more nor less, than *a partial bill of rights* . . . . On the whole, the position appears to me to be undeniable, that *this bill of rights ought to be carried farther*."[88] Thomas Jefferson was similarly unimpressed with Wilson's argument. Writing to James Madison that December, Jefferson remarked:

> To say, as Mr. Wilson does that a bill of rights was not necessary because all is reserved in the case of the general government which is not given, while in the particular ones all is given which is not reserved might do for the Audience to whom it was addressed, but is surely a gratis dictum, opposed by strong inferences from the body of the instrument . . . .[89]

Given the existence of a "partial" bill of rights in Article I, Sections 9 and 10, Federalists found themselves arguing against adding a more *complete* bill of rights. Writing as "Publius" in The Federalist No. 84, Alexander Hamilton did his best. Here, Hamilton famously warned that adding a bill of rights "*in the sense and to the extent in which they are contended for"* was "not only unnecessary in the proposed Constitution but would even be dangerous."[90] Such an enlarged bill of rights "would contain various exceptions to powers which are not granted."[91] This, Hamilton insisted, "would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?"[92] "The truth is," Hamilton insisted, "after all the declamations we have heard, that the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS."[93]

Federalist No. 84 failed to dampen the calls for a bill of rights. In the Virginia ratifying convention, Patrick Henry pressed the argument of

[88] Federal Farmer, Letters to the Republican (Oct. 12, 1787), *in* 2 The Complete Anti-Federalist 245, 248–49 (Herbert J. Storing ed., 1981) (emphasis added).

[89] Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *in* 12 The Papers of Thomas Jefferson 438, 440 (Boyd ed., 1955).

[90] The Federalist No. 84, at 513 (Hamilton) (Clinton Rossiter ed., 1961) (emphasis added).

[91] Id.

[92] Id.

[93] Id. at 515.

"Federal Farmer." "[T]here *is* a Bill of Rights in [the proposed] Government," Henry declared.[94] "There are express restrictions which are in the shape of a Bill of Rights: But they bear the name of the ninth section."[95] "The restraints in *this* Congressional Bill of Rights," however, "are so feeble and few, that it would have been infinitely better to have said nothing about it."[96] "My mind will not be quieted," Henry asserted, "till I see something substantial come forth in the shape of a Bill of Rights."[97]

James Madison and the Federalists ultimately conceded the issue and promised that a more complete bill of rights would be added to the ratified Constitution. The promise was enough to convince wavering voters in states like New York and Virginia to ratify the Constitution, both of which submitted a list of proposed amendments along with their notice of ratification.[98] One of the most commonly requested rights was a provision declaring that the people in the states retained all powers not delegated to the federal government.[99] Virginia, for example, proposed an amendment declaring "[t]hat each State in the Union shall respectively retain every power, jurisdiction and right, which is not by this Constitution delegated to the Congress of the United States, or to the departments of the Federal Government."[100] Massachusetts's very first proposal read, "[t]hat it be explicitly declared that all powers not expressly delegated by the aforesaid Constitution, are reserved to the several States to be by them exercised."[101] According to Massachusetts convention delegate Samuel

[94] Patrick Henry, Comments at the Debates of the Virginia Convention (June 17, 1788), *in* 10 The Documentary History of the Ratification of the Constitution 1338, 1345 (John P. Kaminski & Gaspare J. Saladino eds., 1993) [hereinafter 10 DHRC] (emphasis added).

[95] Id.

[96] Id. (emphasis added).

[97] Id. at 1347.

[98] See Levy, supra note 9, at 31–35.

[99] See, e.g., Debates of the Virginia Convention (June 27, 1787), *in* 10 DHRC, supra note 94, at 1553 ("That each State in the Union shall respectively retain every power, jurisdiction and right, which is not by this Constitution delegated to the Congress of the United States, or to the departments of the Federal Government."). New York ratified with the declared understanding that the proposed constitution already embraced the principle that "all power is originally vested in and consequently derived from the people." Debates of the New York Convention (July 7, 1788), *in* 12 The Documentary History of the Ratification of the Constitution 2106, 2111 (John P. Kaminski & Gaspare J. Saladino eds., 2008) [hereinafter 12 DHRC].

[100] Debates of the Virginia Convention (June 27, 1787), *in* 10 DHRC, supra note 94, at 1553.

[101] 6 The Documentary History of the Ratification of the Constitution 1390, 1395 (John P. Kaminski & Gaspare J. Saladino eds., 2000) [hereinafter 6 DHRC].

Adams, such a provision by itself constituted a "summary of a bill of rights, which, gentlemen are anxious to obtain."[102]

Advocates cared little about where the Bill of Rights would be placed. As John Tyler stated in the Virginia Ratifying Convention, "[i]t was immaterial whether the Bill of Rights was by itself, or included in the Constitution.—But he contended for it one way or the other."[103]

C. Madison's Bill of Rights

On May 27, 1789, soon after the opening of the First Congress, James Madison wrote to Thomas Jefferson that "[a] Bill of rights, incorporated, perhaps, into the Constitution, will be proposed, with a few alterations most called for by the opponents of the Government and least objectionable to its friends."[104] Two weeks later, Madison presented to the House of Representatives a list of proposed amendments to be incorporated into the text of the Constitution.[105] Madison reminded his colleagues that "the great mass of the people who opposed [the Constitution], disliked it because it did not contain effectual provision against encroachments on particular rights."[106] Fortunately, "it will be practicable . . . to obviate the objection, so far as to satisfy the public mind that their liberties will be perpetual, and this without endangering any part of the constitution."[107]

Madison then presented his list of proposed amendments, beginning with a lengthy provision "prefixed to the constitution" declaring that "all power is originally vested in, and consequently derived from the people" and "[t]hat the people have an indubitable, unalienable, and indefeasible right to reform or change their government, whenever it be found adverse

[102] Samuel Adams, Comments at the Debates of the Massachusetts Convention (Feb. 1, 1788), *in* 6 DHRC, supra note 101, at 1413 ("Your Excellency's first proposition is, 'that it be explicitly declared that all powers not expressly delegated to Congress, are reserved to the several States to be by them exercised.' This appears to my mind to be a summary of a bill of rights, which, gentlemen are anxious to obtain . . . .").

[103] John Tyler, Comments at the Debates of the Virginia Convention (June 17, 1788), *in* 10 DHRC, supra note 94, at 1340.

[104] Letter from James Madison to Thomas Jefferson (May 27, 1789), *in* 1 Letters and Other Writings of James Madison Fourth President of The United States 471, 473 (Phila., J.B. Lippincott 1867).

[105] See James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), *in* James Madison Writings 437, 437 (Jack N. Rakove ed., 1999) [hereinafter Writings].

[106] Id. at 441.

[107] Id.

or inadequate to the purposes of its institution."[108] Madison next proposed adding a separate list of rights to Article I, Sections 9 and 10. This list tracked amendments suggested by the states, including provisions protecting speech and press, due process of law, jury provisions, and a prohibition on cruel and unusual punishments.[109] This list ended with a rule of construction declaring that:

> The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people; or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.[110]

Finally, Madison proposed creating a new "Article VII" and closing the substantive provisions of the Constitution with the declaration that "[t]he powers not delegated by this constitution, nor prohibited by it to the states, are reserved to the States respectively."[111]

Having been among those who had initially opposed adding a bill of rights, it was incumbent on Madison to explain why he had changed his mind and was now encouraging his colleagues to adopt a bill of rights. Madison began by conceding that, even though the new government had only limited enumerated powers, "it has certain discretionary powers with respect to the means, which may admit of abuse to a certain extent."[112] It would be helpful, therefore, to clarify that certain means were "neither necessary or proper."[113] Referencing Hamilton's argument in Federalist No. 84, Madison noted that:

> It has been objected . . . against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration, and it might follow by implication, that those rights which were not singled out, were

[108] Id. Madison noted that "[t]he first of these amendments relate[] to what may be called a bill of rights." Id. at 444. It is not clear whether Madison believed only this first provision "relate[d] to what may be called a bill of rights" or whether he meant that this provision, though placed separately, also could be viewed as relating to a bill of rights. Given that the additional proposals addressed subjects that advocates expressly requested be added to a bill of rights (see Mason's suggestion quoted above), the latter seems more likely.

[109] Id. at 442–43.

[110] Id. at 443.

[111] Id. at 444.

[112] Id. at 447.

[113] Id. at 447.

> intended to be assigned into the hands of the general government, and were consequently insecure.[114]

"This," Madison conceded, "is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system."[115] He had "guarded against" the danger, however, by proposing "the last clause of the 4th resolution."[116] Here Madison referred to the proposed amendments declaring that "[t]he exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be construed as to diminish the just importance of other rights retained by the people"—a provision that, in a slightly modified form, became our Ninth Amendment.[117]

Madison thus expressly characterized his proposed list of rights as "a bill of rights," which could be safely added to the Constitution if it included his proposed rule of construction. Notice Madison's early version of the Ninth Amendment addressed dangers arising from "exceptions *here or elsewhere* in the constitution, made in favor of particular rights."[118] Whether the proposed amendments were added to the existing list in Article I, Section 9, or were placed at the beginning or at the end of the document (or a combination of all three), none of these "exceptions" could properly be read as implying otherwise unlimited federal power.[119]

By the end of their discussions, Congress had reduced Madison's proposed preamble to a short declaration of the principle of popular sovereignty: "Government being intended for the benefit of the people, and the rightful establishment thereof being derived from their authority alone."[120] This short statement of popular sovereignty was then moved from the beginning of the Constitution to the end of what became the Tenth Amendment. This occurred on August 18, 1789, when the House discussed Madison's proposal: "The powers not delegated by the constitution, nor prohibited by it to the States, are reserved to the States

[114] Id. at 448–49.
[115] Id. at 449.
[116] Id.
[117] Id. at 443; U.S. Const. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").
[118] Writings, supra note 105, at 443.
[119] Ultimately, Congress accepted Roger Sherman's proposal to place the amendments at the end of the original Constitution. See Levy, supra note 9, at 145–46.
[120] 1 Annals of Cong. 734 (1789) (Gales & Seaton eds., 1834).

respectively."[121] During that discussion, Thomas Tucker proposed moving the popular sovereignty declaration from the opening preamble to Madison's proto-Tenth Amendment:

> Mr. Tucker proposed to amend the proposition, by prefixing to it "all powers being derived from the people." He thought this a better place to make this assertion than the introductory clause of the constitution, where a similar sentiment was proposed by the committee . . . .
>
> Mr. Carroll proposed to add to the end of the proposition, "or to the people;" this was agreed to.[122]

As Tucker's proposal and Congress's ultimate decision both indicate, there was nothing about Madison's proposed "bill of rights" that required they begin with Lockean statements of inherent or natural rights, much less required that they be placed in a special preamble at the beginning of the Constitution. The structure of the Virginia Declaration of Rights notwithstanding, Thomas Tucker thought the "better place" for a statement of popular sovereignty was at the end of the proposed amendments.[123] There is no recorded dissent or objection to the move, by Madison or anyone else.

D. Public Reception

On September 24 and 25, 1789, the House and Senate respectively voted to send the states twelve proposed amendments.[124] The first two were structural proposals, one involving a formula for determining the size of the House of Representatives and the other restricting the timing of congressional pay increases.[125] The last ten, however, were a list of rights and constraints on the powers of Congress—what people at the time would recognize as a bill of rights.[126] Indeed, Madison had publicly presented the entire effort as fulfilling the promised addition of a bill of

[121] Id. at 789–90.

[122] Id.; see also id. at 797 (Sherman successfully moving on August 21 to finalize the language of the amendment to read "the powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people").

[123] Id. at 790.

[124] See Levy, supra note 9, at 40.

[125] See Resolution of the First Congress Submitting Twelve Amendments to the Constitution (March 4, 1789), *in* Documents Illustrative of the Formation of the Union of the American States 1063–64 (Charles C. Tansill ed., 1927).

[126] Id. at 1064–65.

rights, and he included a specific provision expressly for the purpose of addressing a presumed *danger* of adding a bill of rights (the Ninth Amendment). This would not be the last time he referred to his handiwork as a bill of rights.[127]

From the moment the amendments were sent to the states for ratification, calls for a bill of rights receded.[128] Although some antifederalists criticized the list of proposed rights as inadequate, no one claimed that Congress had failed to propose a bill of rights.[129] Antifederalists had every incentive to make such an argument, for this would have helped fuel the momentum for a second constitutional convention where antifederalists hoped to make major changes to the structure of the Constitution.[130]

Instead, the sincere proponents of a bill of rights claimed success. As Thomas Jefferson wrote to George Washington the year following the ratification of the first ten amendments,

> [Y]ou will . . . see that my objection to the constitution was that it wanted a bill of rights securing freedom of religion, freedom of the press, freedom from standing armies trial by jury, & a constant Habeas corpus act. Colo. Hamilton's was that it wanted a king and house of lords. the sense of America has approved my objection & added the bill of rights, not the king and lords.[131]

This is the earliest identified historical reference to the ten amendments as a bill of rights. Not only does Jefferson recognize the amendments as a "bill of rights," he expressly names them "*the* bill of rights." Other early references to the ten amendments used the same language. For example, when a 1795 assembly gathered to protest the new treaty with Great Britain, the protesters declared that their right to assemble and present grievances was protected "by an article *in the Bill of Rights of the Federal*

[127] See infra note 181 and accompanying text.

[128] See Levy, supra note 9, at 43.

[129] George Mason, for example, after initially criticizing the proposed bill of rights, ultimately declared that they gave him "much satisfaction." Id. at 42.

[130] See Kurt T. Lash, Rejecting Conventional Wisdom: Federalist Ambivalence in the Framing and Implementation of Article V, 38 Am. J. Legal Hist. 197, 215–16 (1994) (discussing the antifederalists' ultimately unsuccessful effort to trigger a second constitutional convention).

[131] Letter from Thomas Jefferson to George Washington (Sept. 9, 1792), *in* 11 The Papers of George Washington 96, 100 (Christine Sternberg Patrick ed., 2002).

Constitution."[132] This declaration about "the Bill of Rights" (the term capitalized with the definite article) was published in multiple newspapers.[133]

III. THE "BILL OF RIGHTS": FOUNDING TO CIVIL WAR

A. The Emergence of an "Origin Story" for the Bill of Rights

Today, most Americans view the first ten amendments as a list of specific guarantees of individual liberty. When first presented to the people, however, the amendments were understood primarily as simply clarifying the proper limited interpretation of the powers of the federal government. As Congress explained in the preamble affixed to the proposed amendments, these were but "declaratory and restrictive clauses" that would "prevent *misconstruction or abuse* of [the Constitution's] powers."[134] The amendments did not alter the original Constitution; they merely clarified its nature as a delegation of limited enumerated authority. Put another way, the purpose of the Bill of Rights was to ensure the new federal government would exercise no other powers than those delegated to them by the people in the several states. As Samuel Adams explained during the constitutional ratification debates, a provision declaring "that all Powers not expressly delegated to Congress, are reserved to the several States to be by them exercised" would serve as a "*summary* of a bill of rights."[135]

Beginning with a provision denying congressional power over speech, press, and religion, and ending with a provision declaring that all non-delegated power remained in the states, the ratified amendments of 1791 represented a very different kind of "list" than those attached to state constitutions. State declarations of rights restricted otherwise general unenumerated state legislative power. The federal "list" with its unique Ninth and Tenth Amendments, on the other hand, clarified the nature of the new federal government.

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[132] Town Meeting—Impartial, Mercury (Bos.), July 14, 1795, at 2–3 (emphasis added).

[133] See, e.g., Town Meeting—Impartial, American Minerva (N.Y.C.), July 20, 1795, at 3; Town Meeting—Impartial, The Herald (N.Y.C.), July 22, 1795, at 3.

[134] See Proposed Amendments and Ratification 1789, supra note 83, at 40 (emphasis added).

[135] Samuel Adams, Comments at the Debates of the Massachusetts Convention (Feb. 1, 1788), *in* 6 DHRC, supra note 101, at 1395 (emphasis added); see also Maier, supra note 26, at 462–63 (pointing out the importance of a reserved powers clause to the ratifying states).

For example, when Congress in 1791 proposed a bill chartering the first bank of the United States, James Madison cited the then-pending amendments as *collectively clarifying* the limited nature of federal power. As Madison explained:

> The [Federalist's] defence against the charge founded on the want of a bill of rights, presupposed, he said, that the powers not given were retained; and that those given were not to be extended by remote implications. On any other supposition, the power of Congress to abridge the freedom of the press, or the rights of conscience, &c. could not have been disproved.
>
> . . . .
>
> The explanatory declarations and amendments accompanying the ratifications of the several states formed a striking evidence, wearing the same complexion. . . .
>
> The explanatory amendments proposed by Congress themselves, at least, would be good authority with them; all these renunciations of power proceeded on a rule of construction, excluding the latitude now contended for. These explanations were the more to be respected, as they had not only been proposed by Congress, but ratified by nearly three-fourths of the states. He read several of the articles proposed, remarking particularly on the 11th. and 12th. [our Ninth and Tenth] the former, as guarding against a latitude of interpretation—the latter, as excluding every source of power not within the constitution itself.[136]

Here Madison presents the outline of what in time becomes the standard "origin story" for the Bill of Rights. Initial criticisms that the Constitution lacked a bill of rights were met with the response that the nature of limited delegated power in the Constitution rendered a bill of rights unnecessary.[137]

Note that Madison read "*several* of the articles proposed," including what we now call the Ninth and Tenth Amendments (then the eleventh and twelfth on a list of twelve proposed amendments). These "explanatory declarations and amendments," viewed in the aggregate, illuminated the limited nature of constitutionally delegated power. Madison viewed the

[136] James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791), *reprinted in* Writings, supra note 105, at 480, 489.

[137] The Federalist No. 84, at 513–15 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

first ten amendments as having a common nature and purpose. These ten articles, "ratified by nearly three-fourths of the states," jointly declared the unique nature of federal power. Madison's speech illustrates how even before their ratification, the ten amendments of 1791 were viewed as an integrated whole. They were not scattered independent amendments; they were *a bill* (singular) of rights. Before the end of the first decade under the Constitution, Americans would call upon their "Bill of Rights" in defense of overreaching federal power.

B. The 1798 Sedition Act

In 1798, President John Adams signed into law the Alien and Sedition Acts, the latter of which criminalized any speech or publication that falsely brought the President or his administration "into contempt or disrepute."[138] A number of people were prosecuted under the Sedition Act, including Vermont Congressman Matthew Lyon, who was fined $1,000 and sentenced to four months in jail for publishing an essay accusing the Adams Administration of "ridiculous pomp, foolish adulation, and selfish avarice."[139]

Thomas Jefferson and James Madison, both members of the nascent opposition party, the Democratic-Republicans, condemned the acts as exceeding Congress's constitutional powers. According to Jefferson in his anonymously authored Kentucky Resolutions, the Sedition Act exceeded Congress's delegated powers and thus violated both the First and Tenth Amendments.[140] Since the people did not delegate power over speech to Congress, this necessarily meant that the subject was reserved to the people in the states. Madison, in his Virginia Resolutions, similarly denounced the Sedition Act as violating the "liberty of conscience and of the press" which had been enshrined in an "amendment . . . annexed to the constitution" and involved "authorities, rights, and liberties, reserved to the States respectively, or to the people."[141] In his *Report on the Alien*

[138] See Sedition Act, ch. 74, § 2, 1 Stat. 596 (1798).

[139] Lyon's Case, 15 F. Cas. 1183 (C.C.D. Vt. 1798) (No. 8,646); 1 Julius Goebel, Jr., History of the Supreme Court of the United States: Antecedents and Beginnings to 1801, at 638 (1971).

[140] See 1 Kurt Lash, The Reconstruction Amendments: Essential Documents 37 (Kurt T. Lash ed., 2021).

[141] James Madison, Virginia Resolutions Against the Alien and Sedition Acts (Dec. 21, 1798), *reprinted in* Writings, supra note 105, at 589, 590–91.

and Sedition Acts,[142] Madison explained that Congress's attempt to exercise unenumerated powers over speech violated the constitutional principle that "powers not given to the government, were withheld from it" according to the language of the Tenth Amendment.[143]

Although neither Jefferson nor Madison used the specific term "bill of rights" in their criticism of the Sedition Act, others did. In 1798, the *Boston Independent Chronicle* denounced the federal Sedition Bill as "directly contravening one of the most essential articles in the code of freedom, and as clearly defined as any other clause in *the bill of rights*, namely, liberty of speech, printing and writing."[144] Two other papers published the same assertion about "the bill of rights."[145]

In a widely published 1798 letter to Sedition Act defendant Matthew Lyon, General Steven Thomas Mason echoed Madison's origin story of the Bill of Rights and the role of the Ninth Amendment:

> [W]e well remember, that when the Constitution was proposed for our adoption, and the want of a bill of rights complained of, we were told that personal liberty never could be endangered by our constitution . . . . Nay, that it would be dangerous to attempt their security by a bill of rights, lest it might imply that any such powers were contemplated to be given to the general government . . . . This idea we find afterwards to have been fully embraced, by the [Ninth] amendment,[146] when it was found necessary to reconcile the constitution, even to those who had adopted it, by incorporating provisions equivalent to a bill of rights, on the subjects of religious freedom, the trial by jury, the liberty of speech, and of the press.[147]

[142] James Madison, Report on the Alien and Sedition Acts (Jan. 7, 1800), *reprinted in* Writings, supra note 105, at 608.

[143] Id. at 610.

[144] Sedition Bill, Indep. Chron. & Universal Advertiser (Bos.), June 14–18, 1798, at 2 (emphasis added).

[145] See Sedition Bill, Greenleaf's N.Y. J. & Patriotic Reg., June 13, 1798, at 2; Sedition Bill, Bee (New London, Conn.), June 20, 1798, at 3. The *Bee* editorial closes by quoting the language of the First Amendment. Id.

[146] Mason referred to the Ninth as the "eleventh" amendment, reflecting the fact that the Ninth was the eleventh proposed amendment on the original list of twelve.

[147] Gen. Mason to Col. Lyon, Bee (New London, Conn.), Dec. 12, 1798, at 2; see also Gen. Mason to Col. Lyon, Indep. Chron. & Universal Advertiser (Bos.), Dec. 10–13, 1798, at 2; Gen. Mason, to Col. Lyon, Aurora Gen. Advertiser (Phila.), Dec. 1, 1798, at 2; Gen. Mason, to Col. Lyon, Greenleaf's N.Y. J. & Patriotic Reg., Dec. 5, 1798, at 4; Alexandria Advertiser (Va.), Dec. 14, 1798, at 3; Gen. Mason to Col. Lyon, Stewart's Ky. Herald (Lexington), Jan.

Matthew Lyon's letter of 1801 was more pointed in its denunciation of the Sedition Act's violation of "our bill of rights":

> Perhaps in no one instance, has *our constitution, our sacred bill of rights*, been more shamefully, more bare-facedly trampled on, than in the case of the passage of the bill called the sedition law . . . . You thought by its terrors, to shut the mouths of all but sycophants and flatterers . . . but how happily you have been disappointed—the truth has issued from many a patriot pen and press—and you have fallen, never—never to rise again.[148]

Lyon echoes James Madison's complaint that the Sedition Act violated the Free Speech and Free Press Clauses of the First Amendment.[149] This, to Lyon, rendered the Act a shameful violation of "our constitution, our sacred bill of rights."[150] Lyon's letter was printed in multiple newspapers across the United States.[151]

In sum, contra the revisionists, there was no silence regarding the ten amendments as a bill of rights during the first decade of the Constitution or during the national debate over the Sedition Act.[152] In the few years from 1798 to 1801, we find examples of speakers referring to the 1791 amendments as "the bill of rights," "the equivalent of a bill of rights," "our bill of rights," and as having "the nature of a bill of rights." The terms are used interchangeably and in reference to the same set of amendments. All reflect the same understanding of those amendments as that explained by Madison in his speech against the national bank and his 1798 Virginia Resolutions: the amendments jointly declared the principle of limited national power with all non-delegated powers reserved to the states. As

15, 1799, at 1; Gen. Mason, to Col. Lyon, Centinel of Freedom (Newark, N.J.), Jan. 1, 1799, at 1; Gen. Mason to Col. Lyon, Vt. Gazette (Bennington), Dec. 27, 1798, at 1.

[148] A Letter, Impartial Observer (Providence, R.I.), Mar. 21, 1801, at 2 (emphasis added).

[149] See James Madison, Report on the Alien and Sedition Acts (Jan. 7, 1800), *reprinted in* Writings, supra note 105, at 644.

[150] A Letter, supra note 148, at 2.

[151] See Col. Lyon's Letter to the Late President Adams, Kline's Carlisle Weekly Gazette (Pa.), Apr. 15, 1801, at 1, 4; Letter of Col. Lyon to the Late President Adams, Columbian Minerva (Dedham, Mass.), Apr. 21, 1801, at 2, 4; Lyon's Letter to Mr. Adams, Green Mountain Patriot (Peacham, Vt.), Apr. 23, 1801, at 1–2; Col. Lyon's Letter to the Late President Adams, Centinel of Freedom (Newark, N.J.), Apr. 7, 1801, at 1–2 (changing the text to "our constitution—our sacred bill of rights").

[152] See, e.g., Maier, supra note 3, at 501–02. According to Magliocca, although Madison and Jefferson complained the Sedition Act violated the First Amendment "neither of them (or anyone else) argued that the Sedition Act was contrary to the Bill of Rights." Magliocca, supra note 3, at 52.

Charles Pinckney reminded his Senate colleagues in 1800, less than a decade after their ratification:

> [Critics of the Constitution] determined that an explicit Constitutional declaration should be annexed, expressly stipulating that the powers not specifically delegated were reserved, and that the prohibitions and reservations mentioned in the amendments be added, in the nature of a bill of rights. When those amendments became part of the Constitution, it is astonishing how much it reconciled the States to that measure; they considered themselves as secure on those points on which they had been most jealous.[153]

James Madison, Thomas Mason, and Charles Pinckney use the addition of the Bill of Rights as an origin story, not just about the amendments, but about the nature of the federal Constitution. In response to calls for a bill of rights ensuring a national government of limited and enumerated powers, Congress proposed, and people ratified, a list of amendments which, though unlabeled, nevertheless were in the nature of a bill of rights.[154] To Jefferson, the amendments were *the* bill of rights. To Matthew Lyon, they were *our* Bill of Rights. The defeat of the Federalist Party and Jefferson's election in 1800 resulted in the political enshrinement of Madison's "principles of '98" and would influence public constitutional debate for decades.[155] To the Americans who supported the "revolution of 1800," the defeat of the Sedition Act was a victory for the Constitution and its "bill of rights."

[153] 10 Annals of Cong. 127 (1800) (Gales & Seaton eds., 1851) (statement of Sen. Charles Pinckney); see also Speeches of Charles Pinckney, Esq. in Congress 44–45 (1800), https://digital.library.pitt.edu/islandora/object/pitt:31735054847730 [https://perma.cc/98TK-5S62].

[154] See Luther Martin, For the Federal Gazette, No. V, Fed. Gazette & Balt. Daily Advertiser, Mar. 19, 1799, at 2 ("The first session of the congress of the United States, under the ratified constitution, was begun and held on the fourth of March, 1789: At that time congress took up the subject of amendments, in the nature of a bill of rights, and recommended twelve articles to the state legislatures to be ratified by them; of which the 3d article, since ratified, was as follows: 'Congress shall make no law respecting an establishment of religion . . . .'").

[155] According to influential Virginia Judge Spencer Roane, the Virginia Resolutions and Madison's Report were a "political bible." See "Hampden" (Spencer Roane), Rights of "the States," and of "the People," Richmond Enquirer (Va.), June 11, 1819, at 3; see also Richmond Enquirer (Va.), Aug. 17, 1816, at 3 (declaring their embrace of the "creed of '98" and the "principles of '98").

C. 1800–1824: The Bill of Rights as Collective Declaration of American Federalism

The administrations of Thomas Jefferson, James Madison, and James Monroe generally followed a narrow or "strict construction" view of federal power first articulated by James Madison in his Report of 1800 and echoed in Tucker's "View of the Constitution."[156] With Congress reluctant to enact broad federal programs, there were few national laws passed during this period that might otherwise have generated public discussion of the constraints of the ten amendments and the federal bill of rights. It is all the more surprising, therefore, that there *were* in fact a number of such references.

During the 1807 trial of Aaron Burr, Burr's counsel Edmund Randolph, the former U.S. Attorney General, objected to the admission of evidence violating the Sixth Amendment "directly in the face of our bill of rights and of the constitution of the United States."[157] According to Randolph,"[b]y the Bill of Rights, a man has a right to be confronted with the witnesses against him."[158] Randolph had been a member of the Philadelphia Constitutional Convention and he served as the nation's first U.S. Attorney General.[159]

Early controversies over federal embargo laws also generated references to the ten amendments as the nation's bill of rights. An 1808 editorial in the *Charleston Courier* quoted the Ninth and Tenth Amendments and insisted that "the right to navigate the bays, sounds, rivers and creeks . . . were reserved to the people themselves, not being delegated to the United States."[160] "[T]he privileges of the citizen be[ing] ever so well defined in the bill of rights," it was clear these laws exceeded

[156] See St. George Tucker, Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and the Commonwealth of Virginia 151 (1803) ("As [the federal Constitution] is to be construed strictly, in all cases where the antecedent rights of a *state* may be drawn in question."). Tucker cited to Madison's Report of 1800 in his discussion of the 1791 amendments. See, e.g., id. at 302–03, 307, 315.

[157] Trial of Aaron Burr, Am. & Com. Daily Advertiser (Balt.), June 16, 1807, at 3. Burr's counsel then directly quoted the Sixth Amendment. Id.

[158] Thomas Carpenter, The Trial of Col. Aaron Burr on an Indictment for Treason 49 (Washington, D.C., Westcott & Co. 1808).

[159] See Biography of Edmund Jenings Randolph, Biographical Directory of the United States Congress, https://bioguideretro.congress.gov/Home/MemberDetails?memIndex=R000043 [https://perma.cc/H2UZ-HH8U] (last visited Jan. 15, 2024).

[160] From the Boston Palladium, Charleston Courier, Aug. 26, 1808, at 2 (writing about embargo laws).

federal power.[161] The *Norfolk Gazette and Publick Ledger* made the same complaint about the federal embargo laws:

> Let us now see our constitution and bill of rights . . . . According to the eighth section of the constitution, "congress has powers to regulate commerce with foreign nations, and among or between the several states." It has no other power given to it and it can give no other or greater powers to its officers—for by the twelfth article in addition to, and amendment of the constitution, "The powers not delegated to the United States by the constitution nor prohibited by it to the states are reserved to the states respectively, or to the people."[162]

As the above illustrates, the story of the Bill of Rights during the early decades of the Constitution was often a story about the nature of federal power under the original Constitution. As Senator John Pope explained in 1809, although only "certain enumerated powers are delegated to Congress, . . . the people in their abundance of caution have inserted in that instrument certain restrictions or limitations on the powers of the general government in the nature of a bill of rights."[163] The same year as Pope's speech, the *Hampshire Gazette* reported the following "toast":

> [A toast to] the State sovereignties,—May the powers not delegated to the United States by the constitution, never be surrendered by the people . . . [and to] Levi Lincoln, . . . May his infringements of the Constitution and Bill of Rights never be forgotten by the people.[164]

Limited federal power and the reserved sovereignty of the states were two sides of the same coin. The Bill of Rights represented both sides. The Ninth Amendment declared a rule of narrow construction of federal power, and the Tenth declared the reserved powers and rights of the people in the several states. As the Virginia and Kentucky Resolutions had established, even the First Amendment was understood as a federalist

[161] Id.

[162] Commentary, Norfolk Gazette & Publick Ledger (Va.), May 30, 1808, at 3 (commenting on embargo laws).

[163] Mr. Pope's Speech, Pub. Advertiser (N.Y.), Feb. 3, 1809, at 2; see also 19 Annals of Cong. 1582 (1803) (Gales & Seaton eds., 1853) (speech of Mr. Pope); see also Reporter (Lexington, Ky.), Feb. 28, 1809, at 1; Congress of the United States, Monitor (D.C.), Jan. 26, 1809, at 1.

[164] Hampshire Gazette (Northampton, Mass.), July 12, 1809, at 3. While serving as Jefferson's Attorney General, Lincoln was frequently the subject of criticism in the remaining Federalist stronghold of New England. See Kenneth Moynihan, A History of Worcester 113–14 (2007).

provision denying the federal government power over speech and press and thereby automatically reserving the same to the states. From beginning to end, then, the ten 1791 amendments could be viewed, and were viewed, as a collective whole, a unitary declaration of the federalist nature of the original Constitution: a "bill of rights."

1. A "Bill" Superior to Other Bills

In 1810, Luther Martin published an essay (which was itself reprinted in multiple newspapers) recalling the events that led to the adoption of the ten amendments.[165] Martin had been a member of the Philadelphia Convention and had actually walked out of the Convention because of his concerns about the proposed constitution.[166] Now, two decades later, Martin praised the addition of the ten 1791 amendments, which he called "a valuable and interesting bill of rights."[167]

In his 1814 book, *The Columbian Constitution*,[168] Simon Willard Jr. was even more emphatic. In a chapter that reprinted the entire 1791 list of proposed amendments, Willard described the amendments as "one of the most glorious of all bill[s] of rights."[169] After specifically praising the First and Second Amendments, Willard instructs the reader to "[p]eruse again, and again, that glorious bill of rights, for which the anti-federalists contended."[170]

Willard's laudatory description of the amendments as forming "*one* of the most glorious of *all* bill[s] of rights" is a reminder that Americans in the early nineteenth century were familiar with a number of "bills of rights." The federal bill of rights was especially deserving of praise, but it was only one of a number of such "bills" that played a role in the political and cultural life of antebellum Americans. This did not create a situation of "linguistic confusion."[171] Rather, Americans viewed the existence of multiple bills of rights as illustrating the riches of American

[165] See N.Y. J., Jan. 3, 1810, at 1.

[166] See Luther Martin, The Genuine Information Delivered to the Legislature of the State of Maryland, *in* 2 The Complete Anti-Federalist 19, 78 (Herbert J. Storing ed., 1981).

[167] For the Enquirer, Enquirer (Richmond, Va.), Jan. 13, 1810, at 4; see also A Circular Letter from the General Republican Committee of the City and the County of New York, to their Republican Fellow Citizens Throughout the State 4 (N.Y., Frank, White & Co. 1809).

[168] Simon Willard Jr., The Columbian Union: Consisting of General and Particular Explanations of Government, and the Columbian Constitution (1814).

[169] Id. at 303.

[170] Id. at 307.

[171] Douma, supra note 3, at 598.

freedom. For example, an 1812 editorial in the *Providence Gazette* praised the existence of both federal and state "Bills of Rights" protecting freedom of speech and press, especially the provision in the federal bill of rights which "declares—'Congress shall make no law abridging the Freedom of Speech, or of the Press.'"[172]

The existence of multiple bills of rights provided helpful examples for states to consider in drafting their own bills of rights. Members of the 1821 New York Constitutional Convention, for example, studied "the bill of rights of other states and the United States."[173] The convention's committee on the bill of rights "had taken up the bill of rights of other states and the United States, and our own statute, and compressed the whole into the nine articles read."[174] The assembly then discussed adding a clause declaring "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb," language which Convention Delegate Ambrose Spencer explained "was taken from the amendments to the Constitution of the United States."[175]

These early-nineteenth-century references to the ten amendments as the "bill of rights" appear in both legal and popular culture. In an 1816 opinion, the Louisiana Supreme Court explained that "the [1791] amendments cited were proposed by congress as a bill of rights guarding against encroachments from the federal government."[176] In 1819, opponents of slavery in the territory of Missouri insisted that the state's laws conform to the "principles of civil liberty, recogni[z]ed and adopted in our bill of rights, and sanctioned by our constitution."[177] In an 1821 speech, Kentucky Senator Isham Talbot praised "the amendments to the

[172] From the Newburyport Herald: Freedom of the Press, Providence Gazette (R.I.), Aug. 29, 1812, at 4.

[173] The [N.Y. Constitutional] Convention, N.Y. Evening Post, Sept. 22, 1821, at 1; see also The Convention, N.Y. Spectator, Sept. 25, 1821, at 2 (printing the same text); State Convention, The Watch-Tower (Cooperstown, N.Y.), Oct. 1, 1821, at 2 (same); State Convention, Saratoga Sentinel (Saratoga Springs, N.Y.), Sept. 26, 1821, at 2 (same).

[174] The [N.Y. Constitutional] Convention, N.Y. Evening Post, Sept. 22, 1821, at 1; see also The Convention, N.Y. Spectator, Sept. 25, 1821, at 2 (printing the same text); State Convention, The Watch-Tower (Cooperstown, N.Y.), Oct. 1, 1821, at 2) (same).

[175] The Convention, N.Y. Evening Post, Sept. 22, 1821, at 1; The Convention, N.Y. Spectator, Sept. 25, 1821, at 2; Ambrose Spencer, Historical Society of the New York Courts, https://history.nycourts.gov/figure/ambrose-spencer/#:~:text=Ambrose%20Spencer%20was%20named%20Chief,in%20February%201823%2C%20as%20required [https://perma.cc/JL8P-V8U8] (last visited March 3, 2024).

[176] Renthorpe v. Bourg, 4 Mart. (o.s.) 97, 129–30 (La. 1816) (Martin, J.).

[177] Report of a Committee of the Delaware Society, Am. Watchman (Wilmington, Del.), Dec. 15, 1819, at 2.

federal Constitution, emphatically called the Bill of Rights."[178] That same year, the *New-York Columbian* advertised a schoolbook containing "Valuable State Papers, such as the Bill of Rights, Declaration of Independence, [and the] Constitution of the United States."[179] Interestingly, the schoolbook itself included the text of the *untitled* ten amendments. Potential purchasers of the book were presumed to know that "the Bill of Rights" referred to the ten amendments, even though the phrase "bill of rights" appears nowhere in the actual book.[180]

2. Madison's Toast to the "Bill of Rights"

On November 4, 1824, a dinner took place in the newly completed Rotunda at the University of Virginia in Charlottesville, Virginia. Gathered there that evening were three elderly heroes of the American Founding: French General Lafayette, Thomas Jefferson, and James Madison. Following a grand dinner attended by 400 guests, the three men each proposed a series of toasts to a variety of subjects, including:

> By General Lafayette: "Thomas Jefferson and the Declaration of Independence—alike identified with the cause of liberty."
>
> By Thomas Jefferson: "James Madison—The ablest expositor of the Constitution: his commentaries of '98 will be forgotten only with the text."
>
> By James Madison: "The Constitution of the United States. The Rubicon of Federal Power . . . The Liberty of the Press. 'Error ceases to be dangerous, when reason is left free to combat it.' The Bill of Rights. The Representatives of the people, the trustees, not the owners of the Estates—the fee simple is in us."[181]

Madison's toast to the Bill of Rights was quoted in multiple newspapers, including the *Daily National Intelligencer* (Washington,

[178] 37 Annals of Cong. 418–19 (1821) (Gales & Seaton eds., 1855) (statement of Sen. Isham Talbot).

[179] See School Class Books. Picket, Lewis & Co., No. 192 Greenwich St. (near Washington Market), N.Y. Columbian, Feb. 28, 1821, at 3.

[180] See A. Picket, The Juvenile Mentor, or Select Readings; Being American School Class-Book No. 3, at 249–70 (N.Y., Am. Sch. Class-Book Warehouse, 1820).

[181] See Reception of General Lafayette in Albemarle, Va., Daily Nat'l Intelligencer (D.C.), Nov. 13, 1824, at 2. This is the longest and most complete account of the event. The paper reported Madison's toasts to the Constitution, the Press, and the Bill of Rights as the eighth, eleventh, and twelfth toasts. Id.

D.C.), the *Richmond Enquirer* (Va.), the *Alexandria Gazette* (Va.), the *City Gazette* (Charleston, S.C.), and the *Augusta Chronicle* (Ga.).[182] Together, the three toasts of these Founding heroes represent a symbolic chronology of the key events up to that point in American constitutional history. Lafayette toasted Jefferson and his Declaration of Independence. Jefferson then turned to Madison and toasted his works on constitutional government, including his exposition on the First and Tenth Amendments in his "commentaries of '98,"—the Virginia Resolutions and Madison's Report. Finally, Madison toasted the Constitution itself, including the First Amendment and the Bill of Rights, and ended his toast with the same principle that ends the Bill of Rights—the retained sovereign rights of the people announced by the Tenth Amendment. As recounted in Part II, the framers added the final language of the Tenth Amendment for the express purpose of declaring the fundamental principle of popular sovereignty.

Madison originally presented the original amendments as a proposed Bill of Rights (and wrote to Jefferson beforehand announcing this intention).[183] Jefferson himself, of course, referred to the ten amendments as "the Bill of Rights" months after their ratification.[184] Since then, the reference had become so common that purchasers of children's schoolbooks were presumed to know that "the Bill of Rights" referred to the 1791 amendments. There is little doubt that the guests at the dinner that night in Charlottesville understood Madison's toast to the Bill of Rights.

Madison's toast undermines a number of revisionist claims. First, the toast reveals that the suggestion that Madison never called the ten amendments a "bill of rights" is clearly wrong. Secondly, the dinner remarks show that revisionist claims are wrong about public references to the Bill of Rights in the early decades following the Constitution's adoption. By 1824, dozens of high-profile speakers had referred to the ten amendments as the national bill of rights. Some recognized the amendments as having "the nature of a bill of rights," others explained that the federal Constitution, like state constitutions, contained "a bill of

[182] See, e.g., Alexandria Gazette & Advertiser (Va.), Nov. 16, 1824, at 2; see also La Fayette, Jefferson and Madison, City Gazette (Charleston, S.C.), Nov. 20, 1824, at 2 (printing the same speech); Reception of Gen. La Fayette in Albemarle, Richmond Enquirer (Va.), Nov. 16, 1824, at 2 (same); La Fayette, Jefferson and Madison, Augusta Chronicle (Ga.), Nov. 24, 1824, at 2 (same).

[183] See supra note 104 and accompanying text.

[184] See supra note 131 and accompanying text.

rights." Still others celebrated the nation's common ownership of "*our* bill of rights," or reminded the people about "*your* bill of rights." Americans had praised the amendments, which were "*emphatically called* the bill of rights," or described as the "*valuable and interesting* bill of rights," or the "*glorious* Bill of Rights." Madison's toast, in its simplicity and in its authorship, establishes cultural understanding beyond question.[185]

Revisionists base their claims on an extremely limited set of historical documents. Magliocca, for example, identifies only *two* references to the 1791 amendments as a bill of rights in the period from 1800 to 1824.[186] During this same period, Douma identifies only one of Magliocca's two,[187] and Maier seems not to have discovered any references at all.[188]

My investigation, on the other hand, has produced at least twenty-two separate references to the 1791 amendments as a bill of rights during this same period (1800–1824), with the highest number of references being to "the bill of rights" or "the Bill of Rights."[189] Many of these references were published in multiple newspapers. There is no discernable evolution in public phrasing whatsoever. Jefferson, for example, calls the amendments "the Bill of Rights" in 1792. Madison does the same in 1824. And many others use the same phrasing during the intervening period. There is neither "silence" nor linguistic evolution.

3. Early References to the Declaration of Independence as a Bill of Rights

Revisionists claim that early-nineteenth-century Americans more frequently referred to the Declaration of Independence as a bill of rights

[185] The reference to the Bill of Rights is not in other sources. See, e.g., Toasts for Lafayette's Dinner (Nov. 5, 1824), *in* 3 The Papers of James Madison, Retirement Series, at 423, 423–25 (David B. Mattern, J. C. A. Stagg, Mary Parke Johnson & Katherine E. Harbury eds., 2016).

[186] See Magliocca, supra note 3, at 52 (identifying Edmund Randolph's 1807 statement and Senator Talbot's speech of 1821).

[187] See Douma, supra note 3, at 602 (mentioning Talbot's speech).

[188] See Maier, supra note 3, at 501–02.

[189] As cited in the above sections, I have located numerous references to a specific federal "bill of rights": three "in the nature of a bill of rights," three "our bill of rights," two for "our constitution and bill of rights," and one each for "bill of rights of the United States," "equivalent to a bill of rights," "a valuable and interesting bill of rights," and "a glorious bill of rights." These various references do not support the Revisionist claim of an evolution in public willingness to treat the federal "bill of rights" as a single noun.

than they did the 1791 amendments.[190] The earliest such reference cited by revisionists involves an 1818 editorial in the *Christian Messenger* which declared that "it is the first truth that meets the eye in our bill of rights, that we pretend so highly to revere, 'that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness.'"[191]

In my research, I found four additional examples occurring prior to 1824. In an 1816 essay in the *American Watchman*, the author praises the "sentiments, so nobly held forth to the world in the bill of rights, prefixed to the declaration of independence . . . that all men, are created equal."[192] The second, an 1818 essay speaking of "the declaration of the bill of rights, in 1776."[193] The third, an 1819 speech opposing slavery in the Missouri territory as violating the "declaration in our bill of rights, 'that all men are created equal.'"[194] And a fourth reference involving an account of an 1823 Fourth of July event where participants raised a toast to "Hancock, Franklin, Adams, Jefferson, and the other signers of our first bill of rights."[195]

Further research, of course, would almost certainly discover additional examples. As of now, however, in the period between the ratification of the 1791 amendments and Madison's toast in 1824, discovered references to the amendments as the Bill of Rights outnumber similar references to the Declaration of Independence by twenty-two to five, with no such reference to the Declaration occurring prior to 1816.[196] As we shall see,

[190] Magliocca, supra note 3, at 58–59 ("Until 1860, the first ten amendments lagged well behind the Declaration of Independence in the race for public recognition as the national bill of rights."); Maier, supra note 3, at 503 ("The most important statement of rights for early nineteenth century Americans—particularly those who opposed slavery—was not what we call the Bill of Rights but the Declaration of Independence."); see also Barnett & Bernick, supra note 3, at 326 ("[T]his phrase [the Bill of Rights] did not commonly mean the first ten amendments until sometime in the twentieth century. . . . [E]ven after the first ten amendments were added to the end [of the Constitution], people often characterized the rights affirmed by the previously enacted Declaration of Independence as a 'bill of rights.'").

[191] Editorial, Christian Messenger (Middlebury, Vt.), May 6, 1818, at 3 (emphasis omitted); see also Douma, supra note 3, at 600–01.

[192] Remarks, Am. Watchman (Wilmington, Del.), Sept. 4, 1816, at 2 (emphasis omitted).

[193] Editorial, Alexandria Gazette (Va.), Dec. 2, 1818, at 2.

[194] Remarks of Mr. Taylor, Daily Nat'l Intelligencer (D.C.), Mar. 19, 1819, at 2.

[195] Fourth of July at Paris, Nat'l Advoc. for Country (N.Y.C.), Aug. 29, 1823, at 2.

[196] Douma claims an additional reference involving Thaddeus Mason Harris's speech, A Discourse before the African Slave Society, delivered on July 15, 1822. Douma claims that Harris's statement, "the Bill of Rights, on which our Constitution was founded," indicates the speaker's belief that "the Bill of Rights" preceded the Constitution and therefore must involve

this ratio favoring the 1791 amendments over the Declaration shall remain constant right up to Reconstruction and beyond.

IV. THE AMENDMENTS "COMMONLY CALLED THE BILL OF RIGHTS," 1825–1840

In his 1840 oral argument before the Supreme Court in *Holmes v. Jennison*,[197] Vermont Governor C. P. Van Ness argued that the principles of the Fifth Amendment should bind both state and federal governments. Van Ness acknowledged that the Supreme Court in *Barron v. Baltimore* had ruled "that the amendments to the Constitution of the United States, commonly called the bill of rights, were simply limitations of the powers of the general government, and had no effect upon the state governments."[198] However, because the decision in *Barron* was "a recent one," Van Ness believed it would not be inappropriate to consider whether "an error was committed by the [*Barron*] Court," and that the ten amendments "commonly called the bill of rights" should bind the states as well as the federal government.[199]

Revisionists insist that Van Ness's 1840 remark about the ten amendments being "commonly known" as the Bill of Rights should be dismissed as a "rhetorical device" or a "clever tactic."[200] But Van Ness was not alone in his claim about the Bill of Rights. In the fifteen years between Madison's toast and Van Ness's oral argument, one finds numerous high-profile references to the 1791 amendments as a "bill of rights." For example, future President of the United States James Polk declared in an 1826 speech in the House of Representatives:

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the Declaration or some other preconstitutional document. Douma, supra note 3, at 601. However, there is nothing here clearly linking the statement to the Declaration, and Harris could just as easily be emphasizing the role a promised Bill of Rights played in convincing the states to ratify the Constitution. Douma also mistakenly attributes a reference to "a copy of the Bill of Rights, transcribed on parchment, bearing date June 12th, 1776" as a reference to the Declaration of Independence. Id. at 601–02. The date, however, is the date of the adoption of the Virginia Bill of Rights, a document being discussed at the cited meeting of the literary club of Alexandria, Virginia.

[197] 39 U.S. (14 Pet.) 540 (1840).

[198] Id. at 555.

[199] Id.

[200] Magliocca, supra note 3, at 57 ("Since the historical record is clear (or at least as clear as can be known) that the first ten amendments were not 'commonly called the bill of rights' in 1840, Van Ness's statement is best understood as a rhetorical device . . . [and] a clever tactic . . . ."); see also Maier, supra note 3, at 502 (noting that "the evidence fails to sustain Van Ness's claim").

> At the first Congress held under the Constitution, twelve additional articles were proposed to the States for ratification, in the manner prescribed by the Constitution. Ten of them were ratified by three-fourths of the States, and became a part of the Constitution, and now constitute your Bill of Rights, and secure to the citizen some of his most important privileges and rights.[201]

The day after Polk's speech, Rhode Island Representative Dutee Pearce similarly explained to his colleagues, "[of] all the amendments to the constitution which have hitherto been made . . . [p]erhaps the 11th article [of amendments], relating to the suability of the states, was necessary; but the ten preceding ones are, as so many declaratory acts, a bill of rights, an enumeration of rights reserved, but the reservation of which did not depend upon the enumeration of them."[202] Notice once again the simple definition of a bill of rights as "an enumeration of rights reserved." One finds similar definitions in dictionaries of the period. The 1828 edition of Noah Webster's dictionary, for example, explained that "[a] *bill of rights* is a summary of rights and privileges, claimed by a people."[203] Under the definition of "excessive," Webster used the example "[*e*]*xcessive* bail shall not be required"—a provision in the Eighth Amendment. Then, as the source for the quoted example, Webster noted simply: "*Bill of Rights*."[204]

Although early references to the amendments as a bill of rights generally emphasized the federalist declaratory nature of the bill, some emphasized the individual rights aspect of the amendments. For example, an 1831 essay in William Lloyd Garrison's abolitionist newspaper, *The Liberator*, objected to Georgetown's municipal regulation prohibiting free Black persons from receiving mailed copies of Garrison's newspaper.

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[201] Speech by Mr. Polk of Tennessee, Daily Nat'l Intelligencer (D.C.), Mar. 21, 1826, at 2; see also 2 Register of Debates in Congress: Comprising the Leading Debates and Incidents of the First Session of the Nineteenth Congress 1652 (Gales & Seaton eds., 1826) (hereinafter Register of Debates).

[202] See Nineteenth Congress. Amendment of the Constitution. House of Representatives. March 14, 1826, The R.I. Republican, Apr. 6, 1826, at 1; see also, Register of Debates, supra note 201, at 1655 (speech of Mr. Pearce).

[203] Noah Webster, An American Dictionary of the English Language (1828) ("Bill . . . [definition] 14: "A *bill of rights* is a summary of rights and privileges, claimed by a people. Such was the declaration of presented by the lords and commons of England to the prince and princess of Orange in 1688. In America, a *bill* or declaration of rights is prefixed to most of the constitutions of the several states.").

[204] Id.

In support of his objection, the author quotes an article in the Boston *Christian Herald* declaring the ordinance to be an unconstitutional violation of freedom of association, the rights of conscience, and the right of free men to decide "what they shall read" as protected by "the Bill of Rights in our most excellent Constitution."[205]

A. Joseph Story and the Bill of Rights

Revisionists stress the fact that there are no antebellum Supreme Court cases where the court expressly names the ten amendments to be a bill of rights.[206] This silence is less significant when one considers the rarity of situations that would require the Supreme Court's discussion of the ten amendments. Both the federal Congress and the federal judiciary were far less active during this period than would be the case following the Civil War (much less following the New Deal). And given the Supreme Court's interpretation of the Bill of Rights as binding only the federal government, there would be very few occasions for the court to decide matters involving rights listed in the ten amendments.

A rarity of judicial discussion, however, must not be taken as a proxy for national indifference.[207] Although one finds few references to the ten amendments as a bill of rights in the opinions of Supreme Court Justices, one finds a great many references in the various organs of public conversation, opinion, and education. In fact, after 1833, one of the most influential references would have been on the shelves of every well-educated lawyer and judge in the country.

In 1833, Supreme Court Justice Joseph Story published his three-volume *Commentaries on the Constitution*.[208] Justice Story's *Commentaries* was an immediate and enormous success[209] and went through five American editions before the end of the nineteenth century

[205] Three Curiosities!!!, The Liberator (Bos.), Oct. 22, 1831, at 171 (discussing the freedom of press and the Bill of Rights in Georgetown).

[206] Magliocca, supra note 3, at 5, 55–57.

[207] But see Maier, supra note 3, at 502 (asserting the "legal insignificance" of 1791 amendments in antebellum America).

[208] 1 Joseph Story, Commentaries on the Constitution of the United States (1st ed. 1833).

[209] Simon Greenleaf, chief counsel for the respondent in the U.S. Supreme Court case *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837), wrote: "This great work . . . admirable alike for its depth of research, its spirited illustrations, and its treasures of political wisdom, has accomplished all in this department which the friends of constitutional law and liberty could desire." 2 William W. Story, Life and Letters of Joseph Story 134–35, 139–40 (1851).

and three before the Civil War.[210] The *Commentaries* is a masterwork on the American Constitution and is accepted by historians as the most influential constitutional treatise of the nineteenth century.[211] Not just a handbook for judges and justices, Justice Story's *Commentaries* enjoyed "a wide general readership."[212] Antebellum judges, lawyers, politicians, and newspaper editorialists frequently quoted "Story's Commentaries" as an authoritative guide to understanding the American Constitution.[213]

Chapter XLIV of the third volume discusses the first ten amendments to the Constitution.[214] The chapter is titled "Amendments to the Constitution" and carries a heading at the top of the page reading: "Amendments—Bill of Rights."[215] For the next several pages, the evenly numbered pages carry the heading "Constitution of the U. States," and the odd pages "Amendments—Bill of Rights."[216]

In this chapter, Justice Story instructs his readers about the origins of the ten 1791 amendments. Of all the "objections . . . to the constitution," Justice Story explains, "none were proclaimed with more zeal, and pressed with more effect, than the want of a bill of rights."[217] Advocates of the Constitution defended the omission on the ground that "a formal bill of rights, beyond what was contained in it, was wholly unnecessary, and might even be dangerous. . . . Such a bill would contain various exceptions to powers *not* granted; and on this very account might afford a colourable pretext to claim more than was granted."[218] Although "there is much intrinsic force in this reasoning, it cannot in candour be admitted to be wholly satisfactory, or conclusive on the subject."[219] After all, such a problem "may be interdicted, (as it has been,) by a positive declaration in such a bill of rights, that the enumeration of certain rights shall not be

[210] See R. Kent Newmyer, Supreme Court Justice Joseph Story: Statesman of the Republic 194 (1985). The work was also published in various foreign languages as well. See Ronald D. Rotunda & John E. Nowak, Introduction to Joseph Story: Commentaries on the Constitution of the United States, at xiii (1987).

[211] See Rotunda & Nowak, supra note 210, at xi.

[212] See Newmyer, supra note 210, at 194.

[213] Many of these are cited in the next sections.

[214] 3 Story, supra note 208, at 713–22.

[215] Id. at 713. To see these headings, one must see the original book or a reproduction of the original page.

[216] Id. at 713–22.

[217] Id. at 713.

[218] Id. at 713, 715.

[219] Id. at 716–17 (footnote omitted).

construed to deny or disparage others retained by the people."[220] Here, Justice Story adds a footnote citing the "Constitution, 9th Amendment."[221] Having explained the origins of what he describes as "a bill of rights," Justice Story proceeds to examine the amendments themselves which "principally regard subjects properly belonging to a bill of rights."[222]

A few pages later Justice Story addresses the Second Amendment and its importance to "our national bill of rights":

> The next amendment is: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." . . . The importance of this article will scarcely be doubted . . . . There is certainly no small danger, that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by this clause of our national bill of rights.[223]

This is an important passage. As we shall see, Justice Story's reference to the Second Amendment as a "clause [in] our national bill of rights" would be reprinted over and over again in American newspapers prior to the adoption of the Fourteenth Amendment.

At the same time Justice Story published the three-volume *Commentaries*, he also published a single-volume abridged version of the same work.[224] According to historians Ronald Rotunda and John Nowak, the *Abridgment* "may well have been even more influential than his three volume work" because it "saw a much larger audience."[225] Subtitled "for the use of colleges and high schools,"[226] the *Abridgment* became "required reading at Harvard and in other academic centers."[227] With the exception of the passage on the Ninth Amendment, the *Abridgment* contains the same passages on the Bill of Rights as the three-volume *Commentaries*. This includes the repeated heading "Amendments—Bill of Rights," the description of the amendments as containing content

[220] Id. at 721.
[221] Id. at 721 n.1.
[222] Id. at 722.
[223] Id. at 746–47 (quoting U.S. Const. amend. II).
[224] Joseph Story, Commentaries on the Constitution of the United States (Bos., Hilliard, Gray & Co. abr. ed. 1833) [hereinafter Story, Abridgment].
[225] Rotunda & Nowak, supra note 210, at xiii.
[226] Story, Abridgment, supra note 224.
[227] Rotunda & Nowak, supra note 210, at xiii.

"properly belonging to a bill of rights," and the discussion of the Second Amendment in "our national bill of rights."[228]

Both versions of Justice Story's *Commentaries* flooded libraries and legal bookshelves with an authoritative declaration that the ten amendments were the "national Bill of Rights." Along with this name, the *Commentaries* also authoritatively established an origin story for the 1791 amendments: the First Congress proposed the amendments in response to calls for a bill of rights and avoided the danger of adding a bill of rights to a constitution of enumerated powers by adding the Ninth Amendment. Although the amendments did not themselves carry the formal title "bill of rights," they were nevertheless properly labeled a bill of rights because of the context in which they were enacted and because, as a list of constraints on government power, they were in "the nature of a bill of rights"—a point Justice Story made explicitly the next year in his opinion in *United States v. Gibert.*[229]

The origin story of our national Bill of Rights presented in the *Commentaries* was nothing new. As we have seen, others had made this point for decades. This practice continued unabated throughout the 1830s. In 1836, for example, former President John Quincy Adams delivered a eulogy on the life of James Madison.[230] Adams praised Madison's "steady, unfaltering mind" and his efforts in Virginia to ratify the federal Constitution—an act which "gave occasion to the first ten Articles, amendatory of the Constitution prepared by the first Congress of the United States and ratified by the competent number of the State Legislatures, and which supply the place of a Bill of rights."[231] In 1837, George Tucker published *The Life of Thomas Jefferson*,[232] including

[228] Story, Abridgment, supra note 224, at 693–708. Justice Story was not the only legal treatise writer in this period to refer to the ten amendments as a bill of rights. In 1834, Peter Du Ponceau published *A Brief View of the Constitution of the United States* in which he explained that, in addition to the First Amendment, "there are numerous articles, as well in the [C]onstitution as in the amendments to it, in the nature of a bill of rights, and the object of which is to secure the liberty of the citizen." Peter S. Du Ponceau, A Brief View of the Constitution of the United States, Addressed to the Law Academy of Philadelphia 44 (Phila., E.G. Dorsey 1834).

[229] United States v. Gibert, 25 F. Cas. 1287, 1294 (C.C.D. Mass. 1834) (No. 15,204) ("[C]ertain amendments of the [C]onstitution, in the nature of a bill of rights, have been adopted, which fortify and guard this inestimable right of trial by jury.").

[230] John Quincy Adams, An Eulogy on the Life and Character of James Madison 37 (Bos., American Stationers' Co. 1836).

[231] Id. at 37–38.

[232] 1 George Tucker, The Life of Thomas Jefferson (Phila., Carey, Lea & Blanchard 1837).

Jefferson's letter to George Washington where Jefferson boasted: "My objection to the constitution was the want of a bill of rights . . . . The sense of America has approved my objection, and added the bill of rights."[233] In 1838, multiple newspapers published the same letter with a similar quote.[234] In 1834, George Sharswood delivered a speech on states' rights in which he described the origins of the Tenth Amendment and the Bill of Rights. Following the ratification of the original Constitution, Sharswood explained, "a liberal and comprehensive Bill of Rights was framed and passed: and in order, as it was thought, effectually to quiet the apprehensions of the friends of State Rights."[235]

None of these discussions reference Justice Story's work. They simply echoed a commonly known and accepted account of the 1791 amendments known as the bill of rights, an account which Story gave intellectual gravitas in his *Commentaries*.

B. The Congressional Gag Rules

On May 26, 1836, Congress instituted the first "gag rule" forbidding the House from officially receiving antislavery petitions.[236] The gag rules would be reenacted in one form or another for the next eight years. Throughout that period, abolitionists criticized the rules as abridgments of the First Amendment of the federal Bill of Rights. In 1836, for example, Pennsylvania Senator (and future President) James Buchanan declared that "the Senator from South Carolina (Mr. Calhoun) has justly denominated the amendments to the constitution as our bill of rights" and that "the true history of the first article of our bill of rights" indicated why the gag rules violated the First Amendment right to petition the government for redress of grievances.[237]

In 1838, an antislavery society published a set of resolutions decrying the gag rules' infringement of the First Amendment and contending for the restoration of "the great principles . . . set forth in the declaration of

[233] Id. at 390–91.

[234] See Extracts from a Letter of Thomas Jefferson to President Washington, N.H. Gazette (Portsmouth), Feb. 6, 1838, at 1.

[235] George Sharswood, An Address Upon the Rights of the States, 1 Exam'r & J. Pol. Econ. 305, 306 (1834) (quoting the full Tenth Amendment in his speech).

[236] See, e.g., Cong. Globe, 24th Cong., 1st Sess. 505–06 (1836), *reprinted in* The Reconstruction Amendments, supra note 140, at 216.

[237] Debates of Congress, Senate: Abolition of Slavery in the District of Columbia (Mar. 2, 1836), *in* 12 Abridgment of the Debates of Congress, From 1789 to 1856, at 733, 733–35 (1859).

our Bill of Rights."[238] In 1839, the New York State Senate issued a report on the gag rules which recounted the origin of the First Amendment right of petition and the adoption of "the Bill of Rights." In the passage below, the New York State Senate report expressly relies upon Justice Story's account of the Bill of Rights in his *Commentaries on the Constitution*:

> [T]he adoption of a bill of rights in the United States Constitution was dangerous, rather than beneficial. To forbid Congress to pass a law prohibiting the right "to petition," when no power whatever is given by the Constitution to legislate on this subject, might be construed to imply that Congress possessed powers not granted. And this implication and construction might well be extended to all other subjects, as to those which are embraced in the bill of rights.[239]

The above contradicts revisionist claims about a lack of references to a federal bill of rights during the disputes over the gag rules.[240] The New York State Senate report also illustrates the broad reach of Justice Story's account of the 1791 "Bill of Rights."

In fact, Justice Story was not yet finished establishing an intellectual pedigree for the common account of the federal Bill of Rights. In 1840, Justice Story published *A Familiar Exposition of the Constitution of the United States*.[241] He subtitled the work "a brief commentary on every clause, explaining the true nature, reasons, and objects thereof; designed for the use of school libraries and general readers."[242] The *Familiar Exposition* would go through six editions by 1870, five of these published prior to the adoption of the Fourteenth Amendment. As he had done in both versions of his *Commentaries*, Justice Story once again presents the origins of the 1791 amendments and again labels that discussion

[238] Second Annual Report of the Hardwick Anti-Slavery Society, Presented at the Annual Meeting, July 4, 1838, Vt. Watchman & State J. (Montpelier, Vt.), July 23, 1838, at 1.

[239] See Abolition—Right of Petition, Report Made to the Senate (Feb. 26, 1839), *reprinted in* Albany Argus (N.Y.), March 12, 1839, at 1 (referencing Federalist No. 84 and volume 3, page 745 of the *Commentaries*).

[240] In her Georgetown speech, Pauline Maier (erroneously) claimed there is no evidence that the 1791 amendments were described as the bill of rights during the gag rule debates. See, e.g., Maier, supra note 3, at 498, 502. Gerard Magliocca is somewhat more careful, claiming only that there was "virtually no mention of the Bill of Rights," but he does not cite to any references to the Bill of Rights during the gag rule debates. See Magliocca, supra note 3, at 53.

[241] Joseph Story, A Familiar Exposition of the Constitution of the United States (N.Y., Harper & Bros. 1st ed. 1840).

[242] Id.

"Amendments.—Bill of Rights."[243] The textual account of the 1791 amendments differs somewhat from the *Commentaries*, with Justice Story describing the amendments as "mainly clauses, in the nature of a Bill of Rights, which more effectually guard certain rights, already provided for in the Constitution, or prohibit certain exercises of authority, supposed to be dangerous to the public interests."[244] As for "the origin and objects of the first ten amendments, which may be considered as a Bill of Rights, [they] were proposed by the first Congress, and were immediately adopted by the people of the United States."[245] Once again, Justice Story stresses the "importance" of the Second Amendment and "the protection intended by this clause of our National Bill of Rights."[246]

C. Van Ness's Oral Argument in Holmes v. Jennison

This brings us to 1840 and the event which opened this section, Vermont Governor C. P. Van Ness's oral argument before the U.S. Supreme Court and his claim that the 1791 amendments were "commonly called the bill of rights."[247] Van Ness insisted that the state's effort to extradite his client to a foreign country violated, among other things, the Due Process Clause of the Fifth Amendment.[248] Van Ness conceded that seven years earlier, in *Barron v. Baltimore*, the Court had held that "the amendments to the Constitution of the United States, commonly called the bill of rights, were simply limitations of the powers of the general government, and had no effect upon the state governments."[249] But given that "the decision is a recent one," Van Ness "beg[ged] leave to observe, that in my humble judgment, an error was committed by the Court."[250] Ultimately, a divided Court dismissed the case without deciding Van Ness's claim about the Fifth Amendment.[251]

In sum, Van Ness seems fully justified to have declared that the ten amendments were "commonly called the bill of rights." By 1840, former

[243] Id. at 255.
[244] Id.
[245] Id.
[246] Id. at 264–65.
[247] Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 555 (1840).
[248] Id. ("[The case involves] a violation of the provision in the Constitution of the United States which declares that 'no person shall be deprived of life, liberty, or property, without due process of law.'" (quoting U.S. Const. amend. V)).
[249] Id. (citing Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833)).
[250] Id.
[251] Id. at 561.

and future presidents, federal and state legislators, newspaper editorialists, states' rights advocates and abolitionists, Fourth of July celebrants and book advertisers, opponents of the 1798 Sedition Act and critics of the 1830s gag rules, and the man who drafted the amendments all referred to the ten amendments as the Bill of Rights. Finally, and most importantly for C. P. Van Ness, Justice Story had declared in the most important legal works of the nineteenth century that the ten amendments were the national Bill of Rights. It would have been incorrect and foolish for Van Ness to claim otherwise—staring down from the bench as Van Ness delivered his argument would have been none other than Justice Story himself.[252]

V. "NATIONAL" BILL OF RIGHTS AND PUBLIC EDUCATION, 1841–1860

Justice Story not only gave the amendments an official collective name, but he also gave that name a nationalist spin by referring to "our *national* Bill of Rights." The spin was intentional. Justice Story's *Commentaries* rejected earlier states' rights theories like those presented by St. George Tucker and instead embraced a nationalist interpretation of the Constitution more in keeping with the views of his mentor Chief Justice John Marshall.[253] From this perspective, it was not the *states'* bill of rights: it was the *nation's* Bill of Rights. As Alabama Representative James Belser declared to the House of Representatives in 1844, "the amendments of the Constitution of the United States" were the "*American* Bill of Rights."[254] Similarly, a Mr. Holden exhorted his fellow Tennessee conventioners "to meet together to consult and advise over their grievances and adopt means for addressing them . . . [as] guaranteed to us, not only in our national bill of rights, but in the bill of rights of every state in the Union."[255] Holden's exhortation is interesting not only because it represents a common American awareness of multiple bills of rights, but also because it comes from a representative of the South.

Northern abolitionists, meanwhile, still smarting from the congressional gag rules, called for the national protection of the people's

[252] Justice Story served on the Supreme Court from 1812 to 1845. See Newmyer, supra note 210, at 380.

[253] See Rotunda & Nowak, supra note 210, at xi–xiii.

[254] Cong. Globe, 28th Cong., 1st Sess. 65 (1844) (emphasis added) (remarks of Representative James Belser of Alabama on abolition petitions).

[255] Mr. Holden, Remarks at the Nashville Convention, N.C. Standard (Raleigh), Jan. 16, 1850, at 3.

First Amendment rights. An 1848 essay in William Lloyd Garrison's newspaper, *The Liberator*, for example, declared that "[a]ll the State Constitutions of our country recognize and reaffirm one grand provision of our National Bill of Rights, viz., 'the freedom of speech and of the press, and the right of the people peaceably to assemble, and to petition the government for a redress of grievances.'"[256] That same year, an essay in Ohio's *Lancaster Gazette* criticized President Polk's proposed restriction on antigovernment speech, writing that "[t]he freedom of speech and of the press is declared to be the unalienable right of an American freemen, guaranteed to him in the bill of rights."[257]

As the above illustrates, essayists and politicians in the North and South increasingly understood the Bill of Rights as declaring the national rights of the American people.

A. The Bill of Rights in Late Antebellum American Education

In 1845, Philadelphia Central High School Principal John S. Hart authored *A Brief Exposition of the Constitution of the United States for the Use of Common Schools*.[258] In 1849, the Philadelphia School Board moved to adopt Hart's text as a "Class-Book" to be introduced "into the Grammar Schools of the District."[259] Additional editions of Hart's book were published in 1859, 1860, and 1862.[260] On page ninety-seven of Hart's *Exposition* is a lesson in question-and-answer form about the "Amendments to the Constitution":

[256] The Judges Judged—No. 1, The Liberator (Boston), Oct. 13, 1848, at 164 (reprinting an editorial from the Sabbath Recorder) (quoting U.S. Const. amend. I).

[257] The Freedom of Speech and the Press, Lancaster Gazette (Pa.), Mar. 31, 1848, at 2.

[258] John S. Hart, A Brief Exposition of the Constitution of the United States for the Use of Common Schools (Phila., E. H. Butler & Co. 1850) (copy. 1845). Hart became principal of Philadelphia's Central High School in 1842 and presumably wrote the book for use at the school, copyrighting the manuscript in 1845. See Margery N. Sly, John Seely Hart's "Lectures on the Public Schools of Philadelphia, 1849," 141 Pa. Mag. Hist. & Biography 365, 365 (2017).

[259] In the 1859 edition, immediately following the title page, is the following note: "*December* 12, 1849 . . . . *Resolved*, That Hart's Constitution of the United States be introduced as a Class-Book, into the Grammar Schools of the District." See John S. Hart, A Brief Exposition of the Constitution of the United States for the Use of Common Schools (Phila., E. H. Butler & Co. 1859).

[260] See id.; see also John S. Hart, A Brief Exposition of the Constitution of the United States for the Use of Common Schools (Phila., E. H. Butler & Co. 1860); see also John S. Hart, A Brief Exposition of the Constitution of the United States for the Use of Common Schools (Phila., E. H. Butler & Co. 1862).

> 649. How are the first ten articles of the Amendments to be regarded?
> *As a Bill of Rights.*
>
> 650. What is a Bill of Rights?
> *A formal declaration of certain rights belonging to the people as individuals, and not delegated in forming the National and State Governments.*
>
> 651. Is not the whole Constitution in the nature of a Bill of Rights?
> *It is. Most of the things, usually specified in a Bill of Rights, are either expressly provided, or tacitly implied in the Constitution.*
>
> 652. Why was it thought expedient to make a more formal declaration on the subject?
> *On account of the extreme jealousy of the American people respecting both personal and political liberty.*
>
> 653. What was one of the most prominent objections against the adoption of the Constitution?
> *The want of a Bill of Rights.*
>
> 654. What was done to obviate this defect?
> *Congress, immediately after the ratification of the Constitution, took measures for its amendment, by the adoption of ten Articles, which are almost entirely declaratory in their character.*[261]

In this short lesson, students learn (1) a simple definition of "bill of rights," (2) that there are a number of American bills of rights (including the 1791 amendments, state bills of rights and, as Hamilton explained, the Constitution itself), and (3) that the ten amendments of 1791 are the *federal Constitution's* Bill of Rights. The short lesson echoes Justice Story's account of the origins of the Bill of Rights as a response to objections that the original Constitution did not contain such a bill of rights. Note also the nationalist tone of Hart's lesson: it was not the *states* that demanded the Bill of Rights, but "the American people," and their concerns involved "personal and political liberty."

Hart's book (along with the schoolbooks discussed previously) exemplifies how Americans in the early nineteenth century grew up hearing and learning that the national Constitution had a bill of rights in the form of the ten 1791 amendments. Although more than ten

[261] Hart, supra note 258, at 97 (emphasis added).

amendments had originally been proposed, and more amendments had since been added, it was the collective ten 1791 amendments that constituted America's Bill of Rights. As yet another 1840s academic text explained:

> There have been twelve amendments incorporated, in the manner prescribed by the above provision [Art. V], into the federal constitution, since its adoption. They are treated of, under the proper heads, in this work. See Part I. chap. V. VI. VII.
>
> These amendments were made soon after the adoption of the constitution. Objections to it had been urged, on the ground that it contained no formal Bill or Declaration of Rights; [] and on this account principally the amendments were adopted. The first ten amendments may be regarded as a Bill of Rights.[262]

The last ten of the twelve proposed amendments could be regarded as "a bill of rights" because they met the common definition of a bill of rights. One finds the same point in Richard Hildreth's 1852 three-volume *History of the United States*:

> Of these twelve [proposed amendments], . . . only these ten, being in the nature of a bill of rights, which, in the course of the next two years, received the sanction of a sufficient number of the state Legislatures to make them a part of the Constitution.[263]

In sum, by the end of the 1840s, the idea that the ten 1791 amendments were the nation's Bill of Rights had penetrated deep into American culture. This understanding was not only enshrined in the most influential law books of the day; the official name of the first ten amendments was a basic component of school children's civic education.

B. Slavery, Abolitionism, and the Bill of Rights

The decade before the Civil War opened with an attempted compromise between pro- and antislavery elements in the U.S. Congress.

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[262] Mordecai McKinney, The United States Constitutional Manual 36 (Harrisburg, Hickok & Cantine 1845).

[263] 1 Richard Hildreth, The History of the United States of America, From the Adoption of the Federal Constitution to the End of the Sixteenth Congress 123–24 (N.Y., Harper & Bros. 1852); see also Jones v. Robbins, 74 Mass. (8 Gray) 329, 340 (1857) ("In considering constitutional provisions, especially those embraced in the Declaration of Rights, and the amendments of the Constitution of the United States, in the nature of a bill of rights . . . .").

Under the so-called "Compromise of 1850," California was admitted as a free state, the newly acquired territories of Utah and New Mexico would decide for themselves whether to allow slavery, and a new Fugitive Slave Act greatly enhanced the ability of southern slave-catchers to apprehend Black persons accused of being runaway slaves.[264] The compromise further fueled—rather than settled—an already vigorous national debate about slavery and the fundamental nature of the American union.

In an 1850 speech opposing slavery in the territory of New Mexico, then-Senator William Seward insisted that New Mexico adopt the antislavery provisions of the 1787 Northwest Ordinance—provisions that critics of Seward's proposal dismissed as an inappropriate "abstraction." In mocking response, Seward cited other American "abstractions" like the Declaration of Independence and the Constitution's Bill of Rights:

> There is the Declaration of Independence, with its solemn recital of the natural equality of men, and of the inalienability of their essential rights. There is the Constitution of the United States, beginning with a sublime summary of the objects, and ending with its jealous bill of personal rights. What were these but abstractions? There is the same bill of rights in every Constitution, and even the Constitutions of many of the slave states hopefully assert abstractions of equality . . . .[265]

Antislavery advocates like Seward were especially keen on citing the federal Bill of Rights in order to demonstrate an incompatibility of slavery with the principles of the American Constitution. In an 1850 newspaper essay opposing the 1850 Fugitive Slave Act, the author lamented:

> The bill of rights of the Constitution provides that "No person shall be deprived of life, liberty or property without due process of law." The bill under discussion deprives its victims of liberty without *any* process of law.[266]

[264] See Sean Wilentz, The Rise of American Democracy, Jefferson to Lincoln 643 (2005).

[265] Mr. Seward's Speech on the Compromise Bill, North Star (Rochester, N.Y.), July 18, 1850, at 1 (reprinting a speech that Senator William Seward delivered in the U.S. Senate on July 2, 1850). Seward's speech was published elsewhere. See Mr. Seward's Speech on the Compromise Bill, Nat'l Anti-Slavery Standard (N.Y.C.), July 18, 1850, at 29; Speech of William H. Seward, on the Compromise Bill, at 8 (Gideon & Co. 1850), https://archive.org/details/speechofwillia00sewa [https://perma.cc/QL2P-JUCH].

[266] Unconstitutionality of the Fugitive Slave Law—No. 5, Washington Rep. (Pa.), Dec. 25, 1850, at 2.

Northern abolitionists were outraged by the 1850 Fugitive Slave Act, and a number of northern states refused, overtly or otherwise, to allow its enforcement. Wisconsin courts, for example, went so far as to invalidate the federal act as exceeding the constitutional powers of Congress and, in so doing, rejected the Supreme Court's decision in *Prigg v. Pennsylvania* which had held otherwise.[267] When Congress considered passing bills forcing Wisconsin to enforce the Fugitive Slave Act, abolitionists insisted that any such attempt would violate several provisions in the federal Bill of Rights. According to a March 10, 1855 editorial in the *Albany Evening Journal*:

> When that instrument was proposed by the Convention to the several States for their adoption, in 1787, the chief and indeed almost the only ground of objection to it, was the lack of sufficient guaranties of State and Personal rights. Eight of the thirteen States positively refused to agree to it, unless such guaranties should be given. They were accordingly given by Ten Amendments proposed in the First Congress. These amendments (as may be seen on referring to the Constitution) provide (1) "that freedom of religion, of speech and of the Press, shall not be abridged . . . ." In a word the Ten Amendments constitute a Bill of Rights expressly reserving what Mr. Toucey's bill seeks to take away.[268]

The above constitutes objections to any federal action abridging the Bill of Rights. The rising prominence of the Bill soon prompted theorists to insist that its provisions ought to bind state as well as federal governments.

C. The Rise of a Libertarian Reading of the Bill of Rights

In 1846, Georgia Supreme Court Chief Justice Joseph Henry Lumpkin handed down the court's opinion in *Nunn v. State*.[269] The case involved whether the principles declared by the Second Amendment bound both state and federal governments. According to Chief Justice Lumpkin, they

[267] See In re Booth, 3 Wis. 1 (1854), *reprinted in* The Reconstruction Amendments, supra note 140, at 284, 288–90; Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 622 (1842).

[268] Editorial, Albany Evening J. (N.Y.), Mar. 10, 1855, at 2; see also Wkly. Racine Advoc. (Wis.), Apr. 2, 1855, at 1 (quoting the editorial from *Albany Evening Journal*); Albany Evening J. (N.Y.), June 29, 1855, at 2 (same).

[269] 1 Ga. 243 (1846).

did. "The language of the *second* amendment," Chief Justice Lumpkin wrote,

> is broad enough to embrace both Federal and State governments—nor is there anything in its terms which restricts its meaning. . . . We do not believe that, because the people withheld this arbitrary power of disfranchisement from Congress, they ever intended to confer it on the local legislatures. This right is too dear to be confided to a republican legislature.[270]

In 1852, Chief Justice Lumpkin extended the same reasoning to the Sixth Amendment right of an accused "to be confronted with the witnesses against him."[271] Describing the ten amendments as "our American Magna Charta," Chief Justice Lumpkin insisted that their principles bound both state and federal governments.[272] Professor Akhil Amar describes Chief Justice Lumpkin as a "*Barron* contrarian[]," meaning that he was aware of the Supreme Court's reasoning in *Barron v. Baltimore*,[273] but nevertheless viewed the Bill of Rights as binding the states. In fact, by the 1850s, an increasing number of Americans, north and south, viewed the 1791 amendments as a national bill of *individual* rights which bound both state and national governments.

In his 1849 *Treatise on the Unconstitutionality of American Slavery*, the abolitionist Joel Tiffany declared that the Due Process Clause of the Fifth Amendment was one of the "privileges" of citizens of the United States and that it, along with other guarantees in the 1791 amendments, "are National in their character, and binding upon the State, as well as the National Government."[274] In an 1854 congressional speech published in Frederick Douglass's newspaper, New York Representative Gerrit Smith revived Van Ness's 1840 argument and insisted that the Due Process Clause of the Bill of Rights bound both state and federal governments:

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[270] Id. at 250.

[271] U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.").

[272] Campbell v. State, 11 Ga. 353, 368 (1852) (emphasis omitted).

[273] See Amar, supra note 9, at 153–55.

[274] Joel Tiffany, A Treatise on the Unconstitutionality of American Slavery 97–99, 106 (Cleveland, J. Calyer 1849).

> "*No person shall be deprived of life, liberty, or property, without due process of law*." Let this provision have free course, and it puts an end to American Slavery. . . . Twelve articles of amendment were proposed by the first Congress. The first three and the last two do, in terms, apply to the Federal Government, and to that only. . . . But inasmuch as [the remaining seven amendments of] this Bill of Rights speak[] neither of Congress nor the Federal Government, its language is to be construed as no less applicable to a State than to the Nation, as providing security no less against the abuse of State power than Federal power.[275]

In 1856, West Virginia mobs warned the local president of the Wheeling Black Republicans Club, E. M. Norton, not to attend future meetings of the club. Norton's response, published in the *National Anti-Slavery Standard*, called upon the legal sanctuary of "our constitution and bill of rights."[276] "I believe with Thomas Jefferson," Norton wrote, "that even error may safely be tolerated whilst truth is left free to combat it, and the palladium of American liberty consists in the liberty of speech and the press."[277]

Pro-slavery mobs had little interest in respecting the principles of free speech and the free exercise of religion. In the South, abolitionist expression was punishable by death.[278] In the North, mobs shut down antislavery meetings and destroyed northern abolitionist printing presses.[279] In Illinois, they attacked and destroyed Elijah Lovejoy's abolitionist press and, when he tried to defend a new one, they shot Lovejoy dead.[280] Still, even Democrats understood that the 1791 amendments constituted the national Bill of Rights. In his 1856 letter to

[275] Speech of Gerrit Smith on the Nebraska Bill, Frederick Douglass' Paper (Rochester, N.Y.), May 12, 1854, at 1, 4 (reprinting a speech that Representative Smith delivered in Congress on April 6, 1854). Representative Gerrit Smith's speech was also published as a separate pamphlet. See Gerrit Smith, No Slavery in Nebraska, No Slavery in the Nation: Slavery an Outlaw, https://babel.hathitrust.org/cgi/pt?id=nnc2.ark:/13960/t9s20f65k&view=1up&seq=13 [https://perma.cc/GYC5-RHV9] (last visited Jan. 15, 2024).

[276] E. M. Norton, Letter to the Editor, Nat'l Anti-Slavery Standard (N.Y.C.), Oct. 4, 1856, at 1 (publishing the response of E. M. Norton, president of the Black Republican Club in Wheeling, West Virginia, after he received a threat warning him not to attend a meeting of the club).

[277] Id.

[278] See Kurt T. Lash, The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment, 88 Nw. U. L. Rev. 1106, 1134 (1994).

[279] See Michael Kent Curtis, Free Speech, "The People's Darling Privilege" 140, 216–17 (Neal Devins ed., 2000).

[280] Id.

the Pennsylvania Democratic Central Committee, for example, William Carey Jones complained that expansive readings of the Speech and Debate Clause would "nullify at least three provisions of the bill of rights attached to the Constitution."[281]

Northern abolitionist Republicans, meanwhile, increasingly insisted that the federal government had a constitutional obligation to protect the Bill of Rights against state abridgment. In resolutions adopted only months before the outbreak of the Civil War, for example, the Church Anti-Slavery Society declared:

> Resolved, That in the judgment of this meeting it is the manifest duty of the President of the United States to interpose with authority for the protection of those Christian citizens in the South, whose lives, liberties, properties and persons are violated, and themselves banished in open violation of the Bill of Rights guaranteed by the Constitution to all American citizens, and without due process of law.[282]

This was more than "*Barron* Contrarianism." These were calls for federal enforcement of a nationalized Bill of Rights. Such a view transformed the original bill from a limit on federal power to a libertarian declaration of the rights of national citizenship which the national government had a duty to defend.

D. The Bill of Rights in a Time of Civil War

In January 1860, as the country spiraled ever closer to civil war, an ominous essay appeared in the *North Carolinian*, a southern newspaper published in Fayetteville, North Carolina. The author proclaimed his love of the Union but noted that "incase dissolution or secession was contemplated," the state should have in place a well-trained body of men to serve as the militia.[283] Citing the Second Amendment to the Constitution, the essay quotes Justice Story's *Commentaries on the Constitution* and the importance of "this clause of our national Bill of rights."[284] During the Civil War, this particular line from Justice Story's

[281] Letter of William Carey Jones, of California, to the Democratic Cent. Comm. of Pennsylvania (Sept. 15, 1856), *in* Celebration of the Adoption of the Constitution of the United States 2 (1856).

[282] Church Anti-Slavery Society Starting in Pittsburgh, Pa., Frederick Douglass' Paper (Rochester, N.Y.), Feb. 17, 1860, at 3.

[283] Reflections for the South, North Carolinian (Fayetteville), Jan. 14, 1860, at 2.

[284] Id.

Commentaries would be quoted again and again, by both northern and southern Americans.

1. James Buchanan and the Bill of Rights

In the fall of 1860, America elected Abraham Lincoln to be the next President of the United States. Convinced that slavery could not survive, much less territorially advance, under a Republican administration, southern states began the process of seceding from the Union.[285] With Lincoln's inauguration still months away,[286] it fell to outgoing President James Buchanan to formulate the Union's initial response to southern secession. On December 5, 1860, Buchanan addressed the nation. In a speech reprinted in newspapers across the country (including the front page of the *New York Times*), Buchanan entreated the southern states to pursue the addition of a slavery-protective constitutional amendment rather than embracing the revolutionary and unconstitutional act of secession. After all, Buchanan explained, states in the past had secured protective amendments by way of the amendment process of Article V:

> To this [Article V amendment] process the country is indebted for the clause prohibiting Congress from passing any law respecting an establishment of religion, or abridging the freedom of speech or of the Press, or of the right of petition. To this we are also indebted for the Bill of Rights, which secures the people against any abuse of power by the Federal Government. Such were the apprehensions justly entertained by the friends of State Rights at that period as to have rendered it extremely doubtful whether the Constitution could have long survived without these amendments.[287]

Revisionists concede that Buchanan's reference to the Bill of Rights was a reference to the 1791 amendments, but they insist that the reference

[285] On November 9, 1860, the South Carolina General Assembly passed a "Resolution to Call the Election of Abraham Lincoln as U.S. President a Hostile Act" and declared its intention to secede from the United States. See South Carolina, Declaration of Causes Which Justify Secession (Dec. 24, 1860), *in* 1 Reconstruction Amendments, supra note 140, at 327.

[286] Lincoln was inaugurated on March 4, 1861. See The New Administration, N.Y. Times, Mar. 5, 1861, at 1.

[287] The Message of President Buchanan, N.Y. Times, Dec. 5, 1860, at 1. Buchanan's speech was published in newspapers throughout the United States. See, e.g., The Examiner (Frederick, Md.), Dec. 12, 1860, at 1; Richmond Whig (Va.), Dec. 7, 1860, at 4; The President's Message, Wkly. Wis. Patriot (Madison), Dec. 8, 1860, at 6; Annual Message of President Buchanan, Evening Bull. (San Francisco, Cal.), Dec. 20, 1860, at supp. 1.

did not reflect common usage in 1860.[288] As we have seen, however, such references had been common for decades.

2. Civil War and the Bill of Rights

Nothing about the Civil War affected the common practice of referring to the 1791 amendments as the "bill of rights." This was as true for Republicans as it was for their political opponents. In July of 1861, for example, Democratic Tennessee Territorial Governor (and future President) Andrew Johnson delivered a speech before the Senate of the United States asking for the restoration of the Second Amendment right to bear arms:

> The amendments to the Constitution, which constitute the bill of rights, declare that "a well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." Our people are denied this right secured to them in their own constitution and the Constitution of the United States . . . .[289]

In 1862, Unionist and Massachusetts Representative Benjamin Thomas exhorted his colleagues, "[n]or are we to forget that the Constitution is a bill of rights as well as a frame of government; that among the most precious portions of the instrument are the first ten amendments."[290] In 1863, George B. Butler noted how concerns over states' rights "commenced in the effort to amend the Constitution by the introduction of a bill of rights (the ten amendments), on the erroneous principle that the Constitution contained a mass of hidden powers."[291] At the New York Peace Convention of 1863, Judge Flanders complained that the administration's conduct during the Civil War had resulted in a situation

[288] See Magliocca, supra note 3, at 59–60 (explaining that "it would be a mistake to read too much into Buchanan's statement," since the crisis had simply prompted Buchanan to give "an exalted title" to the 1791 amendments in an effort to keep the southern states in the Union).

[289] Cong. Globe, 37th Cong., 1st Sess. 296 (1861) (quoting U.S. Const. amend. II). Johnson's speech was also published as a twenty-four-page tract by the *New-York Daily Tribune* on September 2, 1861. See Andrew Johnson's Great Speech, N.Y. Daily Trib., Sept. 1, 1861, at 4; see also Speech of Andrew Johnson, Delivered in the Senate of the United States (July 27, 1861), *reprinted in* 2 The Rebellion Record 415, 433 (Frank Moore ed., N.Y., G. P. Putnam 1862) (offering another example of Johnson's speech).

[290] Cong. Globe, 37th Cong., 2d Sess. 1614 (1862) (speech of Mr. Thomas).

[291] George B. Butler, The Conscription Act: A Series of Articles Communicated to the Journal of Commerce 20 (N.Y., Loyal Publication Society 1863).

"as though the American Revolution had not entered into history, the Declaration of Independence had never been proclaimed, and a free, constitutional government, with its bill of rights . . . were but the 'baseless fabric of a vision.'"[292]

Others during this period echoed this common origin story of the Bill of Rights. In 1862, for example, Philadelphia Democrat Charles Ingersoll explained:

> [A]fter the publication of the Federalist, and after the Constitution had been adopted, as it stood, in compliance with the expressed wishes of the conventions of certain of the States, the first Congress, by resolution of September, 1789, proposed to the States, and they ratified them, the amendments, ten in number, to which reference has already been made, and these amendments provide for the absence from the Constitution of a Bill of Rights. They are: [Articles 1 through 10 of the 1791 amendments]. The States were jealous, their people skeptical, they said that, some day, by the door of implication, Federal tyranny would enter, and they demanded and obtained this Bill of Rights.[293]

In 1863, as the country approached a national election, the *New York Times* lamented how northern opponents of Lincoln's Administration "seized upon the machinery of liberty and wielded it to overthrow the whole structure of our Government; they made our bill of rights, our free speech and free press and *habeas corpus* instruments of sedition and revolution, thus turning the artillery of our citadel against its own garrison."[294]

In fact, war-time Democrats regularly praised the 1791 "bill of rights." In a widely published 1864 speech in the U.S. House of Representatives, New Jersey Democrat Andrew J. Rogers explained:

> After our fathers had framed the Constitution, fearing that despotism might at some future time attempt to take the place of liberty, they added to it several amendments, commonly called the Bill of Rights, in the very first article of which it is provided that "Congress shall make

[292] Speech of Judge Flanders, *in* Proceedings of the Great Peace Convention, Held in the City of New-York, June 3d, 1863: Speeches, Addresses, Resolutions, and Letters from Leading Men 19 (1863).

[293] Charles Ingersoll, An Undelivered Speech on Executive Arrests 75–76 (Phila. 1862).

[294] The Coming Elections—The Opposition Party, N.Y. Times, Oct. 25, 1863, at 4.

> no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press."[295]

Two years later, as a member of the Thirty-Ninth Congress, Rogers would listen to his colleague John Bingham propose a constitutional amendment enforcing the Bill of Rights against the states.[296] Also in 1864, another future member of the Thirty-Ninth Congress, John Pruyn, declared that "[t]welve amendments to the Constitution have been made, the first ten almost simultaneously with its adoption. They are declaratory and restrictive, containing the great principles of the Bill of Rights."[297]

Rogers and Pruyn are examples of Civil War-era Democrats sharing the common understanding of the 1791 amendments as the nation's Bill of Rights. There are others. An 1864 essay in the *Wisconsin Daily Patriot* exhorted Democrats to adopt a pro-Bill of Rights platform at their coming national convention:

> Let the Democracy at Chicago proclaim the liberty of speech—liberty of the press—the sacred writ of *habeas corpus* as, sacred altars in the pantheon of liberty, and also proclaim their eternal enmity to all who shall wantonly violate this webb [sic] and woof of our national bill of rights.[298]

Democrats regularly, and expressly, cited Justice Story's passage in his *Commentaries* praising the Second Amendment of "our national Bill of Rights." In 1864, for example, Lincoln issued an executive order temporarily banning the transportation of arms and ammunition without a special military permit.[299] This and similar orders outraged Democrats who viewed the actions as an abridgment of the Second Amendment.[300]

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[295] On the Resolution to Expel Mr. Long, Speech of Hon. Andrew J. Rogers, of New Jersey, Delivered in the House of Representatives of the United States, April 19, 1864, Daily Const. Union (D.C.), Apr. 25, 1864, at 1; see also Cong. Globe, 38th Cong., 1st Sess. 1619 (1864). But see Amar, supra note 9, at 286–87 (suggesting that Democrats like Rogers at the time tended to avoid using the term "bill of rights").

[296] See supra note 56 and accompanying text.

[297] Cong. Globe, 38th Cong., 1st Sess. 2940 (1864).

[298] On My Way, Wis. Daily Patriot (Madison), June 10, 1864, at 2.

[299] The Right to Bear Arms, N.H. Patriot & State Gazette (Concord), Sept. 14, 1864, at 2.

[300] Id.; see also Address of The Hon. Richard Vaux, At Tremont Temple, Boston, Illustrated New Age (published as The Daily Age) (Phila.), Oct. 28, 1864 ("[M]ilitary authorities, by force of arms are depriving the citizen of the right to bear arms to protect himself in the exercise of what he regards as the inherent and inestimable rights of an American citizen."); The Western Conspiracy, N.H. Patriot & State Gazette (Concord), Sept. 7, 1864, at 1

In support of their claims against the President, Democrats repeatedly quoted Justice Story's discussion of the Bill of Rights. The author of an 1864 essay titled "The Right to Bear Arms," for example, quoted Justice Story's passage on the Second Amendment from "our national bill of rights."[301] This same essay was printed in the *New Oregon Plain Dealer*, the *Indianapolis Daily State Sentinel*,[302] and the *Millersburg Ohio Holmes County Farmer*.[303]

An 1865 editorial published in the *Albany Argus* insisted that Lincoln's Administration had violated "all of the provisions" of the federal Bill of Rights:

> The bill of rights embodied in the Federal Constitution, with its amendments, is a fair delineation of what civil liberty is . . . . There is no need of a detail of all the provisions of this national bill of rights. Suffice it to say that it guaranties [sic] the freedom of speech and of the press, the right of trial by jury, the privilege of the writ of *habeas corpus*,[304] and a great variety of other well known constituent elements of civil liberty . . . . Such is the position in which American liberty has been placed to a very great extent by the events of the last four years. All the provisions of the Bill of Rights in the Federal Constitution have been openly, unscrupulously and systematically violated.[305]

Throughout the Civil War and into Reconstruction, Democrats agreed with their Republican counterparts that the 1791 amendments constituted the national Bill of Rights. For example, on December 13, 1865, days after the opening of the Thirty-Ninth Congress, an editorial in Albany's *Argus* complained about the exclusion of southern Democrats and discussed "[t]he right to assemble and petition, which was claimed in our bill of rights."[306] In a January 1866 editorial, the editors of the *Albany*

("Democrats have all the rights which Republicans have, and among those which they share in common, is the right to bear arms for their defense and protection.").

[301] The Right to Bear Arms, Wis. Daily Patriot, Apr. 14, 1864, at 2.

[302] See The Right to Bear Arms, New Or. Plain Dealer, Apr. 1, 1864, at 1; The Right to Keep and Bear Arms, Daily State Sentinel (Indianapolis, Ind.), Mar. 28, 1864, at 2.

[303] The Right to Keep and Bear Arms, Holmes Cnty. Farmer (Millersburg, Ohio), Mar. 31, 1864, at 2.

[304] The habeas right traditionally was associated with the Due Process Clause of the Fifth Amendment. See, e.g., Brandon L. Garrett, Habeas Corpus and Due Process, 98 Cornell L. Rev. 47, 49 (2012) ("The writ of habeas corpus and the right to due process have long been linked together.").

[305] The Effect of the War Upon Civil Liberty, Argus (Albany, N.Y.), Aug. 16, 1865, at 2.

[306] The Radical Attempt to Head the President!, Argus (Albany, N.Y.), Dec. 13, 1865, at 2.

Argus complained that "[t]he necessities of War were the ostensible pretense for the suspension of the Bill of Rights, and encroachments upon the liberty of the press and the abrogation of the right to trial by jury."[307] On February 21, 1866, the *Chicago Republican* published an editorial criticizing President Johnson's veto of the Freedmen's Bureau Bill. The editors quoted the language of the Fifth and Sixth Amendments and then declared, "if any State by its local laws violates these and the various other privileges enumerated in the Bill of Rights, the United States must be powerless to remedy the wrong, and the freedmen thus deprived of constitutional rights must appeal in vain for national protection."[308]

Days later, John Bingham introduced an amendment enforcing "the Bill of Rights" against the states.[309] When Bingham used that term, he did so against a legal, political, and cultural background that had used the term as a reference to the enumerated 1791 amendments to the federal Constitution. As we shall see, this is exactly how Bingham's colleagues understood Bingham's references to "the Bill of Rights."[310]

In sum, by the time members of the Thirty-Ninth Congress debated the Fourteenth Amendment, they did so against a legal, political, and cultural background that commonly referred to the 1791 amendments as the Bill of Rights.

IV. THE "BILL OF RIGHTS" AND THE THIRTY-NINTH CONGRESS

A. John Bingham and the Bill of Rights

Ohio Representative John Bingham drafted the majority of Section One of the Fourteenth Amendment, including the Privileges or Immunities Clause, the Due Process Clause, and the Equal Protection Clause.[311] Both during and after the debates of the Thirty-Ninth Congress, Bingham insisted his efforts were directed at enforcing the Bill of Rights against the states. As the previous sections have established, by 1866 Americans commonly referred to the first ten amendments as the Bill of Rights. As we shall see, this is how they understood Bingham's references to the Bill

[307] Retrogression in Politics, Daily Albany Argus (N.Y.), Jan. 8, 1866, at 2.

[308] The President's Veto, Chi. Republican, Feb. 21, 1866, at 4.

[309] See supra note 56.

[310] 2 The Reconstruction Amendments, supra note 25, at 110 (referring to various provisions within the text of the 1791 amendments as the "bill of rights").

[311] See Kurt T. Lash, The Fourteenth Amendment and the Privileges and Immunities of American Citizenship 187 (2014).

of Rights. It is also how Bingham himself understood the term. In a speech explaining the meaning of the ratified Fourteenth Amendment, Bingham declared his agreement with Jefferson that the personal rights in "the first eight articles of amendments to the Constitution of the United States, they constitute the American Bill of Rights."[312] Bingham continued:

> These eight articles I have shown never were limitations upon the power of the States, until made so by the fourteenth amendment. The words of that amendment, "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," are an express prohibition upon every State of the Union, which may be enforced under existing laws of Congress, and such other laws for their better enforcement as Congress may make.[313]

Bingham did not wait until after ratification to describe his handiwork as protecting the 1791 amendments known as the Bill of Rights. In his 1866 speeches, which introduced his first draft of what became Section One, Bingham expressly announced his intention to pass an amendment that would enforce the Bill of Rights against the states, including the 1791 amendments like the Fifth Amendment's Due Process Clause. Revisionists argue that Bingham did not intend his references to the Bill of Rights to be understood as a reference to the 1791 amendments. They base this in part on their erroneous reading of antebellum usage, but also in part on a misunderstanding of Bingham's theory of the Constitution. We have already addressed antebellum usage. I will discuss Bingham's constitutional theory below.

But first, it is important to note that whatever Bingham's subjective beliefs about the term "Bill of Rights," his audience would have understood Bingham's use of the term as a reference to the 1791 amendments. They would have done so both because this was common usage at that time, and also because of the context in which Bingham spoke. As we shall see, Bingham's audience *did* expressly understand Bingham's references to the Bill of Rights as a reference to the 1791 amendments. They had no reason to think otherwise.

[312] John Bingham, Speech on the Privileges or Immunities Clause, *in* 2 The Reconstruction Amendments, supra note 25, at 624.

[313] Id. at 626.

1. Bingham's Theory of Article IV and the Bill of Rights

John Bingham's ideas about the privileges or immunities of national citizenship appear as early as 1859 in his speech opposing the admission of Oregon to the Union.[314] Although Oregon's proposed state constitution banned slavery, it also excluded free Black persons from entering the state and prohibited them from owning property, entering into contracts, or filing suit in Oregon state court.[315] To Bingham, these restrictions amounted to a denial of the right to due process of law as declared by the Fifth Amendment to the federal Constitution.[316] Bingham insisted that a combination of Article IV and the Supremacy Clause (including the oath) obligated every state official in the Union, including the proposed state of Oregon, to enforce the enumerated rights in the first eight amendments, including the Fifth Amendment.

Bingham's theory relied on a passage in Justice Joseph Story's *Commentaries on the Constitution*—the same volume in which Justice Story labels the ten 1791 amendments as the "national Bill of Rights." Justice Story noted that citizens of the states are, "*ipso facto*," citizens "of the United States."[317] Expressly relying on this passage, Bingham argued that if citizens of a state are "*ipso facto*" citizens of the United States, then Article IV may be read as if it contains an "ellipsis," or an implied parenthesis:

> Citizens [*of the United States*] of each State shall be entitled to all privileges and immunities of citizens [*of the United States*] in the several States.[318]

When read with this implied "ellipsis," it appears that Article IV obligates the states to respect *all* of the rights "of citizens of the United States," including the right of all persons not to be deprived of life, liberty, or property without due process of law. These due process rights,

[314] Readers may find the full speech at Cong. Globe, 35th Cong., 2d Sess. 981–85 (1859).

[315] See id. at 984.

[316] Id.

[317] Id. at 983 (speech of Rep. Bingham) ("It has always been well understood amongst jurists in this country, that the citizens of each State constitute the body politic of each community, called the people of the State; and that the citizens of each State in the Union are *ipso facto* citizens of the United States. (Story on the Constitution, vol. 3, p. 565.)"); see also 3 Story, supra note 208, at 564–66.

[318] Cong. Globe, 35th Cong., 2d Sess. 984 (1859) ("There is an ellipsis in the language employed in the Constitution, but its meaning is self-evident that it is 'the privileges and immunities of citizens of the United States in the several States' that it guaranties.").

Bingham explained, were found in the text of the Fifth Amendment in "our Constitution" in "its bill of rights."[319] In 1866, John Bingham relied on the same "ellipsis" theory of Article IV, and the same volume of Justice Story's *Commentaries*, in support of his first draft of the Privileges or Immunities Clause—a clause Bingham insisted enforced the Bill of Rights against the states.

2. Bingham's First Draft of Section One

On December 6, 1865, the opening days of the Thirty-Ninth Congress, John Bingham introduced a joint resolution "to amend the Constitution of the United States so as to empower Congress to pass all necessary and proper laws to secure to all persons in every State of the Union equal protection in their rights, life, liberty, and property."[320] A month later, on January 9, 1860, Bingham explained the necessity of adding such an amendment. "[A]ll the States of the Union," Bingham declared, "have flagrantly violated the absolute guarantees of the Constitution of the United States to all its citizens, it is time that we take security for the future, so that like occurrences may not again arise to distract our people and finally to dismember the Republic."[321] Bingham then repeated his 1859 theory of Article IV and the Bill of Rights:

> When you come to weigh these words, "equal and exact justice to all men," go read, if you please, the words of the Constitution itself: "The citizens of each State (being *ipso facto* citizens of the United States) shall be entitled to all the privileges and immunities of citizens (supplying the ellipsis 'of the United States') in the several States." This guarantee is of the privileges and immunities of citizens of the United

[319] According to Bingham:

> Sir, our Constitution, the new Magna Charta, which the gentleman aptly says is the greatest provision for the rights of mankind and for the amelioration of their condition, rejects in its bill of rights the restrictive word "freeman," and adopts in its stead the more comprehensive words "no person;" thus giving its protection to all, whether born free or bond. The provision of our Constitution is, "no person shall be deprived of life, or liberty, or property without due process of law." This clear recognition of the rights of all was a new gospel to mankind . . . .

Cong. Globe, 37th Cong., 2d Sess. 1638 (1862).

[320] Cong. Globe, 39th Cong., 1st Sess. 14 (1865).

[321] Cong. Globe, 39th Cong., 1st Sess. 158 (1866).

> States in, not of, the several States. This guarantee of your Constitution applies to every citizen of every State of the Union.[322]

A month later, Bingham introduced a proposed amendment which he described as an effort to enforce the "bill of rights" against the states:

> Article—. The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.[323]

Bingham stressed that "[e]very word of the proposed amendment is to-day in the Constitution of our country, save the words conferring the express grant of power upon the Congress of the United States."[324] This allowed Bingham to claim that "the proposed amendment does not impose upon any State of the Union, or any citizen of any State of the Union, any obligation which is not now enjoined upon them by the very letter of the Constitution."[325]

The problem with the existing Constitution, Bingham explained, was that "these great provisions of the Constitution, this immortal bill of rights embodied in the Constitution, rested for its execution and enforcement hitherto upon the fidelity of the States."[326] The rebelling states, however, had acted "in utter disregard of these injunctions of your Constitution, in utter disregard of that official oath which the Constitution required they should severally take . . . [and they] have violated in every sense of the word these provisions of the Constitution of the United States, the enforcement of which are absolutely essential to American nationality."[327]

Barnett and Bernick claim that readers should not assume Bingham's reference to "the bill of rights" was a reference to the 1791 amendments.[328] They base this claim in part on the revisionist scholarship

[322] Id.

[323] Id. at 1033–34. Major newspapers reported their own versions of Bingham's speech of February 26th, with minor changes. See Thirty-Ninth Congress, 1st Session: A Constitutional Amendment, N.Y. Times, Feb. 27, 1866, at 8; Thirty-Ninth Congress, First Session: Another Amendment to the Constitution, N.Y. Herald, Feb. 27, 1866, at 1.

[324] Cong. Globe, 39th Cong., 1st Sess. 1034 (1866).

[325] Id.

[326] Id.

[327] Id.

[328] Barnett & Bernick, supra note 3, at 132–34.

discussed above and in part on Bingham's effort to use Article IV as a vehicle for holding states accountable to enforce the Bill of Rights. We now know the revisionists are wrong about antebellum usage. By 1866, lawyers and politicians commonly used the term "Bill of Rights" as a reference to the 1791 amendments. Against this long-standing common usage, Bingham's audience would have presumed his reference to the Bill of Rights was a reference to the ten amendments to the Constitution. In fact, we know they did.

The day after Bingham's speech about the Bill of Rights, New York Republican Representative Robert Hale responded to Bingham's speech about the need to enforce the Bill of Rights:

> Now, what are these amendments to the Constitution, numbered from one to ten, one of which is the fifth article in question? . . . They constitute the bill of rights, a bill of rights for the protection of the citizen, and defining and limiting the power of Federal and State legislation.[329]

Hale not only accepted the common antebellum understanding of the term "the Bill of Rights" as a reference to the ten 1791 amendments, but he also presumed this was the meaning of Bingham's reference to the Bill of Rights. Hale nevertheless opposed Bingham's amendment because he believed that the 1791 amendments *already* "defin[ed] and limit[ed] the power of Federal and State legislation." "They are not," Hale claimed, "matters upon which legislation can be based."[330]

As previously discussed, a number of antebellum Americans shared Hale's belief that the federal Bill of Rights already bound the national and state governments.[331] This idea emerged as more and more Americans came to view the Bill of Rights as a list of individual rights, and not merely a statement about federalism.

The Supreme Court, of course, did not share this view and, in cases like *Barron v. Baltimore*[332] and *Livingston v. Moore*,[333] had refused to apply the Bill of Rights against the states. John Bingham knew this, and he immediately challenged Hale to produce a case where "the sufficiency of the Constitution has been tested and found in the past. . . . Where is the

[329] Cong. Globe, 39th Cong., 1st Sess. 1064 (1866).
[330] Id.
[331] See, e.g., supra note 272 and accompanying text.
[332] 32 U.S. (7 Pet.) 243 (1833).
[333] 32 U.S. (7 Pet.) 469 (1833).

decision? I want an answer."[334] Taken aback, Hale responded that he did not know of a specific case, "[b]ut still I have, somehow or other, gone along with the impression that there is that sort of protection thrown over us in some way, whether with or without the sanction of a judicial decision that we are so protected."[335]

Jumping to Hale's defense, Wisconsin Democrat Charles Eldredge[336] tried to turn the tables on Bingham and demanded that Bingham produce "a case in which the Constitution of the United States has been pronounced to be insufficient."[337] Bingham responded that he was "ready to answer the gentleman now, and to produce such a decision, whether the gentleman from New York is or is not."[338] The next day, Bingham would take the opportunity to explain Bill of Rights case law to both Eldredge and Hale.

In his speech of February 28, 1866, John Bingham referenced the "bill of rights" more than a dozen times.[339] Bingham began by denying the amendment would "take away from any State any right that belongs to it."[340] "The proposition pending before the House," Bingham explained, "is simply a proposition to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution to-day. It 'hath that extent—no more.'"[341]

Bingham presumed his colleagues agreed that the Bill of Rights should bind both state and federal governments, and he mocked the amendment's opponents for refusing to empower Congress to enforce the Bill of Rights and its provisions such as the Due Process Clause:

> Ah! say gentlemen who oppose this amendment, we are not opposed to equal rights; we are not opposed to the bill of rights that all shall be

[334] Cong. Globe, 39th Cong., 1st Sess. 1064 (1866).

[335] Id.

[336] Spelled "Eldridge" in the Congressional Globe, the accurate spelling appears to be "Eldredge." See Biographical Directory of the United States Congress, https://bioguideretro.congress.gov/Home/MemberDetails?memIndex=E000103 [https://perma.cc/XBP7-UMRU] (last visited Jan. 15, 2024).

[337] Cong. Globe, 39th Cong., 1st Sess. 1064 (1866).

[338] Id.

[339] Bingham's speech of February 28, 1866, was published separately in pamphlet form. See One Country, One Constitution, and One People: Speech of Hon. John A. Bingham, of Ohio, In Support of the Proposed Amendment to Enforce the Bill of Rights (D.C., Cong. Globe 1866).

[340] Cong. Globe, 39th Cong., 1st Sess. 1088 (1866).

[341] Id.

> protected alike in life, liberty, and property; we are only opposed to enforcing it by national authority, even by the consent of the loyal people of all the States.[342]

Bingham then addressed Hale's assertion that the Bill of Rights already limited the legislation of both state and federal governments, and Eldridge's challenge to produce a case stating otherwise. Yesterday, Bingham reminded his colleagues:

> A gentleman on the other side interrupted me and wanted to know if I could cite a decision showing that the power of the Federal Government to enforce in the United States courts *the bill of rights under the articles of amendment to the Constitution had been denied*. I answered that I was prepared to introduce such decisions; and that is exactly what makes plain the necessity of adopting this amendment.[343]

Bingham then quoted Chief Justice John Marshall's statement in "the case of Barron vs. The Mayor and City Council of Baltimore" that "the fifth amendment must be understood as restraining the power of the General Government, not as applicable to the States."[344] *Barron*, of course, involved only the Fifth Amendment. Bingham therefore continued and cited "the case of the Lessee of Livingston vs. Moore," where the same Supreme Court declared:

> As to the amendments of the Constitution of the United States, they must be put out of the case, since it is now settled that those amendments do not extend to the States; and this observation disposes of the next exception, which relies on the seventh article of those amendments.[345]

Looking up from the text, Bingham demanded, "What have gentlemen to say to that? Sir, I stand relieved to-day from entering into any extended argument in answer to these decisions of your courts . . . ."[346] "The question," Bingham explained,

> is, simply, whether you will give by this amendment to the people of the United States the power, by legislative enactment, to punish

[342] Id. at 1089.
[343] Id. (emphasis added).
[344] Id. at 1089–90.
[345] Id. at 1090 (quoting Livingston v. Moore, 32 U.S. (7 Pet.) 469, 551–52 (1833)).
[346] Id.

> officials of States for violation of the oaths enjoined upon them by their Constitution? . . . Why should it not be so? Is the bill of rights to stand in our Constitution hereafter, as in the past five years within eleven States, a mere dead letter? It is absolutely essential to the safety of the people that it should be enforced.[347]

The dialogue between Bingham and Hale is significant for several reasons. It shows that when Bingham referenced "the bill of rights," Hale immediately presumed Bingham was referring to the ten 1791 amendments. Hale shared the same common understanding of the term. As Hale put it, "[T]hese amendments to the Constitution, numbered from one to ten, one of which is the fifth article in question . . . [t]hey constitute the bill of rights . . . ."[348] Hale then expressed what had become an increasingly common individual rights understanding of the Bill of Rights, one that equally bound both state and national governments. Bingham accepts Hale's understanding of Bingham's reference to the Bill of Rights as the 1791 amendments. However, he points out that the Supreme Court in cases like *Barron* and *Livingston* had refused to enforce the Bill of Rights under the articles of amendment to the Constitution. *Barron* involved a Fifth Amendment claim and *Livingston* involved a Seventh Amendment claim. The Court in *Livingston*, moreover, announced its decision involved a reading of the amendments as a unified whole: "As to the amendments of the constitution of the United States, they must be put out of the case; since it is now settled that those amendments do not extend to the states."[349] The only way to make sense of this dialogue is if both Bingham and Hale understood the term "bill of rights" as a reference to the 1791 amendments, and that court decisions refusing to apply the 1791 amendments against the states amounted to a decision not to apply the Bill of Rights against the states. Finally, it shows that Hale understood that Bingham's proposal to enforce the Bill of Rights against the states was a proposal to enforce the 1791 amendments against the states.

There is no confusion here regarding the term "bill of rights." Despite Bingham's use of Article IV as part of his constitutional theory, Hale has no difficulty understanding Bingham's reference to the Bill of Rights as a reference to the ten 1791 amendments. This is exactly what we would

[347] Id.
[348] Cong. Globe, 39th Cong., 1st Sess. 1064 (1866).
[349] *Livingston*, 32 U.S. at 551–52.

expect given the longstanding antebellum usage of the term and the context of Bingham's declared intention to adopt an amendment that would, for the first time, apply the Bill of Rights against the states. In sum, there is good reason to believe that in 1866 Bingham shared the same common understanding of the term "Bill of Rights" as did his colleagues, and that he simply repeated this common understanding in his speech of 1871. Any other understanding would be wildly out of step with common usage at the time, and expressly contradicted by Justice Story's third volume of the *Commentaries*, the volume Bingham repeatedly quoted from on the floor of the House during his speeches.

Other members of the Thirty-Ninth Congress shared the same common understanding. In his speech supporting the Civil Rights Bill, Iowa Representative James Wilson stated, "I find in the bill of rights which the gentleman desires to have enforced by an amendment to the Constitution that 'no person shall be deprived of life, liberty, or property without due process of law.'"[350] Ohio Representative William Lawrence, also speaking in favor of the Civil Rights Bill, noted that "*The bill of rights to the national Constitution* declares that: 'No person . . . shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation.'"[351] Wilson and Lawrence shared Bingham's national rights understanding of the term "bill of rights," but they believed that Congress already had the power to enforce Bill of Rights provisions like the Due Process Clause. It was because Bingham did not share this view that he opposed the Civil Rights Act and continued to press for the adoption of his proposed amendment.

There is also abundant evidence that the public in 1866 continued to share what had become the common understanding of the national Bill of Rights. On May 8, 1866, Democrat S.S. Nicholas published an essay complaining that "[t]he bill of rights, or what are termed the guaranties of liberty, contained in the Federal Constitution, have none of them any sort of application to or bearing upon the State governments, but are solely prohibitions or restrictions upon the Federal Government."[352] When Democrats insisted that the President be allowed to sign the proposed Fourteenth Amendment, the editors of the *Chicago Republican* mockingly wrote:

[350] Cong. Globe, 39th Cong., 1st Sess. 1294 (1866).
[351] Cong. Globe, 39th Cong., 1st Sess. 1833 (1866) (emphasis added).
[352] S.S. Nicholas, Comment, The Civil Rights Act, Daily Nat'l Intelligencer (D.C.), May 8, 1866, at 1.

> The President has taken the position that the amendment to the Constitution proposed by the present Congress, not having been submitted to the President for his approval, can have no validity even when ratified by the Legislatures of three fourths of the States. . . . [Democrats who agree with the President] must also insist that *the amendments which constitute the Bill of Rights in the Constitution* are all equally void and form no part of that instrument.[353]

In his 1861 book, *National History of the War for the Union*, Evert Duyckinck quoted then-Senator Andrew Johnson's discussion of "[t]he amendments to the Constitution, which constitute the bill of rights," including the Second Amendment.[354] In 1868, constitutional scholar Judge George W. Paschal delivered a speech in which he described the (common) origin story of the federal Bill of Rights:

> [A]t the very first session of Congress the clamor for a bill of rights caused the amendments to be proposed, which were very soon ratified by the appropriate number of States. . . . These were the first ten amendments and they were intended to be alike binding upon the government, the states and the people. But unfortunately the great guarantees of liberty have been held to apply only to the national government and not to the States.[355]

The next month, Paschal published an essay in the *New York Tribune* praising the newly ratified Fourteenth Amendment and its effect on enforcing the Bill of Rights, including the freedom of expression. According to Paschal, those tempted to

> underrate this national guaranty [the Fourteenth Amendment] . . . should have lived in the South, where there was always a class of "persons" for whom there was a summary and barbarous code; they should know that the national bill of rights has, by a common error, been construed not to apply to or control the States; they should have seen and felt that for 30 years there was even half the area of the Union where no man could speak, write, or think against the institution of Slavery.[356]

[353] "Strikes Both Ways," Daily Inter Ocean (Chi., Ill.), July 6, 1866, at 4 (emphasis added).
[354] 1 Evert A. Duyckinck, National History of the War for the Union: Civil, Miliary and Naval 302 (1861).
[355] Speech of Judge George W. Paschal, Daily Austin Republican, July 30, 1868, at 3.
[356] George Paschal, The Fourteenth Article, N.Y. Trib., August 6, 1868, at 2.

That same year, the year the country ratified the Fourteenth Amendment, John Norton Pomeroy published *An Introduction to the Constitutional Law of the United States*.[357] Subtitled "Especially Designed for Students, General and Professional,"[358] Pomeroy's treatise explains that "immediately after the assembling of the new Congress, amendments were proposed and speedily ratified, which consist in a series of negations of any assumed power to perform certain enumerated acts. These express denials of the existence of certain attributes in the general government, constitute our national bill of rights."[359]

As had been true prior to the Civil War, Reconstruction-era Americans over and over again used the term Bill of Rights as a reference to the 1791 amendments. The same "origin story" about the Bill of Rights that emerged soon after their adoption regularly appears in Reconstruction-era documents. For example, in an 1867 speech reported in the Cleveland *Plain Dealer*, Ohio Supreme Court Justice R.P. Ranney reminded his audience:

> *You all know the history of the ten amendments*. When the Constitution of the United States was first submitted to the States for ratification, it was found not to contain what is commonly called a bill of rights—that is, provisions containing limitations on the power of the government. The advocates of the Constitution said this was unnecessary. Why? Because there was nothing granted to the Government except what was clearly expressed in the letter of the Constitution. But to make assurance doubly sure, a large number of States to which the Constitution was submitted, recommended *amendments constituting a bill of rights.* I will call your attention to the tenth amendment. It provides that the powers not herein expressly delegated to the General Government, are reserved to the States and the people thereof.[360]

Similarly, in his closing argument in President Andrew Johnson's 1868 impeachment trial, former Attorney General Henry Stanberry explained:

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[357] John Norton Pomeroy, An Introduction to the Constitutional Law of the United States: Especially Designed for Students, General and Professional (N.Y., Hurd & Houghton 1868).

[358] Id.

[359] Id. at 143–44. Notice how Pomeroy twice names the amendments "the national bill of rights."

[360] Conclusion of the Speech of Hon. R. P. Ranney, at Mansfield O., August 6, 1867, Plain Dealer (Cleveland), August 9, 1867, at p. 1 (emphasis added).

> When our Constitution was formed and was presented to the various States for adoption, the universal objection made to it was not so much for what it contained as for what it omitted. It was said, we find here no bill of rights; we find here no guarantee of conscience, of speech, of the press. The answer was that the Constitution itself was, from beginning to end, a bill of rights; that it conferred upon the Government only certain specified and delegated powers, and among these were not to be found any grant of any power over the conscience or over free speech or a free press. The answer was plausible, but not satisfactory. The consequence was that at the first Congress held under the Constitution, according to the instructions sent from the various State Conventions, *ten amendments* were introduced and adopted . . . .[361]

3. The First Eight Amendments as the Bill of Rights

Although Reconstruction-era Americans uniformly understood references to the national Bill of Rights as a reference to the 1791 amendments, one occasionally finds references to the Bill of Rights as the first eight 1791 amendments. For example, in his speech introducing the Fourteenth Amendment to the Senate, Jacob Howard described the Bill of Rights as involving the first *eight* amendments, excluding the Ninth and Tenth Amendments from his list.[362] This seems to reflect what was already a common practice of distinguishing the personal rights listed in the first eight amendments from the structural federalist protections of the last two amendments.

From the time of the Founding through the Civil War, the Ninth and Tenth Amendments were commonly treated as joint defenders of federalism and the reserved rights and powers of the people in the

[361] The Impeachment Trial, Mr. Stanberry's Great Speech, N.Y. Trib., May 2, 1868, at 5 (emphasis added) (quoting the first ten amendments in full in his closing argument); see also Norwich Aurora (Conn.), May 6, 1868, at 2 (emphasis added). Stanberry served as Attorney General in Johnson's cabinet and resigned to represent Johnson during the impeachment trial. See also Timothy Farrar, Manual of the Constitution of the United States 392–95 (Bos., Little, Brown & Co. 1867) ("[T]he first session of the first Congress . . . proposed an addition of twelve Articles, in the nature of a bill of rights, most of them copied or modified from English or American models . . . . Two of the proposed Articles were rejected; but the other ten were ratified by the legislatures of three-fourths of the States, and constitute the first ten of the amendments now making a part of the Constitution.").

[362] Speech of Jacob Howard, May 23, 1866, *in* 2 The Reconstruction Amendments, supra note 25, at 188.

states.[363] In his concurrence supporting the decision in *Dred Scott v. Sanford*, for example, Justice Campbell declared that "the ninth and tenth amendments to the Constitution were designed to include the reserved rights of the States, and the people."[364] In his speech supporting South Carolina's secession from the Union, Democrat Judah P. Benjamin quoted the Ninth and Tenth Amendments as

> an important addition made to the Constitution by which it was expressly provided that it should not be construed to be a General Government over all the people, but that it was a Government of States, which delegated powers to the General Government. The language of the ninth and tenth amendments to the Constitution is susceptible of no other construction . . . .[365]

In his speech opposing the Thirteenth Amendment, New York's Fernando Wood declared:

> The control over slavery, and the domestic and social relations of the people of the respective States, was not and never was intended to be delegated to the United States, and cannot now be delegated except by the consent of all the States. Articles nine and ten of the Amendments to the Constitution are conclusive on this point.[366]

In the Thirty-Ninth Congress, Pennsylvania Democrat Benjamin Boyer opposed Section Two of the Fourteenth Amendment, quoting the Ninth and Tenth Amendments as evidence that Congress had no right to "disfranchise the majority of the citizens of any State on account of their past participation in the rebellion."[367]

Given this long-standing association of the Ninth Amendment with states' rights, it is not surprising to find some Republicans focusing their attention on the personal rights listed in the first eight amendments. In 1871, for example, John Bingham claimed that "Jefferson well said of the first eight articles of amendments to the Constitution of the United States,

[363] See, e.g., James Madison, Speech in Congress Opposing the National Bank, *in* Writings, supra note 104, at 489. For an extended discussion of antebellum federalist understanding of the Ninth Amendment, see generally Kurt T. Lash, The Lost History of the Ninth Amendment (2009).

[364] 60 U.S. (19 How.) 393, 511 (1857) (Campbell, J., concurring).

[365] Cong. Globe, 36th Cong., 2nd Sess. 214 (1860) (speech of Judah P. Benjamin).

[366] Cong. Globe, 38th Cong., 1st Sess. 2941 (1864).

[367] Cong. Globe, 39th Cong., 1st Sess. 2467 (1866).

they constitute the American Bill of Rights."[368] Similarly, in 1880, Thomas Cooley presented an origin story in which the states "were only induced to ratify in reliance on a bill of rights being added to the Constitution by amendments, and this was done in eight articles, which were proposed and adopted as speedily as the necessary forms could be gone through with."[369]

But even if one distinguished the protections of the first eight amendments from the last two, this did not alter the fact that most people continued to see all ten as aspects of the American Bill of Rights. For example, after Cooley discussed the origins of the first eight amendments, he then went on to recognize that "the incorporation in the Constitution of a bill of personal rights and liberties *by the first ten articles of the amendments*" required that one of these articles explain that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."[370]

CONCLUSION

The revisionists are wrong. Long before the twentieth century, and well before the adoption of the Fourteenth Amendment, Americans commonly referred to the 1791 amendments as the "bill of rights." When John Bingham in the Thirty-Ninth Congress declared his intention to pass an amendment enforcing the "bill of rights" against the states, his colleagues and the attentive public understood this meant applying the personal rights of the 1791 amendments against the states.

This final point is important for those seeking to understand the original meaning of the Fourteenth Amendment. Revisionists insist that we cannot know what Bingham was referring to when he declared his proposed amendment would enforce the "bill of rights" against the states and nothing more. If the term "bill of rights" was not commonly used in reference to the 1791 amendments, and instead was more often used as a reference to multiple sources of rights including the Declaration of Independence, then this suggests that both Bingham and his audience understood that the amendment would protect any number of rights, from the enumerated rights of the 1791 amendments to unenumerated

[368] Cong. Globe, 42d Cong., 1st Sess. app. 84 (1871).

[369] Thomas Cooley, The General Principles of Constitutional Law in the United States of America 18 (Bos., Little, Brown & Co. 1880).

[370] Id. at 35 (emphasis added).

libertarian economic rights.[371] As this essay has demonstrated, however, the term "bill of rights" *was* commonly used to refer to the 1791 amendments, and there is no evidence the term was used for anything other than enumerated rights.

Even if incorrect in their specific claims, revisionists nevertheless have helpfully focused scholarly attention on antebellum understanding of the 1791 amendments and the rhetorical role played by terms like the "national Bill of Rights." Revisionists insist that the public perception of the 1791 amendments changed over time. This insight seems essentially correct, though not in the manner they intend. The historical evidence suggests that, between the Founding and Reconstruction, Americans shifted from viewing the 1791 Bill of Rights as an emblem of federalism to viewing the amendments as a national declaration of fundamental individual rights.

In the beginning, when Americans referred to the Constitution's "Bill of Rights," they generally did so in order to say something about the original Constitution. Along with the term came an origin story about the struggle to ratify the Constitution, the insistence on written guarantees that federal power would be limited, and the addition of the amendments to prevent "abuse" or misconstruction of the original document. The term "Bill of Rights," in other words, enjoyed a "thick" cultural meaning about the nature of the Constitution and the federalist system it both symbolized and secured. This thick cultural understanding seems to cut across the grain of recent scholarly work that questions the fixed nature of the original Constitution.[372] However, even if some members of the Founding generation held an open-ended view of the constitutional project, those who insisted upon and embraced the Bill of Rights held a very different and far more "fixed" or federalist understanding of those powers enumerated in the original Constitution.

On the other hand, as the decades wore on, an increasing number of Americans came to view the Bill of Rights as symbolizing a national commitment to individual freedom. To these antebellum Americans, the 1791 amendments stood as a collective symbol of freedom called "the Bill of Rights." This is a remarkable transformation in public understanding and one not fully appreciated in constitutional historical scholarship. Again, the amendments themselves had no label whatsoever.

[371] See, e.g., Barnett & Bernick, supra note 3, at 133, 143.

[372] See, e.g., Jonathan Gienapp, The Second Creation: Fixing the American Constitution in the Founding Era (2018).

Nevertheless, Americans came to view them as a single document, one communicating something about who we were as a national people. In the beginning, the communication was about the nature of national power. By Reconstruction, the communication was about national liberty.

Throughout, the meaning of the term "bill of rights" remained thick in the sense that it represented something more than the mere aggregation of the individual provisions. But by Reconstruction, the term "bill of rights" communicated a new understanding of American liberty. "The Bill of Rights" became the birthright of every American citizen, one that states were as obligated to respect as the federal government. If the southern states had violated *our* Bill of Rights, then it was time to give the federal government power to ensure that states respected our Bill of Rights in the future.

In terms of Fourteenth Amendment interpretation, it is this emergent understanding of the Bill of Rights that scholars must take into consideration in grappling with the meaning of Bingham's phrase "the privileges or immunities of citizens of the United States." Countless articles and Supreme Court opinions discuss which of the 1791 amendments ought to be "incorporated" into the Fourteenth Amendment. The Supreme Court has never embraced a single answer to this question, choosing by default to engage in a kind of "selective incorporation" project that, over time, has embraced most of the 1791 amendments.[373] At no time, however, has any Justice or scholar suggested that the people of 1868 viewed the Bill of Rights as an organic whole (with different parts playing different roles). If this aggregated understanding of the Bill of Rights represents the common view of Americans in 1868, then this suggests the need to rethink the entire incorporation project. It may be that Justice Hugo Black was right to insist on incorporating all of the personal rights enumerated in the 1791 Bill of Rights.[374] This approach may best reflect not only the original meaning of the Privileges or Immunities Clause but also the common understanding in 1868 of the Bill of Rights.[375]

[373] See, e.g., Adamson v. California, 332 U.S. 46, 53–54 (1947) (declining to incorporate the Fifth Amendment's right against self-incrimination and refusing to adopt Justice Hugo Black's theory of "total incorporation").

[374] *Adamson*, 332 U.S. at 74–75 (Black, J., dissenting).

[375] See generally Kurt T. Lash, Respeaking the Bill of Rights: A New Doctrine of Incorporation, 97 Ind. L.J. 1439 (2022) (arguing that the Bill of Rights should be understood as reflecting the people's understanding of the first amendments at the time of the adoption of the Fourteenth Amendment in 1868).