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Respeaking the Bill of Rights: A New Doctrine of Incorporation

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The incorporation of the Bill of Rights against the states by way of the Fourteenth Amendment raises a host of textual, historical, and doctrinal difficulties. This is true even if (especially if) we accept the Fourteenth Amendment as having made the original Bill of Rights binding against the states. Does this mean we have two Bills of Rights, one applicable against the federal government with a "1791" meaning and a second applicable against the state governments with an "1868" meaning? Do 1791 understandings carry forward into the 1868 amendment? Or do 1868 understandings of the Bill of Rights carry backward into the 1791 amendments through the doctrine of "reverse incorporation"?

This essay proposes a new way to solve these conundrums and reconcile the original Bill of Rights with the incorporated Bill of Rights and do so in a manner consistent with a historically based understanding of the Fourteenth Amendment. When the people adopted the Fourteenth Amendment into existence, they readopted the original Bill of Rights, and did so in a manner that invested those original 1791 texts with new 1868 meanings. There is only one Bill of Rights—the one the people spoke into existence in 1791 but then respoke in 1868. This respoken Bill of Rights is now one of the privileges or immunities of citizens of the United States which neither state nor federal government may abridge.

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INTRODUCTION

The current doctrine of incorporation of the Bill of Rights—the manner by which some or all of the ten 1791 amendments are made applicable to the states by way of the Fourteenth Amendment—creates a number of interpretive conundrums. For example, which text in the Fourteenth Amendment actually effects the incorporation of the Bill of Rights—the Due Process Clause or the Privileges or Immunities Clause?[1] Do incorporated rights have the same meaning and scope as their counterparts in the 1791 amendments,[2] or does the original Free Speech Clause have a different meaning and scope than the "incorporated" Free Speech Clause?[3] If both the 1791 amendments and their 1868 incorporated counterparts have the same meaning, which meaning controls? Are the original 1791 meanings carried *forward* into the 1868 amendment,[4] or are the understandings of the people of 1868 carried *backward* into the original Bill of Rights and applied against the federal government by way of "reverse incorporation"?[5]

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1. The current Supreme Court is divided on this issue. *Compare, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 759 (2010) (plurality opinion) (basing incorporation of the Second Amendment on the Due Process Clause), with *id.* at 813 (Thomas, J., concurring in part) (relying on the Privileges or Immunities Clause as the textual vehicle for incorporation). *See also* AKHIL AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998) (arguing that the Privileges or Immunities Clause and not the Due Process Clause incorporates the Bill of Rights).

2. *See, e.g.*, Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408 (2010) (distinguishing the meaning of the Fifth Amendment's Due Process Clause from the Fourteenth Amendment's Due Process Clause).

3. For an argument that 1791 freedom of speech is quite different from the Court's incorporation doctrine on free speech, see Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246 (2017).

4. *See, e.g.*, STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 19–21 (1995) (arguing that the original 1791 federalist meaning of the Establishment Clause prevents its being incorporated into the 1868 Fourteenth Amendment).

5. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497 (1954) (reading Fourteenth Amendment concepts of equality into the 1791 Due Process Clause). *See also* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) (defending the reverse incorporation approach of *Bolling*); Adrian Vermeule & Ernest A. Young, *Hercules, Herbert and Amar: The Trouble*

These conundrums are especially perplexing for Fourteenth Amendment scholars who seek to discover and apply the original meaning of constitutional text.[6] Even if the original 1868 understanding of the Fourteenth Amendment supports the doctrine of incorporation, how can that 1868 meaning be reconciled with what is likely to be a very different public understanding of the Bill of Rights in 1791?[7] Originalists seem forced to either abandon originalism or accept a world in which we have two Bills of Rights, one applicable against the federal government and invested with 1791 meanings and one incorporated against the states and invested with 1868 meanings.

This Essay proposes a new way to solve these conundrums and reconcile the *original* Bill of Rights with the *incorporated* Bill of Rights and do so in a manner consistent with a historically based understanding of the Fourteenth Amendment. When the people adopted the Fourteenth Amendment, they readopted the original Bill of Rights, and did so in a manner that invested those original 1791 texts with new 1868 meanings. There is only one Freedom of Speech Clause—the one the people spoke into existence in 1791 but then *respoke* in 1868. This respoken Bill of Rights is now one of the privileges or immunities of citizens of the United States which neither state nor federal government may abridge.

Reconceptualizing the doctrine of incorporation as involving a respeaking of the Bill of Rights implicates both the original understanding of the Fourteenth Amendment and the post-Reconstruction enforcement of the Bill of Rights against the federal government. Whatever the original meaning of the 1791 amendments, the people of 1868 spoke those older rights into a new context, one reflecting decades of battles over the meaning of the Bill of Rights and the importance of protecting those rights against both federal and state abridgment. An originalist interpretation of the Fourteenth Amendment not only calls for an 1868 understanding of provisions in the Bill of Rights incorporated against the states by way of the Privileges or Immunities Clause, but it also requires an updated 1868 understanding of the Bill of Rights itself. The 1868 respeaking of the Bill of Rights transforms the doctrine of "reverse incorporation" from an antihistorical example of living constitutionalism into a textually and historically based understanding of the original meaning of Section 1 of the Fourteenth Amendment. It also transforms "reverse incorporation" from a

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with Intratextualism, 113 HARV. L. REV. 730 (2000) (criticizing Amar's intratextualist defense of reverse incorporation).

6. Most scholars and judges believe that the original understanding of constitutional text ought to play at least some role in constitutional interpretation. *See The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010) (testimony of Elena Kagan) ("we are all originalists"). Although Kagan's statement should not be understood as claiming scholars and judges are the *same kind* of originalists, there is broad scholarly agreement that original understanding plays a nontrivial role in determining the meaning and contemporary application of constitutional text. *See* Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 CONST. COMMENT. 451 (2018); William Baude, *Is Originalism Our Law?,* 115 COLUM. L. REV. 2349 (2015).

7. *See* Campbell, *supra* note 3 (arguing that the modern Supreme Court's First and Fourteenth Amendment free speech doctrine is altogether different from the original 1791 understanding of free expression).

proposition about equal protection and a single clause of the Fifth Amendment into a proposition about the entire content of the Bill of Rights.

I. "SPEAKING" CONSTITUTIONAL TEXT

The American Constitution announces itself as an act of popular sovereignty. "*We the people* of the United States . . . *do ordain and establish this constitution*."[8] A theory of self-government which emerged in the United States between the Revolution and the Founding, American popular sovereignty envisions that the people communicate their will through the device of written constitutions and stand apart from the ordinary institutions of government.[9] Although the members of the Philadelphia Constitutional Convention drafted a proposed constitution in 1787, this document did not become *the people's* Constitution until considered and ratified by the people acting in conventions in the several states. As James Madison put it, the proposed constitution was "nothing but a dead letter, until life and validity were breathed into it, by the voice of the people, speaking through the several state conventions."[10]

Madison's biblical metaphor about the "voice of the people" is both striking and apt. According to the book of Genesis, "the LORD God formed man of the dust of the ground, and breathed into his nostrils the breath of life; and man became a living soul."[11] Madison takes the biblical account of the creation of man and applies it to the creation of the Constitution. As Adam was but clay until brought to life by the breath of God so the proposed constitution was but a "dead letter" until the people breathed life into the document by acting in their highest sovereign capacity in the state ratifying conventions. In this way, words written by others became the words of the people themselves spoken into legal existence by the act of ratification.

Under a system of popular sovereignty, the distinction between *words-as-proposed* and *words-as-ratified* has important implications for the content of constitutional law. Words are invested with legal validity only to the extent that they represent the communicated will of the people themselves. Many originalist theorists embrace this distinction and maintain that determining the meaning of a constitutional communication requires determining the understanding held by those with the sovereign authority to "speak" fundamental law into existence. For example, whatever the understanding of those who drafted a proposed constitutional text, the legally relevant understanding is that held by those with the authority to "breathe life" into that text through the act of ratification. As Madison explained in the expanded version of the above quote:

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8. U.S. CONST. pmbl. (emphases added).

9. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–87, 344–45 (1969) (discussing the rise of popular sovereignty theory and its relationship to written constitutions); *see also* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 110 (1999) (discussing the theory of American popular sovereignty and its relationship to originalist theories of constitutional interpretation).

10. James Madison, speech of April 6, 1796, *in* JAMES MADISON: WRITINGS 574 (Jack N. Rakove, ed., 1999).

11. *Genesis* 2:7 (King James).

> [W]hatever veneration might be entertained for the body of men who formed our constitution, the sense of that body could never be regarded as the oracular guide in the expounding [of] the constitution. As the instrument came from them, it was nothing more than the draught of a plan, nothing but a dead letter, until life and validity were breathed into it, by the voice of the people, speaking through the several state conventions. If we were to look therefore, for the meaning of the instrument, beyond the face of the instrument, we must look for it not in the general convention, which proposed, but in the state conventions, which accepted and ratified the constitution.[12]

Madison's distinction between the understanding of the drafters and the understanding of the ratifiers is echoed in contemporary scholarly debates regarding the original meaning of the Constitution. Scholars who adopt an originalist methodology for determining the meaning of constitutional text commonly (though not universally) distinguish the intentions of the framers from the understanding of the ratifiers.[13] Although the publicly declared intentions and purposes of the framers may have informed the understanding of the ratifiers, the principles of popular sovereignty dictate that it is the understanding of the ratifiers that informs (indeed, establishes) the legal validity of the text. Thus, to the degree that the drafters of a text held a different understanding than the ratifiers, the legally operative understanding must be that of the ratifiers. Only the latter counts as the voice of the people.[14]

The sovereign people not only have the right to establish their constitution, but they also retain the right to alter or amend that constitution whenever they see fit. This fundamental principle of popular sovereignty is announced in the Declaration of Independence[15] and constitutionalized in Article V of the Constitution.[16] According to the supermajoritarian process set out in Article V, simply proposing a constitutional text requires two-thirds support of both houses of Congress (or national convention).[17] Ratification requires an even higher three-quarter vote of support from the people in the several states.[18] Only those texts which survive this

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12. Madison, *supra* note 10.

13. *See, e.g.*, Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 4–5 (2015).

14. *See, e.g.*, *Nomination of Judge Amy Coney Barrett to Be Associate Justice of the United States Supreme Court: Questions for the Record Submitted October 16, 2020: Hearing before the S. Comm. on the Judiciary*, 116th Cong. (2020), https://www.judiciary.senate.gov/imo/media/doc/Barrett%20Responses%20to%20QFRs.pdf [https://perma.cc/H4QK-U3RK]("I interpret the Constitution as binding law. And I interpret its text to mean what the public understood it to mean when it was ratified.").

15. *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776) ("That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, --That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.").

16. U.S. CONST. art. V (setting out a two-step supermajoritarian process for amending the Constitution).

17. *Id.*

18. *Id.*

supermajoritarian process earn the right to be received as "higher law"—a communication from the people themselves.[19] This process allows the people to speak into existence new constitutional ideas. They did so, for example, when they restructured the original Article II presidential election process through the adoption of the Twelfth Amendment.[20]

II. RESPEAKING CONSTITUTIONAL TEXT

Occasionally, the people "respeak" portions of the original Constitution and either invest those words with new meaning or clarify their proper interpretation. This occurred when the people ratified the Eleventh Amendment. Article III of the original Constitution declares that *"[t]he judicial power of the United States*, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[21] In 1795, the people respoke the opening words of Article III when they ratified the text of the Eleventh Amendment which declares: "*The Judicial power of the United States* shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[22]

These opening words of the Eleventh Amendment "respeak" the original opening language of Article III and invest those 1787 words with a 1795 meaning. The people added the Eleventh Amendment in response to the actions of Article III judges, who had construed the judicial power to allow out of state citizens to sue nonconsenting states in federal court.[23] The people swiftly responded by ratifying an amendment which self-consciously respoke the words of Article III and declared their sovereign will that the words "*The Judicial power of the United States* shall not be *construed*" in a forbidden manner.

Whether one views the Eleventh Amendment as clarifying the original meaning of the language of Article III or as establishing a new construction of the same words, the people's 1795 understanding of "the judicial power" trumps any contrary understanding *of the same words* held by the people of 1787. The Eleventh Amendment is an example of the people exercising their sovereign right to respeak constitutional language and invest old words with specific and potentially new meaning.

A similar "respeaking" occurred when the people ratified the Thirteenth Amendment. The language of that amendment is based on the language of Article 6 of the 1787 Northwest Ordinance which declared: "There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in punishment of crimes whereof the party shall have been duly convicted."[24]

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19. *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 6 (1993).

20. U.S. CONST. amend. XII.

21. U.S. CONST. art. III, § 1 (emphasis added).

22. U.S. CONST. amend. XI (emphasis added).

23. For a discussion of the events leading to the adoption of the Eleventh Amendment, see Kurt T. Lash, *Leaving the Chisholm Trail: The Eleventh Amendment and the Background Principle of Strict Construction*, 50 WM. & MARY L. REV. 1577 (2009).

24. NW. ORDINANCE OF 1787 art. 6.

Prior to the Civil War, abolitionist opponents to slavery repeatedly quoted the language of the Northwest Ordinance as an example of the founding generation's opposition to holding persons as property.[25] According to abolitionists, the Ordinance was evidence that neither the founders nor their Constitution demanded the continued existence of slavery. In 1865, Republican members of Congress embraced the pro-freedom theories of constitutional abolitionists like Frederick Douglass,[26] and they self-consciously chose the language of the Northwest Ordinance as the textual guide to framing Section 1 of the Thirteenth Amendment. Here are the two texts side by side: *Northwest Ordinance*: "There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in punishment of crimes whereof the party shall have been duly convicted."[27] *Thirteenth Amendment*: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."[28]

In transforming the language of the Northwest Ordinance into the language of a constitutional amendment, the people invested 1787 language with 1865 meaning. Antebellum courts had construed the language of the original Northwest Ordinance as banning the importation of new slaves into the territory, not as emancipating those slaves already living in the territory.[29] When the people of 1865 spoke these words through their ratification of the Thirteenth Amendment, however, they understood these words as immediately freeing every enslaved person throughout the United States.

There is no obvious semantic difference between the Ordinance's declaration that "*[t]here shall be neither slavery nor involuntary servitude"*[30] and the Thirteenth Amendment's demand that "*[n]either slavery nor involuntary servitude . . . shall exist*."[31] There was, and is, however, a dramatic difference in the historical context in which those phrases were communicated. The people who passed the original Ordinance were willing to tolerate the existence of slavery on American soil. The people who spoke very similar words in 1865 had lived through decades of public debate over slavery and the loss of over half a million Americans in a bloody civil war. This older language, when used by a new people in this new context, communicated the complete eradication of chattel slavery from the soil of the United States.[32]

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25. *See, e.g.*, 33 Annals of Cong. 1170–72 (1819); Liberty Party Platform (Aug. 30, 1843), *in* THE LIBERTY PARTY, 1840–1848: ANTISLAVERY THIRD-PARTY POLITICS IN THE UNITED STATES 315, 317 (La. State Univ. Press, 2009).

26. *See* Frederick Douglass, *The Constitution of the United States: Is it Pro-slavery or Anti-slavery*? (Mar. 26, 1860), *in* 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 467–80 (Philip S. Foner, ed. 1950).

27. NW. ORDINANCE OF 1787 art. 6.

28. U.S. CONST. amend. XIII; *see also*, CONG. GLOBE, 38th Cong., 1st Sess., 1479, 1479–83, 1487–90 (1984) (drafting debates discussing the use of the Ordinance's language in the proposed amendment).

29. *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 356 (2005).

30. NW. ORDINANCE OF 1787 art. 6, (emphasis added).

31. U.S. CONST. amend. XIII (emphasis added).

32. *See generally* REBECCA E. ZIETLOW, THE FORGOTTEN EMANCIPATOR: JAMES

The adoption of the Eleventh and Thirteenth Amendments are examples of how the sovereign people can respeak legal texts and invest old language with new meaning. A similar respeaking occurred when the people ratified the language of the Fourteenth Amendment. Section 2 of that amendment expressly respeaks, removes, and replaces portions of the original text of Article I, Section 2.

Here is the original text of Article I, Section 2:

> Representatives . . . *shall be apportioned among the several states* which may be included within this union, *according to their respective numbers*, which shall be determined by adding to *the whole number* of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other Persons.[33]

This older text took on new and unanticipated importance when the people ratified the Thirteenth Amendment. By abolishing slavery, the Thirteenth Amendment nullified that part of Article I which counted enslaved persons as three-fifths of a person for the purposes of representation. After 1865, four million formerly enslaved people now counted as *five-fifths* of a person for the purposes of congressional representation. This created an enormous political problem for 1866 Republicans. When representatives from the former rebel states returned to the seats they had vacated four years earlier, it was possible they would do so in larger number than before the Civil War. In order to prevent this, the Republicans of the Thirty-Ninth Congress refused to readmit any representatives from the former Confederate States until the people first ratified an amendment that prevented such an unjust political windfall for the former states of the Confederacy. This was accomplished by Section 2 of the proposed Fourteenth Amendment which declares:

> Representatives *shall be apportioned among the several States according to their respective numbers*, counting the *whole number* of persons in each State, excluding Indians not taxed. *But when the right to vote* at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, *is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States*, or in any way abridged, except for participation in rebellion, or other crime, *the basis of representation therein shall be reduced* in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.[34]

Section 2 solved the problem of the returning southern Democrats by reducing their representation to the degree that the former rebel states refused to give freedmen the right to vote. Section 2 does not expressly declare that it is respeaking, repealing, and

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MITCHELL ASHLEY AND THE IDEOLOGICAL ORIGINS OF RECONSTRUCTION (2018) (discussing the origins and original understanding of the Thirteenth Amendment).

33. U.S. CONST. art. I, § 2 (emphases added).

34. U.S. CONST. amend. XIV, § 2 (emphases added).

replacing portions of the original text of Section 2 of Article I. Nevertheless, that is the necessarily implied effect of the text.[35]

In sum, we know that the sovereign people have "respoken" legal and constitutional texts in the past.[36] We also know that Reconstruction-era Americans engaged in "respeaking" texts, both in Section 1 of the Thirteenth Amendment and in Section 2 of the Fourteenth Amendment. In the next section, I explain why there is good reason to think that the people of 1868 also respoke older legal texts when they ratified Section 1 of the Fourteenth Amendment.

III. THE SECOND SENTENCE OF SECTION ONE AS RESPEAKING THE BILL OF RIGHTS

Section 1 of the Fourteenth Amendment contains four separate provisions. The first two address the rights of "citizens of the United States," while the third and fourth address the rights of "persons." Thus:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are *citizens of the United States* and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of *citizens of the United States*; nor shall any State deprive *any person* of life, liberty, or property, without due process of law; nor deny to *any person* within its jurisdiction the equal protection of the laws.[37]

According to the judicially created doctrine called "substantive due process," rights originally listed in the first eight amendments (which originally bound only the federal government) are "incorporated" against the states by way of a "substantive" reading of the Due Process Clause.[38] Few scholars (and, likely, few judges[39]) find this to be a plausible reading of the Fourteenth Amendment's Due

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35. Implied effects in this case should be understood as an aspect of what Lawrence Solum refers to as "constitutional implicature," or the idea that the words may communicate more meaning than just that expressly stated. *See* Lawrence B. Solum, *Semantic Originalism*, 172 (Ill. Pub. L. & Legal Theory Rsch. Papers Series No. 07-24, 2008). In the case above, the text of Section 2 of the Fourteenth Amendment does not have language expressly repealing the language of Article I, but by echoing its subject (and, in some aspects, using the same words) Section 2 necessarily implies the repeal and replacement of the earlier text.

36. Additional examples would include the Seventeenth Amendment which respoke sections of Article I, Section 3 ("*The Senate of the United States shall be composed of two Senators from each state*, chosen by the legislatures thereof. . . ." (emphasis added)). *See* U.S. CONST. amend. XVII ("*The Senate of the United States shall be composed of two Senators from each state*, elected by the people thereof. . . ." (emphasis added)).

37. *Id.* (emphases added).

38. *See, e.g.*, Timbs v. Indiana, 139 S. Ct. 682, 687 (2019) ("With only 'a handful' of exceptions, this Court has held that the Fourteenth Amendment's Due Process Clause incorporates the protections contained in the Bill of Rights, rendering them applicable to the States." (quoting McDonald v. Chicago, 561 U.S. 742, 767 (2010))).

39. *See McDonald*, 561 U.S. at 813 (Thomas, J., concurring with the judgment) (relying

Process Clause.[40] Instead, most constitutional historians (and some Supreme Court justices) believe that the Privileges or Immunities Clause is the more plausible textual vehicle for the incorporation of the Bill of Rights.[41] As I explain below, if this view is correct, then it means that when the people of 1868 declared that states cannot abridge "the privileges or immunities of citizens of the United States," they effectively respoke the Bill of Rights and invested those words with a broader meaning than had been the case in 1791.[42]

The original meaning of the Bill of Rights *had* to be reshaped before these 1791 provisions could be applied against the States. At the time of the Founding, the Bill of Rights represented the people's commitment to the structural principle of federalism.[43] The Bill of Rights bound only the federal government and left the people in the states free, as a matter of constitutional right, to pass laws establishing religion, limiting the exercise of religion, or punishing seditious speech.[44] It was only *Congress* that could make no law respecting these subjects. When read in conjunction with the Ninth and Tenth Amendments, the Bill of Rights stood as a reminder to courts of law that the federal government had only limited delegated power, with all nondelegated powers and rights retained by the people in the several states.[45]

If the people of 1868 understood the words "privileges or immunities of citizens of the United States" to include the personal rights listed in the 1791 Bill of Rights, then this means that those people held a very different understanding of the Bill of Rights than did the people of 1791. Rather than understanding the words of the Bill of Rights as securing the interests of the several states, the people of 1868 understood

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on the Privileges or Immunities Clause as the textual vehicle for incorporation); *Timbs*, 139 S. Ct. at 691 (Gorsuch, J., concurring) ("As an original matter, I acknowledge, the appropriate vehicle for incorporation may well be the Fourteenth Amendment's Privileges or Immunities Clause, rather than, as this Court has long assumed, the Due Process Clause.").

40. *See* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1675–80 (2012) (discussing the modern scholarly criticism of the doctrine of "substantive due process").

41. *See, e.g.*, AMAR, *supra* note 1, at 166.

42. Although some scholars argue that the Privileges or Immunities Clause incorporates only some, but not all, of the 1791 amendments, *see, e.g.*, AMAR, *supra* note 1, at 248, nothing about this possibility affects the argument in this Essay regarding the respeaking of *any* of the Bill of Rights.

43. *See* LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 28–31 (1999). Securing a provision retaining the rights and powers of the several states was one of the primary purposes behind calls for the addition of a Bill of Rights. In the Massachusetts Ratifying Convention, for example, Samuel Adams explained that adding a provision "declar[ing] that all powers not expressly delegated to Congress, are reserved to the several States to be by them exercised" would be itself "a summary of a bill of rights." Samuel Adams, Massachusetts Convention Debates (Feb. 1, 1788), *in* VI THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1390, 1395 (John P. Kaminski & Gaspare J. Saladino eds., 2000) [hereinafter DHRC].

44. *See* Barron v. Baltimore, 32 U.S. 243, 250 (1833).

45. *See, e.g.*, JAMES MADISON, *Speech Opposing the Bank of the United States*, *in* MADISON: WRITINGS, *supra* note 10, at 489 (describing the Ninth and Tenth Amendments as jointly calling for a limited construction of federal power).

those same words as securing the rights of national citizenship.[46] Accordingly, when the people spoke the Privileges or Immunities Clause into existence, they used a phrase that they understood included the privileges and immunities listed in the Bill of Rights, but which invested these older words with new meanings. It is as if the people of 1868 lifted up the original 1791 Bill of Rights and set them down again upon a new 1868 foundation.

Understanding the words of the Bill of Rights as being "respoken" by a different people in a different historical context allows us to understand how old words can take on new meaning. For example, there is good reason to believe that the 1791 people's understanding of "freedom of press" was quite different than that held by the people of 1868.[47] Even if the original Freedom of Speech and Press Clauses communicated nothing more than freedom from prior restraints,[48] the suppression of free expression under slavery may have generated a far broader understanding of the rights of free expression among the Reconstruction Republicans who framed and ratified the Fourteenth Amendment.[49]

The same would be true of the Establishment Clause.[50] It is possible that the original meaning of the Establishment Clause prohibited federal establishments while simultaneously *protecting* state religious establishments from federal interference.[51] If so, this seems to render the Establishment Clause an inappropriate candidate for incorporation *against* the states.[52] This original federalism-based reading of the Clause, however, may have faded away between the time of the Founding and the ratification of the Fourteenth Amendment. If so, then it is possible that the people of 1868 understood the words of the Establishment Clause as declaring a principle of constitutional immunity from all religious establishments that is as applicable against the state governments as it is against the federal government.[53]

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46. *See* KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP 277–79 (2014). This new understanding did not involve an abandonment of federalism, it reconceptualized federalism as a constitutional principle advancing national liberty. Republican abolitionists, for example, embraced federalism and used its principles to deny federal power to pass the Fugitive Slave Acts and secure the right of northern states to oppose slavery. *See, e.g.*, DAILY GLOBE, 32d Cong., 1st Sess. 3 (1852).

47. *Compare*, *e.g.*, Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246 (2017) (arguing that the people of 1791 held a far narrower understanding of free speech than we do today), *with* MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY (2000) (arguing that the people of 1868 held far broader views of freedom of expression than did the people in 1791).

48. *See* LEVY, *supra* note 43, at 123.

49. CURTIS, *supra* note 47, at 357.

50. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . .").

51. *See* AMAR, *supra* note 1, at 41.

52. *See id.*

53. For a discussion of the 1868 understanding of the First Amendment Establishment Clause, see Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085 (1995).

In sum, for those who believe the original meaning of the Fourteenth Amendment is relevant to contemporary application of constitutional text, the meaning of the "incorporated" Bill of Rights is the meaning held by the people of 1868. The original rights were respoken and, potentially, reshaped.

IV. THE FIRST SENTENCE OF SECTION ONE AS RESPEAKING THE BILL OF RIGHTS

Thus far, I have discussed the second sentence of Section 1 as involving a respeaking of earlier constitutional texts. But if the second sentence involves a respeaking, then so does the *first* sentence of Section 1. Declared by the same people at the same time, these two sentences both speak about the "citizens of the United States." This repeated language must be read in *pari materia*. When these two sentences are read in conjunction, it appears that people have respoken the Bill of Rights in a manner that affects the post-Fourteenth Amendment enforcement of the Bill of Rights against the federal government as much as the states.

The opening sentence of Section 1 of the Fourteenth Amendment declares: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are *citizens of the United States* and of the State wherein they reside."[54] This sentence announced something new under the constitutional sun.

The original Constitution did not contain a clause defining national citizenship. It neither defined national citizenship nor declared whether national citizenship was attended by any rights, privileges, or immunities. This omission became a matter of substantial debate during the antebellum period and was one of the central issues in the infamous case of *Dred Scott v. Sandford*.[55] Even Union officials during the Civil War acknowledged that the original Constitution did not expressly declare the nature and substance of national citizenship.[56]

This original constitutional omission did not prevent antebellum abolitionist Republicans from calling for a new understanding of the rights of national citizenship. According to Joel Tiffany in his 1849 *Treatise on the Unconstitutionality of American Slavery*,[57] "the privileges and immunities which the American citizen has a right to demand of the Federal Government,"[58] were those "guaranteed to him by the Federal Constitution,"[59] including

> the right of petition,—the right to keep and bear arms, the right to be secure from all unwarrantable seizures and searches,—the right to demand, and have a presentment, or indictment found by a grand jury before he shall be held to answer to any criminal charge,—the right to be informed beforehand of the nature and cause of accusation against him, the right to a public and speedy trial by an impartial jury of his peers,—

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54. U.S. CONST. amend. XIV (emphasis added).

55. 60 U.S. 393 (1856).

56. *See* U.S. Dep't of Just., Opinion Letter on Citizenship (Nov. 29, 1862).

57. JOEL TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY (1849). According to Akhil Amar, "Tiffany's Treatise became a basic handbook for many Republicans who later served in the Thirty-ninth Congress." AMAR, *supra* note 1, at 263.

58. TIFFANY, *supra* note 57, at 87.

59. *Id.* at 57.

> the right to confront those who testify against him,—the right to have compulsory process to bring in his witnesses,—the right to demand and have counsel for his defence, the right to be exempt from excessive bail, or fines, &c., from cruel and unusual punishments, or from being twice jeopardized for the same offence.[60]

To Tiffany, the privileges and immunities of citizens of the United States included the rights enumerated in the 1791 Bill of Rights—rights that Tiffany insisted should be viewed as binding upon the states.[61] This same view was shared by the man who drafted the Privileges or Immunities Clause of the Fourteenth Amendment, John Bingham. According to Bingham, "the privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States."[62]

This is not the place to canvass the historical evidence supporting the incorporation of the Bill of Rights by way of the Privileges or Immunities Clause of Section 1.[63] The point is that there is a substantial record of antebellum and Reconstruction-era Republicans describing the "privileges and immunities of citizens of the United States" as including the rights listed in the Bill of Rights.

When the people of 1868 spoke into constitutional existence a group they named the "citizens of the United States," they referred to this group *twice*. First, they named and defined "citizens of the United States" in the first sentence of Section 1.[64] Then, in the second sentence, they declared that states could not abridge the privileges or immunities of these newly announced "citizens of the United States."[65]

By definition, the "citizens of the United States" named in sentence one hold the *same* privileges and immunities that, according to sentence two, states must not abridge. If it is correct that the second sentence applies a "respoken" (and reshaped) Bill of Rights against the states because such are the "privileges or immunities of citizens of the United States," then these same respoken rights equally bind the federal government for the same reason—*because* they are the "privileges or immunities of citizens of the United States." This would be true even if the second sentence of Section 1 did not exist, since the people of 1868 understood the term "citizens of the United States" referred to a group holding certain privileges and immunities. Our understanding of the first sentence is assisted by the historical evidence regarding the second sentence, but the legal meaning of the first sentence is not dependent on the second sentence.

To the people of 1868, the term "citizen of the United States" was thick with meaning.[66] It included a panoply of textually enumerated rights—words originally

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60. *Id.* at 99.

61. *Id.* at 117.

62. CONG. GLOBE, 42d Cong., 1st Sess. app. at 84 (1871).

63. For important discussions of the historical sources supporting incorporation of the Bill of Rights, see MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1990); AMAR, *supra* note 1.

64. U.S. CONST. amend. XIV §1.

65. *Id.*

66. *See* MARTHA S. JONES, BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA (2018).

added by the people of 1791, but now spoken into existence by the people of 1868 and carrying an 1868 meaning. The ratification of the first two sentences of Section 1 thus had the effect of updating and reshaping the meaning of the 1791 Bill of Rights in a manner that equally bound both state and federal governments—*neither* of which have the constitutional authority to abridge "the privileges or immunities of citizens of the United States."

Once we understand the first two sentences of Section 1 as jointly speaking into constitutional existence "citizens of the United States" with 1868 understandings of the rights inherent in the status of national citizenship, we can clarify the meaning of these sentences by rewriting them as declaring:

> All persons born or naturalized in the United States are citizens of the United States who hold the privileges and immunities of national citizenship, such as those listed in the Bill of Rights as we the people of 1868 understand the Bill of Rights.
> Henceforth, neither state nor federal government shall make or enforce any law abridging these 1868-informed privileges or immunities of citizens of the United States.

There is no need here to fully develop how the Fourteenth Amendment modified the original understanding of the 1791 amendments and how that understanding might bind the federal government. My claim here is simply that the people of 1868 believed that citizens of the United States had *one* Bill of Rights, and they communicated words that made this 1868 understanding of that Bill enforceable against both state and federal governments.

V. RESPEAKING THE BILL OF RIGHTS AND THE CONUNDRUMS OF INCORPORATION

Understanding the opening two sentences of the Fourteenth Amendment as the people of 1868 respeaking the Bill of Rights solves a number of interpretive conundrums, particularly for those committed to a historically grounded interpretation of constitutional text. In terms of the doctrine of incorporation, this approach supports the insights of most contemporary constitutional historians who view the Privileges or Immunities Clause as the proper textual vehicle for incorporation of the Bill of Rights.[67] It suggests, however, that the meaning of these incorporated rights should be that held by the people who ratified the Fourteenth Amendment, not those who ratified the original Bill of Rights.

The approach also places the seemingly ahistorical theory of "reverse incorporation" on solid textual and historical ground.[68] There is nothing historically backward about investing the post-Fourteenth Amendment Bill of Rights with the understanding of the people who respoke that Bill of Rights in 1868. Reconstruction-era Americans exercised their sovereign right to alter their original Constitution and

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67. *See* Suja A. Thomas, *Nonincorporation: The Bill of Rights After* McDonald v. Chicago, 88 NOTRE DAME L. REV. 159 (2012).

68. For a discussion of the scholarly debates over reverse incorporation and the impact of the Fourteenth Amendment on the powers of the federal government, see Richard A. Primus, *Bolling Alone*, 104 COLUM. L. REV. 975 (2004).

invest old words with new meaning.[69] This is not a pouring of new wine into old wineskins (reverse incorporation), this pours *new* wine into *new* wineskins—a new Bill of Rights for a newly constitutionalized group called the "citizens of the United States." Americans adopted their *current* Bill of Rights in 1868. They did so after decades of public debate over the cruelty and injustice of slavery, the need to secure equal rights, and the importance of marginalized voices in the creation and enforcement of fundamental rights. The sovereign people who drove this constitutional revolution included women's rights groups,[70] martyred abolitionists,[71] black sailors,[72] black soldiers,[73] the enslaved and formerly enslaved,[74] the majority black South Carolina legislature,[75] pro-freedom northern Republicans,[76] and pro-black suffrage southern loyalists.[77] The sovereign people who respoke the words of the Bill of Rights had a new understanding of those words and how they bound both federal and state governments. Our jurisprudence should reflect this new understanding of our one and only Bill of Rights.

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69. Another way to think about this is viewing the Fifth Amendment not as "reverse incorporating" the Fourteenth Amendment, but as being altered or amended by the Fourteenth Amendment. My thanks to Richard Primus for this insight. *See also* Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 408–10 (arguing that a "synthesis" of the Fifth and Fourteenth Amendment alters the meaning "due process").

70. *See* Women's Loyal National League*, Woman's Emancipation Petition*, U.S. SENATE, https://www.senate.gov/artandhistory/history/resources/pdf/WomensLoyalNationalLeague.pdf [https://perma.cc/J39E-U9ZZ]; Susan B. Anthony, *Make the Slave's Case Our Own*, *in* AMERICAN WOMEN: A LIBRARY OF CONGRESS GUIDE 380 (Sheridan Harvey et. al eds., Library of Congress, 2001).

71. *See* Michael Kent Curtis, *The 1837 Killing of Elijah Lovejoy by an Anti-Abolition Mob: Free Speech, Mobs, Republican Government, and the Privileges of American Citizens*, 44 UCLA. L. REV. 1109 (1997).

72. *See* JONES, *supra* note 66, at 50.

73. *See* AMAR, *supra* note 29, at 396 ("The story of black ballots begins with black bullets."); JAMES M. MCPHERSON, THE NEGRO'S CIVIL WAR: HOW AMERICAN BLACKS FELT AND ACTED DURING THE WAR FOR THE UNION (1965).

74. *See* DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF EMANCIPATION (2014) (discussing the role of slaves and former slaves in advancing abolition); *see also* FREDERICK DOUGLASS, *The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?*, *in* FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITING 379, 380–90 (Philip S. Foner ed., 1999).

75. *See* SOUTH CAROLINA HOUSE JOURNAL, Spec. Sess., at 46 (1868) (majority black legislative assembly voting to ratify the Fourteenth Amendment).

76. *See* H.R.J. Res. 127, 39th Cong., (1866).

77. *See* Frederick Douglass, Speech at Southern Loyalist Convention (Sept. 6, 1866), *in* NATIONAL ANTI-SLAVERY STANDARD, Sept. 22, 1866, at 1.