How the First Ten Amendments became the Bill of Rights*

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ABSTRACT

The use of the term "the Bill of Rights" as a proper noun that refers specifically and exclusively to the first ten amendments to the U.S. Constitution was largely a result of civic education drives in the 1920s and 1930s. Many in the founding generation called for a bill of rights to be attached to the Constitution, but they never called the first ten amendments "the Bill of Rights." In the nineteenth century, these amendments had little power, and the bill of rights (usually not capitalized) was often thought to be an abstract set of principles, existing prior to and not co-equal with the first ten amendments. Through a gradual linguistic evolution, driven by a need to define and apply political principles, Americans created "the Bill of Rights" and imbued it with iconic status. This occurred first in legal language in the 1890s, and spread into textbooks, before entering the vocabulary of contributors to newspapers. In the 1930s, while courts and political leaders looked to the Bill of Rights to justify the federal expansion of power, Americans discovered that this iconic document could be used to resist the same. As they debated the nature, purpose, and application of the Bill of Rights, Americans clarified the meaning of the term and empowered it.

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* I wrote this article completely unaware of Pauline Meier's draft that also appears in this journal volume. I am encouraged that the late Dr. Meier and I came to some similar conclusions, even if there are differences in our approach and arguments.

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INTRODUCTION

Today, when we speak of the Bill of Rights, we mean the first ten amendments to the U.S. Constitution. Although there are, and have been, other "bills of rights" at the state level and in other countries, the American Bill of Rights of 1791 needs no further qualifications in the contemporary vernacular; it is simply what we mean when we say "the Bill of Rights." For some, this bill is practically a holy scripture, the ten commandments of our civic religion. Even those who do not go that far, recognize that it is more than just list of restrictions on government power. Indeed, the Bill of Rights has become a symbol that we appeal to in defending liberal values.

Legal scholars know that the Bill of Rights gained most of its symbolic and practical power in the twentieth century. What may be surprising, however, is that our present use of the term "the Bill of Rights" to refer specifically and exclusively to the first ten amendments to the U.S. Constitution is also mostly a twentieth century construct. In the political discussions of 1787 to 1791, there were many references to the need for *a* "bill of rights" to be included with the national constitution. There is little evidence, however, that the founding generation referred to the first ten amendments to the Constitution specifically or commonly as *the* "Bill of Rights," that is, a specific proper noun, with capital letters. Printed sources from the constitutional conventions and from newspapers of the founding period seldom, if ever, used this term.[1]

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Although the general idea of a bill of rights was often associated with the first ten amendments, Americans in the late eighteenth and early nineteenth century did not use the term "the bill of rights" and "the first ten amendments" interchangeably, in a one-to-one correspondence. Many educated observers thought that the first ten amendments to the Constitution provided *a* bill of rights, was in the nature of a bill of rights, or that it was "our" American or federal bill of rights. Some said that the first eight or nine amendments, not the first ten, formed a bill of rights, or, again, were in the nature of a bill of rights. There was a sense, as well, that the bill of rights was something prior to and greater than the first ten amendments. This can be seen when Americans spoke of the bill of rights as something guaranteed in the Declaration of Independence, or something which the Constitution defended. In other words, it appears from nineteenth century usage of the term, that just as the British believed in an unwritten constitution, the heritage of English law and tradition, at least some

1. There are indeed rare instances when the word "the" preceded the term "bill of rights" within the context of the debates over amendments to the national Constitution. George Mason, for example, in a recorded speech from June 1788, spoke of "the bill of rights" because he was speaking directly about the particular bill of rights under discussion at the moment, and not because he had defined it as some kind of document known under the proper name "the Bill of Rights." *See* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES AND ORIGINS 332 (Neil H. Cogan ed., 1997). Another collection confirms the view that there was a desire for "a bill of rights" that was not called "the bill of rights." THURSTON GREENE, THE LANGUAGE OF THE CONSTITUTION: A SOURCEBOOK AND GUIDE TO THE IDEAS, TERMS, AND VOCABULARY USED BY THE FRAMERS OF THE UNITED STATES CONSTITUTION 85–99 (1991).

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Americans believed in an unwritten bill of rights, an inheritance from the English past that was larger than and preceded the amendments.

One reason that the first ten amendments were not called "the Bill of Rights" in the founding period was that there were other bills of rights in existence, particularly the precursors at the state level. Before 1791, seven of thirteen states already had bills of rights of their own, so few could speak of "the" bill of rights as if there were only one in existence. A bill of rights, or a declaration of rights, was sometimes a stand-alone document, but it usually served as a preface to a written constitution. The ten amendments were, of course, part of the national Constitution, but they came at the end of the document; so while contemporaries knew that the amendments made claims similar to those in other bills of rights, those amendments were not in the traditional form of such a bill and were not clearly worthy of the name.

In early nineteenth century America, the term "bill of rights" (without the preceding "the" and generally not capitalized) was probably used more often in reference to the Virginia or Massachusetts bills of rights, or even the English Bill of Rights of 1689, than in reference to the first ten amendments of the Constitution. While the ten amendments were known to be like a bill of rights, the term "the bill of rights" (with the preceding "the") was not commonly used in reference to the first ten amendments at any period in the first half of the nineteenth century. Another reason for this is that the ten amendments did not have the legal stature that they have today, and so there was little reason to distinguish them with a definite article or with capital letters. Steven Schechter, Richard Bernstein, and others have shown quite clearly that the ten amendments were seldom invoked and were thought to have little power in the early republic. In *Barron v. Baltimore*, the federal courts decided that they would not
Fn2 apply the ten amendments against activities of state governments.[2] Before the Civil War, state courts sometimes applied general principles of the amendments, but only with the passage of the Fourteenth Amendment did the first ten amendments begin to be incorporated against the states, raising the profile and
Fn3 power of the Bill of Rights.[3]

In popular usage, it took a full century and a half for the term "the Bill of Rights" to evolve into its present form as a commonly used proper noun, referring specifically and exclusively to the first ten (no more, no less) amendments to the federal constitution. While there are a few examples in the nineteenth century when Americans did use the term in this modern sense, this was not a dominant usage until at least the 1890s, and was not commonly used outside of legal circles or textbooks until the 1920s and 1930s, when "the Bill of Rights" became part of American civics education and patriotism drives. The evolution of the term "the Bill of Rights" and its consolidation in the 1920s and

2. Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

3. STEPHEN L. SCHECHTER & RICHARD B. BERNSTEIN, CONTEXTS OF THE BILL OF RIGHTS (1990); Jason Mazzone, *The Bill of Rights in the Early State Courts*, 92 MINN. L. REV. 1 (2007).

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1930s should interest legal scholars who recognize that rhetorical changes can mirror, reflect, and even shape legal understandings and interpretations. Specifically, it is crucial to note the importance of the 1930s as the period in which "the Supreme Court began in earnest the process of incorporating the Bill of Rights against the States via the Fourteenth amendment."[4] But others who have tracked the rights revolution that made the Bill of Rights what it is today do not provide recognition that the term was in the process of acquiring a new meaning, before and concurrently, as it was being applied more broadly. In this case, meaning and rhetoric, I argue, track closely to purpose and intent.

The literature on the history of the Bill of Rights falls primarily into two sorts: histories of how the first ten amendments were written and ratified,[5] and histories of how these amendments were interpreted and applied by later courts.[6] While the former studies deal with how the first ten amendments came to be, they generally do not explain how these amendments came to be collectively known as "the Bill of Rights." With respect to these writers, Madison and his colleagues were not strictly speaking the "men who produced the Bill of Rights," but rather they were the men who produced what would *come to be called* the Bill of Rights. Such language, which runs through the whole sub-field of constitutional history, must be considered at least partially anachronistic.[7] Indeed, as Kenneth Bowling has noted, it is ironic that some would wish to call James Madison the father of the Bill of Rights when Madison himself did not believe he was writing a bill of rights. But perhaps "Madison, the father of rights-related amendments" does not have much of a ring to it.[8]

More than any other scholar, Akhil Reed Amar has probed the evolution of the meaning of the term the Bill of Rights in the American context. Amar explains that, in the nineteenth century, there were few invocations of the Bill of Rights, and that it had not yet become "a powerful brake on runaway government."[9] His interest in the linguistic changes of the term "the Bill of Rights" is interesting, but limited, however, to legal discourse during the late nineteenth century and the first two decades of the twentieth, stopping just before what I identify as the term's crucial linguistic evolution in 1920s and 1930s.[10]

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4. Lael Weinberger, *Enforcing the Bill of Rights in the United States*, *in* JURISPRUDENCE OF LIBERTY 103 (Suri Ratnapala & Gabriël A. Moens eds., 2d ed. 2011).

5. *See* LEONARD WILLIAMS LEVY, ORIGINS OF THE BILL OF RIGHTS (2001); BERNARD SCHWARTZ, THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS (1977).

6. *See generally* EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY (1957); LEARNED HAND, THE BILL OF RIGHTS (1958); THE BILL OF RIGHTS IN MODERN AMERICA (David J. Bodenhamer and James W. Ely eds., 2008).

7. For an example of such language, see CAROL BERKIN, THE BILL OF RIGHTS: THE FIGHT TO SECURE AMERICA'S LIBERTIES 2 (2015).

8. Kenneth R. Bowling, *"A Tub to the Whale": The Founding Fathers and the Adoption of the Federal Bill of Rights*, 8 J. EARLY REPUBLIC 223, 224 (1988).

9. AKHIL R. AMAR, THE BILL OF RIGHTS, CREATION AND RECONSTRUCTION 205 (1998).

10. *Id.* at 287–88.

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Michael Kammen picks up the story a few decades after Amar's narrative leaves off. Kammen argues that throughout American history ordinary people misunderstood the Constitution and that the public's relationship to the document was generally a failure. Kammen explains that the Bill of Rights was "rediscovered" in 1939–1941 and again in 1955–1956. The Constitutional "awakening" of the late 1930s, Kammen argues, "cannot be ascribed to any single stimulus."[11] Kammen points, however, to a variety of factors: articles in 1939 in *Readers' Digest* and the magazine *Democracy Works* that brought attention to the Bill of Rights's defense of minority positions; a Bill of Rights Committee of the American Bar Association that had formed in 1938 and began publishing its only journal in 1940; and a Bill of Rights Week, which the New York State Legislature passed in 1940. Although Kammen has discovered part of the story, I will argue that he has looked too late to find the cause that he seeks, and what he has identified as causes of the "rediscovery" of the Bill of Rights are better understood as consequences of a longer evolution of the term, with important nineteenth century antecedents and precursory developments in the 1920s and 1930s.

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In summary of the literature on the topic, then, Amar tracks some of the linguistic evolution of the term "the Bill of Rights," but does not carry his case forward into the twentieth century, nor does he focus on primary sources outside of the legal literature. Kammen, on the other hand, focuses on the cultural history of the Constitution and is mostly interested in printed sources outside of legal scholarship. Despite a fairly thorough study of cultural change, however, Kammen makes no note of the evolving linguistic meaning of the term "the Bill of Rights." In reading Kammen on this topic, one might conclude that culture and language were unrelated.

In a significant recent work on the subject of the linguistic evolution of the term "the Bill of Rights," Gerard N. Magliocca asserts, as I do here, that the first ten amendments were not known as the Bill of Rights from the start. But Magliocca's narrative explanation is at odds with my conclusion. Magliocca treats the term "bill of rights" as a term of art used by those who desired to expand judicial review and national political power over the states. For Magliocca, it was the New Deal and World War II that "elevated the Bill of Rights to its present iconic status in an effort to increase national power still further."[12] He argues that it was only after the acquisition of the Philippines that the first ten amendments were believed to constitute a bill of rights, and that the Supreme Court's decision in *Kepner v. United States* took this view in order that the court could justify colonialism. Later, Magliocca argues, Franklin Roosevelt also promoted the term "the Bill of Rights" to justify his own expansion of

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11. MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE 338 (1986).

12. Gerard N. Magliocca, *The Bill of Rights as A Term of Art*, 92 NOTRE DAME L. REV. 231, 233 (2016).

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power. Echoing this view, Kenneth Bowling sees Roosevelt's anti-Nazism as
Fn13 the motivating force behind the iconization of the Bill of Rights.[13]

Magliocca may be partly correct, but in my mind, he has provided an incomplete top-down narrative, in which the courts and the presidents are seen to determine the linguistic usage of the county. Like Akhil Amar, he has been unable to satisfactorily explain the evolution of the term "the Bill of Rights" because he has drawn his picture from a source base limited to published legal documents and presidential statements. This fails to recognize the long-term cultural factors that shape the language of everyday Americans. By looking more broadly at a range of sources, I demonstrate that there was a gradual linguistic process that pulled Americans away from thinking of rights in the abstract, to thinking of rights as a written list. Linguistic change can certainly be shaped by conscious decision of propaganda, but language often evolves as a kind of spontaneous order, the result of human action but not human design. Certainly, government agents, and particularly Franklin Roosevelt, played *a* role in shaping the meaning and application of the Bill of Rights, but they were far from the only contributors to this development.

This present article takes an historical-linguistic approach, which compliments but also challenges traditional legal scholarship on the history of the Bill of Rights. By mining digital text databases in ways that were not possible until just a few years ago, I track both the legal and popular understanding of the term "the Bill of Rights" over time. Readex's American historical newspaper database provides evidence for how the term was used popularly in the press. We can track both its frequency of use, application, and context. HeinOnline, meanwhile, gives access to an extensive array of court records and published decisions, through which it is possible to trace how lawyers and judges used the term "the Bill of Rights." HathiTrust and Google Books provide full text copies of nineteenth century books and textbooks. These databases can be used to mine textbooks, so that we can track how the Bill of Rights was presented in classrooms from elementary schools to universities. Big data can answer the question of "when" something occurred; it indicates the first usage of a term, or its rise of popularity of use. However, the "why" question requires understanding historical context and human motivation. Multicausal explanations are generally needed to adequately explain large scale change.

My argument then is that before the 1930s, the term "the Bill of Rights" had a variety of meanings ranging from an abstract set of ideas to the written documents attached to Constitution. Gradually, in the late nineteenth and earlier twentieth century, as the first ten amendments gained greater legal currency, the term "the Bill of Rights" shed its mass of linguistic confusion to become a synonym for the first ten amendments. That is, "the Bill of Rights" became a

13. Kenneth Bowling, *Nazi Germany, The New Deal, and the Iconization of the Federal Bill of Rights,* THE CAPITOL DOME: MAGAZINE OF THE UNITED STATES CAPITOL HISTORICAL SOCIETY, Summer 2016, at 26–32.

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proper name, defined by its connection to the first ten amendments. This process of linguistic clarification mostly preceded the iconization of the term, but in later stages of its evolution these two processes—clarification and iconization—worked together and reinforced each other.

Motivating forces of this change were myriad, and I submit that most historical change is accidental, undirected, unintended, and gradual. For example, abolitionists in the 1850s and rights activists in the early twentieth century raised the profile of the Bill of Rights by calling on it for political purposes. Textbook authors and teachers, perhaps driven by patriotic motivations, or in an attempt to ground an abstract historical concept in clear language, emphasized and clarified the meaning of the Bill of Rights. Americans, seeking clear historical precedent and justification for their own causes, invoked the Bill of Rights, repeated its language, and through their attention to its purpose, introduced it into the national vocabulary.

I propose further that there was a relationship between the public understanding of the term, its use in legal contexts, and its use in educational contexts, but that the use of the term evolved differently in each context. The evolution of the term "the Bill of Rights" probably first took root in legal language in the late nineteenth century, and was then promoted in legal texts and finally in classroom textbooks. But meaning was not decided by courts, to be passed unidirectionally into the minds of citizens. For one, even into the 1920s, the term "the Bill of Rights" was not a term always understood or used outside of the courtroom, and some who did use the term still thought of the Bill of Rights in the old fashion, not as the ten amendments specifically, but as an abstract English inheritance more generally. But for many Americans, the words spoken in courtrooms, and written in legal decisions, probably never made their way into their own discussions at home. Another popular source was likely more responsible for influencing common vocabulary; as Americans and their textbooks began specifically defining the Bill of Rights as the first ten amendments, the term switched from an old abstract concept to a new and useful concrete set of words that could be applied in legal and patriotic discourse.

The iconization of the Bill of Rights in the 1930s and 1940s followed decades in which the term was shaped and clarified in textbooks, classrooms, newspapers, courtrooms, and governmental offices. The Bill of Rights, understood in its modern form, was popularized in the patriotic civic education movements of the 1920s and 1930s. To be useful, it first had to be properly defined, and much of this process was complete before the iconization of the bill. As the Bill of Rights became a more concrete concept—something distinctive that one could point to—it also gained more power, both for the national government wielding it against the states, and for citizens who used it against all visions of government overreach. From the 1920s through the 1960s, the Bill of Rights gained power over state constitutions through incorporation. As it became a tool of "rights" discourse, the Bill of Rights also gained power over the public and over court cases. It simultaneously served to increase the power of the federal

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government over the states and to limit the power of courts to restrain individual liberties. The linguistic evolution of "the Bill of Rights" served to increase calls for liberty and claims on power.

I. THE BEGINNING OF THE NINETEENTH CENTURY

When reading early nineteenth century sources that use the term "the Bill of Rights," it would be easy to be confused, or to think that Americans of the time were confused about what the Bill of Rights is. For example, when "W.W.H." used the term "Bill of Rights" in a Baltimore editorial from 1817, he declared both the constitution (small c) and the bill of rights (lower case) were statutes to be expounded. But when he added that the framers' "bill of rights" relates to tests on admission to office, it is clear that he cannot be referring to the ten amendments, which of course make no such mention of admission or oaths of office.[14] It would be easy to ascribe this error to ignorance of the Constitution. We might shrug and say that "W.W.H." does not know the difference between Article I of the Constitution and the first ten amendments.

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Also from 1817, in a sketch of the life of Patrick Henry, that old statesman is said to have convinced others "to agree to a bill of rights, and a series of amendments providing for his objections to the constitution."[15] Again, to modern ears, this would sound strange, as we conceive of the Bill of Rights and the first ten amendments as the same thing. How could there be a bill of rights and a series of amendments? But this kind of language, which may appear to us to be in error, actually makes sense when we understand that many Americans in the early republic thought of the bill of rights not as the amendments to the Constitution, but as a larger abstract inheritance of English rights that preceded the amendments and indeed the written Constitution. This is certainly a factor in the view of someone like Alexander Hamilton, who thought that the Constitution was already a bill of rights, so there was no need to put on paper any further restrictions on the federal government because the Constitution already outlined what this government had the authority to do.

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Because a bill of rights was conceived of as an abstraction, it could appear to many that a bill of rights was much the same thing as a constitution. This is also why one could speak of the Declaration of Independence as defending an American bill of rights.[16] In 1818, the *Christian Messenger* spoke of the bill of rights (again in the lower case) as "the cornerstone of our Constitution," a phrase that would make perfect sense in our modern understanding. But the newspaper continued by linking text from the Declaration with the concept of a

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14. Junius No. 1, *The Genius of Liberty*, BALT. PATRIOT AND MERCANTILE ADVERTISER, Aug. 26, 1817, at 3. "Junius" wrote of a bill or rights "annexed" to the constitution, where it was declared "that all men are equally free and independent."

15. *Miscellany: Life of Patrick Henry*, BOS. COMMERCIAL GAZETTE, Dec. 11, 1817, at 1.

16. The Bill of Rights and the Constitution are spoken of as the same thing in an article in the *Columbian Register* of New Haven, CT. *See* COLUMBIAN REGISTER, Nov. 22, 1817, at 3.

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bill of rights: "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.'"[17] Again, we could ascribe this to some kind of error or ignorance. But 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. In other words, in the early Republic, "bill of rights" as a term was quite distinct from and referred to more than just the first ten amendments. The Declaration of Independence, meanwhile, was considered part of the foundation of constitutional law, in the sense that both documents appeal to a set of abstract, inherited rights.[18]

Whether conceived of as a large set of abstract principles, or as an enumerated list, the term "the Bill of Rights" appears most often in the literature of the antebellum anti-slavery movement. Robert J. Reinstein has argued that those who challenged slavery in this period drew inspiration from both the Declaration of Independence and from state constitutions alike.[19] Indeed, antebellum appeals to "the Bill of Rights" seem to refer to a variety of sources. In 1822, in a discourse delivered before the African Slave Society in Boston, Thaddeus Mason Harris spoke of "the Bill of Rights, on which our Constitution was founded," indicating that he viewed the bill of rights as a concept which preceded the written Constitution.[20] An orator in New York in 1834 told his audience of "your boasted Declaration, or Bill of Rights, handed down to you by your great political apostles."[21] A speaker at an anti-slavery convention in 1836 referred to "the declaration of equality in the bill of rights."[22] An article in the *National Anti-Slavery Standard* from 1850 explained that "[t]his Bill of Rights of the American nation declares liberty to be an inalienable right," again specifically echoing the Declaration of Independence, not the amendments to the Constitution.[23] An address to the literary club of Alexandria, Virginia, in 1852 described "a copy of the Bill of Rights, transcribed on parchment, bearing

17. CHRISTIAN MESSENGER, May 6, 1818, at 3.

18. This supports a view espoused by Scott Gerber than the Declaration of Independence should play an important role in constitutional interpretation, and that both were designed to defend a natural rights doctrine. *See* SCOTT DOUGLAS GERGER, TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION (1995).

19. Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 TEMPLE L. REV. 361 (1992).

20. THADDEUS MASON HARRIS, A DISCOURSE DELIVERED BEFORE THE AFRICAN SLAVE SOCIETY IN BOSTON, 15TH OF JULY 1822, ON THE CELEBRATION OF THE ABOLITION OF THE SLAVE TRADE 20 (1822).

21. DAVID PAUL BROWN, AN ORATION, DELIVERED, BY REQUEST, BEFORE THE ANTI-SLAVERY SOCIETY OF NEW YORK, ON THE FOURTH OF JULY 1834, at 9 (1834).

22. PROCEEDINGS OF THE NEW ENGLAND ANTI-SLAVERY CONVENTION: HELD IN BOSTON, MASSACHUSETTS 52 (May 24-26, 1836).

23. NAT'L ANTI-SLAVERY STANDARD, Sept. 5, 1850, at 58.

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Fn24 date June 12th, 1776." [24] One Geo. W. Clark of Rochester, New York, spoke of
Fn25 the Dred Scott decision as "a libel . . . on our great American Bill of Rights."[25]

To be clear, however, there are examples from this period in which writers or speakers linked the first ten amendments and the term "the Bill of Rights" directly. One example appears as early as 1821, in a speech before Congress by Mr. Talbot of Kentucky. In this speech, Talbot referred to "the amendments to
Fn26 the Federal Constitution, emphatically called the Bill of Rights."[26] William Carey Jones, in 1856, also spoke of "provisions of the bill of rights attached to
Fn27 the Constitution."[27] An article in Frederick Douglass's newspaper in 1860 mentioned "the Bill of Rights guaranteed by the Constitution to all American
Fn28 citizens."[28]

Yet these writers do not define the Bill of Rights as the first ten amendments, and the term "the Bill of Rights" clearly still had a contested meaning: both something specific in particular state and national examples, and more often, something more general, referring to a larger abstract concept. President Buchanan's message of 1860 seems to choose the first application. Speaking of the process of amending the constitution, he noted:

> To this process the country is indebted for the clause prohibiting Congress from passing any law respecting an established religion or abridging the freedom 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 entertained by the friends of the State rights at that period as to have rendered it extremely doubtful whether the Constitution could have long survived without these
> Fn29 amendments."[29]

Buchanan recommended an amendment to the Constitution that would recognize the right of property in slaves, protect slavery in the territories, and confirm the legal capture and return of fugitive slaves to their masters. The sectional crisis, he believed, would be solved through the same process that brought about the Bill of Rights.

But it would be vain to try to identify a single moment of transition, and certainly Buchanan's particular use of the term did not set off some pattern of universal usage. In another debate on slavery in 1862, a Mr. Thomas argues:

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24. *Movements of Kossuth—Address to the Literary Club of Alexandria,* N.Y. TIMES, Jan. 5, 1852, at 1.

25. FREDERICK DOUGLASS' PAPER, Jan. 7, 1859, at 1.

26. 1 ANNALS OF CONG. 419 (1820–1821) (Gales and Seaton, 1855).

27. Celebration of the Adoption of the Constitution of the United States, Letter of William Carey Jones, of California, to the Democratic Central Committee of Pennsylvania (Sept. 15, 1856), *available at* Library of Congress, *accessed at* https://catalog.hathitrust.org/Record/009597677.

28. FREDERICK DOUGLASS' PAPER, Feb. 17, 1860, at 3.

29. THE FARMER'S CABINET, Dec. 7, 1860, at 3.

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> Nor 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 . . . which are our Magna Carta, embodying in the organic law the securities of life, liberty, and estate, which, to the Anglo-Saxon mind, are the seed and the fruit of free government.[30]

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II. POST-CIVIL WAR

After the Civil War, specifically after the passage of the Fourteenth Amendment in 1866, people began to talk about incorporating the first ten amendments of the Constitution against the states. Surprisingly, however, there is no noticeable increase in the use of the term "the Bill of Rights" in the 1870s.

One development at this time is of particular note. Throughout the latter third of the nineteenth century, and for much of the first few decades of the twentieth, the first ten amendments were said to be "in the nature of a bill of rights." That is, the first ten amendments were not one and the same as *the* bill of rights, but that they were in the nature of *a* bill of rights.

This language might be traced to Joseph Story. His 1834 text, *The Constitutional Class Book*, described the ten amendments as "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."[31] Joseph Story's popular *A Familiar Exposition of the Constitution of the United States Containing a Brief Commentary on Every Clause,* first published in 1840, used similar language. The 1860 edition speaks of "the first ten amendments, which may be considered as a Bill of Rights."[32]

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Story's work was assigned in law schools and served as a reference in law libraries. Also, the American Law Register of 1868 speaks of the first ten amendments as being in the nature of a bill of rights.[33] By the 1890s, a host of legal works used this phrase. A.J. Baker's *Annotated Constitution of the United States* (1891) claimed that the ten amendments were "in the nature of a bill of rights."[34] So did Frederick N. Judson in "Liberty of Contract Under the Police Power."[35] Mr. Hawley, in the Congressional Record, declared that "[it] has always been stated by writers on this subject that the amendments were rather in the nature of a bill of rights, a general declaration of rights having been in a sense omitted in the Constitution."[36] An article in *The Law Student's Helper*

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30. CONG. GLOBE, 37th Cong., 2d Sess. 1614 (1862).

31. JOSEPH STORY, THE CONSTITUTIONAL CLASS BOOK: BEING A BRIEF EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 147 (1834).

32. JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES CONTAINING A BRIEF COMMENTARY ON EVERY CLAUSE 255 (1860).

33. *United States v. Rhodes*, 7 AM. L. REGISTER 233, 239 (1868).

34. A.J. BAKER, ANNOTATED CONSTITUTION OF THE UNITED STATES 180 (1891).

35. Frederick N. Judson, *Liberty of Contract Under the Police Power, in* REPORT OF THE FOURTEENTH ANNUAL MEETING OF THE A.B.A. 231–40 (1891).

36. 28 CONG. REC. 6158 (1896).

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from 1898 said that "[t]he first ten amendments are in the nature of a bill of rights and apply only to the national government."[37] Nearly identical language appeared in Lewis M. Miller, *The Compiled Laws of the State of Michigan* (1899).[38] This language continued in some way into the 1920s and perhaps further.[39]

At roughly the same time that some spoke of the first ten amendments as being in the nature of a bill of rights, others confirmed that only eight or nine amendments comprised the Bill of Rights. William Hirt Henry, for example, in his *Patrick Henry: Life, Correspondence, and Speeches* said that "the bill of rights was substantially adopted in the first eight amendments."[40] Two years before, Charles B. Wait had intended something similar when he wrote the line: "After the first eight amendments, constituting the Bill of Rights, had been tacitly agreed upon."[41] "Nine of them are intended as a bill of rights," wrote Henry Campbell Black in Handbook of American Constitutional Law (1897).[42] In 1892, however, William W. Rupert, in his Guide to the Study of the History and the Constitution of the United States, defined the Bill of Rights in the modern way. "The first ten amendments are known as the 'Bill of Rights,'" he said. "They are so called, because in them are named those rights that are essential to the liberties of the people."[43] In a few places, the language of eight or nine amendments constituting the Bill of Rights appears in published texts well into the twentieth century.[44] One prominent example is Learned Hand's *The Bill of Rights* (1958), which refers to "what we have come to call our 'Bill of Rights,' by which I mean the first eight and the fourteenth amendments of the Constitution of the United States."[45]

In legal writings and publications from the 1890s, this relationship between the first ten amendments and the Bill of Rights is clarified. A comment in the Yale Law Journal from 1893 mentions a "series of ten [clauses], which form 'the bill of rights,' demanded by the people, after the Constitution had been adopted without one, and which was added as a safeguard to the liberties of every citizen of the Union, against the encroachment of either State or Federal

37. *Questions Answered and Difficulties Met for Students of the Law*, 6 THE LAW STUDENT'S HELPER, 363, 363 (1898).

38. LEWIS M. MILLER, THE COMPILED LAWS OF THE STATE OF MICHIGAN 1897, at 29 (1899).

39. *Rights of Man Involved: Prohibition Appeal Involves Historic Status of Citizen Since Magna Charta, Lawyer Asserts*, N.Y. TIMES, Feb. 1, 1920, at X9.

40. WILLIAM WIRT HENRY, 2 PATRICK HENRY: LIFE, CORRESPONDENCE, AND SPEECHES 385 (1891).

41. Charles B. Waite, *Conspiracy Against the Republic: Blair Amendments to the Federal Constitution*, 3 CHI. LAW TIMES 141–42 (1889).

42. HENRY CAMPBELL BLACK, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW 43 (2d ed. 1897).

43. WILLIAM W. RUPERT, GUIDE TO THE STUDY OF THE HISTORY AND THE CONSTITUTION OF THE UNITED STATES 106 (1892).

44. *See, e.g.*, ALPHEUS THOMAS MASON & WILLIAM M. BEANEY, THE SUPREME COURT IN A FREE SOCIETY 24 (1959).

45. LEARNED HAND, THE BILL OF RIGHTS 1 (1958).

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Fn46 powers."[46] Here, "the bill of rights" is put in quotation marks to set it apart as a specific term.

Explaining the term to an English audience, James Bryce said in 1895 that the "ten amendments made immediately after the adoption of the Constitution, ought to be regarded as a supplement or postscript to it, rather than as changing it. They constitute what the Americans, following the English precedent, call a Bill of Rights, securing the individual citizen and the States against the encroach-
Fn47 ment of Federal power."[47] The necessary quotations or explanations attached to the term "bill of rights" suggest that the term was not universally used or understood. Other sources from the 1890s through the 1920s speak of the first ten amendments to the Constitution to be commonly or "frequently" known as
Fn48 the Bill of Rights.[48] Some write of the "so-called Bill of Rights" as if the term is
Fn49 frequently used but not fixed or official.[49] In this context, we might read "commonly known as" to infer that some, but not all people used it in this
Fn50 way.[50] The need for clarification or distinction is apparent elsewhere in a source from 1898, in the *Congressional Record*, which speaks of "the first ten amend-
Fn51 ments, which have been designated the Bill of Rights of the Constitution."[51] Whereas today we consider the Bill of Rights as part of the Constitution, others at the close of the nineteenth century might not have been so sure. Writing in 1900, Jas. McCabe explained that the "adoption of the first ten amendments [was] so nearly contemporaneously with the original Constitution as to be
Fn52 deemed a part of it. They are often termed the American Bill of Rights."[52]

As the term "bill of rights" became more popularly used in American legal channels in the 1890s, it also needed to be distanced or distinguished from the English Bill of Rights of 1689. It was as common in the second half of the nineteenth century to speak of the "American Bill of Rights," as it was in earlier
Fn53 decades to speak of a "national Constitution" or "Federal Bill of Rights."[53] "These amendments recite the immemorial privileges of British subjects, and employ in some instances the very words of the Magna Charta and the Declara-
Fn54 tion of Rights,"[54] said the popular Philadelphia Baptist minister W.T. Brantly in 1881. An article in the *American Law Review* in 1897 expressed similar views about the nature of the first ten amendments, what was "commonly known as

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46. Comment, 11 YALE L.J. 31 (Oct. 1892–June 1893).

47. JAMES BRYCE, 1 THE AMERICAN COMMONWEALTH 366 (1895).

48. RAYMOND GARFIELD GETTELL, THE CONSTITUTION OF THE UNITED STATES: A STUDY OF THE FUNDAMENTAL IDEALS, PRINCIPLES, AND INSTITUTIONS OF THE AMERICAN GOVERNMENT 200 (1924).

49. H. VON HOLST & ALFRED BISHOP MASON, THE CONSTITUTIONAL LAW OF THE UNITED STATES OF AMERICA 267 (1887).

50. Robertson v. Baldwin, 165 U.S. 275, 281 (1897).

51. 24 CONG. REC. 854 (1893).

52. Jas. McCabe, *The Constitution and our New Possessions*, 61 ALBANY L. J. 309, 309 (1900).

53. One example of the use of the term "American Bill of Rights" can be seen in Herbert B. Shoemaker, *Federal Power to Regulate Interstate Commerce and the Police Powers of the State*s, 29 AM. L. REV. 59 (Jan.–Feb. 1895).

54. W.T. Brantly, *Of the Influence of European Speculation in the Formation of the Federal Constitution*, 6 S. L. REV. 350, 366 (1880–1881).

the Bill of Rights" and which defended privileges "inherited from our English ancestors."[55]

The end of the nineteenth century might be seen then, as a period of contestation of language, when the legal language worked to define the meaning of "the bill of rights." Some still spoke of the bill of rights as "contained within the first ten amendments,"[56] or said that these amendments "have been called the Federal Bill of Rights" or the "national Bill of Rights."[57] Quite a few writers said that the first ten amendments constituted a bill of rights.[58] It was common in the 1880s and 1890s to put the term "the Bill of Rights" in quotations, as if it were in need of qualification and further definition.[59] Harlow Godard, a nineteenth-century textbook writer, puts the term "the Bill of Rights" in quotation marks, and at one point, gave directions for students to "[r]ead the first ten amendments to the Constitution, and decide why they are called "The Bill of Rights."[60] In 1883, Thomas Suplée asked students, "[i]s the Constitution itself a Bill of Rights?"[61]

Throughout the nineteenth century and the first decade of the twentieth, the courts continued to argue about the incorporation of the bill of rights. A writer for *The American Law Register* in 1899 thought that it was "remarkable that the court was again obliged to reiterate the rule that the bill of rights contained in the first ten amendments to the Constitution of the United States has nothing whatever to do with action by the states."[62] In defining the Bill of Rights, writers added lines such as "the first ten Amendments to the Constitution of the United States were prepared and ratified as a Bill of Rights to restrain the Federal government, and, therefore, do not apply to the states."[63] In 1917, Herman Chaplin described it this way: "These amendments, therefore, collectively, constitute, with slight exceptions, a Federal Bill of Rights, having no operation as against State action, but operative only as against Federal (chiefly

55. 31 AM. L. REV. 299, 301 (1897).

56. Mr. Winchester to Mr. Bayard, Legation of the United States, Berne, Switzerland, Feb. 17, 1888 in *Papers relating to the Foreign Relations of the United States, transmitted to Congress with the Annual Message of the President, Dec 3, 1888. Part 2* 1525 (Washington: Government Printing Office, 1889).

57. DAVID S. GARLAND & LUCIUS P. MCGEHEE, 6 THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 961 (2d ed. 1898); *see* Maxwell v. Dow, 176 U.S. 581, 607 (1900) (Harlan, J., dissenting).

58. WESTEL WOODBURGY WILLOUGHBY, THE RIGHTS AND DUTIES OF AMERICAN CITIZENSHIP 88 (1898); JOHN WILFORD OVERALL, A CATECHISM OF THE UNITED STATES OF AMERICAN: WITH SKETCHES OF THE CONSTITUTIONAL CONVENTION, AND VALUABLE PERSONAL, HISTORICAL, POLITICAL, AND LEGAL INFORMATION, CRITICISM AND INTERPRETATION 83 (1895).

59. WILLIAM W. RUPERT, A GUIDE TO THE STUDY OF THE HISTORY AND THE CONSTITUTION OF THE UNITED STATES 106 (1888).

60. HARLOW GODARD, AN OUTLINE STUDY OF UNITED STATES HISTORY 78 (1895).

61. THOMAS SUPLÉE, A HAND-BOOK OF CIVIL GOVERNMENT UNDER THE CONSTITUTION OF THE UNITED STATES FOR THE USE OF SCHOOLS AND ACADEMIES 221 (1883).

62. 47 AM. L. REGISTER 505, 509 (1899).

63. F.W. Whitaker, *Unanimity of Jury Verdicts in Civil Cases in Virginia*, 5 VA. L. REGISTER 438, 440 (1899–1900).

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Congressional) action."[64] As late as 1941, one can find those who defend the Bill of Rights as a restriction only on national power. [65]

III. EARLY TWENTIETH CENTURY—STRUGGLE TO DEFINE A TERM

In the first decades of the twentieth century, the collective, mostly unconscious struggle to define the Bill of Rights continued. Instead of saying in the modern sense that "the Bill of Rights is the first ten amendments," some still spoke of "a Bill of Rights, embodied in the first ten amendments"[66] or "contained in the first ten amendments";[67] or that the first ten amendments embodied a bill of rights;[68] that "the Bill of Rights had been incorporated in [the Constitution] as the first Ten Amendments";[69] or even that the first ten amendments were necessary "to secure a "bill of rights" for the citizens and to define the reserved rights and powers of the States."[70] Instead of being called "the Bill of Rights," the first ten amendments were frequently spoken of as the "American Bill of Rights,"[71] or the "Federal Bill of Rights."[72]

In the first decades of the twentieth century, with all of the debate about the Bill of Rights, it became popular to propose a bill of rights for women, or for laborers, or for African Americans. This was a sign that the term was becoming more common. States also each discussed their own bills of rights. In the early twentieth century, there was increased discussion of rights and consequently an increased interest in the nature of the American Bill of Rights. Noble C. Butler described these rights as "natural, inherent and unalienable," and "partially defined and formulated in our State and Federal Constitutions where they are usually grouped and described as a bill of rights."[73]

References to an English heritage of rights continued to be useful in educating about the American Bill of Rights. Thomas James Norton noted in 1928 that "[m]any other provisions of the Constitution are thus merely restatements of the common law of England, particularly those in the Bill of Rights (the first ten

64. HEMAN W. CHAPLIN, PRINCIPLES OF THE FEDERAL LAW AS PRESENTED IN DECISIONS OF THE SUPREME COURT 30 (1917).

65. Dr. Charles Stelzle, *Our Basis of Freedom*, CLEVELAND GAZETTE, March 8, 1941, at 1 (claiming that the first ten amendments, the Bill of Rights, is to restrict national power).

66. Robert McNutt McElroy, *The Battle Cry of Freedom: the Heritage of Freedom*, 93 THE INDEPENDENT . . . DEVOTED TO THE CONSIDERATION OF POLITICS, SOCIAL AND ECONOMIC TENDENCIES, HISTORY, LITERATURE, AND THE ARTS 346 (Mar. 2, 1918).

67. *John W. Davis Sees Threats to Liberty*, N.Y. TIMES, June 6, 1928, at 42.

68. Mo. Pac. Ry. Co. v. Kansas, 248 U.S. 276, 281 (1920).

69. Nicholas Murray Butler, *The Solid Foundations of Our Constitution*, N.Y TIMES, March 3, 1928, at 141.

70. James Albert Woodburn, *Amending the Constitution*, 67 THE INDEPENDENT . . . DEVOTED TO THE CONSIDERATION OF POLITICS, SOCIAL AND ECONOMIC TENDENCIES, HISTORY, LITERATURE, AND THE ARTS 1497, 1498 (1909).

71. Herbert B. Shoemaker, *Federal Power to Regulate Interstate Commerce and the Police Powers of the States*, 29 AM. L. REV. 59–73 (Jan./Feb. 1895).

72. William D. Guthrie, *Constitutional Morality*, 196 N. AM. REV. 154, 156 (1912).

73. Noble C. Butler, *Natural Rights,* 36 AM. L. REV 481 (Jul./Aug. 1902).

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Amendments), which were reduced to writing to 'make assurance double sure' and prevent as far as possible for the future occasion of dispute."[74]

By the 1920s, educated readers probably had encountered the term "American Bill of Rights." In the 1920s and 1930s, Americans began losing the adjectives "American" or "federal" to define their national Bill of Rights. Until perhaps the mid-1940s, however, it was not yet firmly established that the Bill of Rights and the first ten amendments were precisely the same thing. This much is clear when we read lines such as this one from the *New York Times* in 1922: "The American Bill of Rights, which includes the first ten amendments to the Constitution of the United States."[75] And there were plenty of opportunities for the uneducated newspaper writer to confuse the situation, such as in this example from a 1923 issue of the *Washington Post*: "The American bill of rights and the ten amendments to the Constitution will be the subject of a lecture to be given by Representative Horace Mann Towner."[76] Or still again in a line that proposes that liberty is "expressed in our Bill of Rights and in the first ten amendments of the Constitution."[77] Or even in the Supreme Court in 1927, in a case where it was written that "the Bill of Rights [is] contained in the first ten Amendments."[78] It is unclear in these circumstances just how exactly the speakers are using the terms, or whether they are just plain confused. What is clear, however, is that there is no single reigning pattern of the term's use.

IV. THE 1930S—THE TERM IS DEFINED

The 1920s and 1930s, however, were also the time of a paradigm shift in the common use of the term. As I have argued, the nature of the Bill of Rights and its relationship to or with the first ten amendments to the U.S. Constitution was in flux. There were a number of possible ways of viewing it. By about 1935, however, the shift was almost entirely complete. By then, the Bill of Rights and the first ten amendments were essentially two names for the same thing. No longer were the first ten amendments part of the Bill of Rights, a reflection of it, a continuation of it, inspired by it, or comprised of it, but instead were the bill themselves. The transition was from a general term with historical meaning—a bill of rights from English heritage, expressed in the U.S. Declaration of Independence, carried forward—to a specific concrete list of rights enshrined in ten written amendments. But in the nineteenth century, the first ten amendments were rarely discussed. The 1910s and 1920s saw new amendments and increased discussion of the Constitution. Concern with government overreach in the 1930s, combined with civic patriotism movements, brought the first ten

74. THOMAS JAMES NORTON, LOSING LIBERTY JUDICIALLY: PROHIBITORY AND KINDRED LAWS EXAMINED 39 (1928).

75. N.Y. TIMES, June 18, 1922, at 20.

76. *Americanization Notes*, WASH. POST, Feb. 11, 1923, at 40.

77. *Stone Urges Rights in Law Enforcement*, N.Y. TIMES, June 19, 1924, at 26.

78. McGrain v. Daugherty, 273 U.S. 135, 148 (1927).

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amendments to center stage. The first ten amendments now became seen as the Bill of Rights itself, and the Bill of Rights was no longer an abstract idea but a document, like the Declaration of Independence or the Constitution. As the term changed meaning, it was also picked up more in the press and used more in common language outside of the courtroom. Once it became popular, people used "the Bill of Rights" as a defense claim in the press. It came to be seen as patriotic, ultra-American document, a necessary part of civics education, a bulwark against government overreach, and an essential and longstanding part of American tradition.

By the late 1920s and early 1930s, the Bill of Rights was becoming defined
Fn79 simply as the first ten amendments.[79] A move towards the concrete and direct connection between the two terms came slowly, from the end of the 1920s through the 1930s. This was partly a response to rising civic nationalism and the search for American principles. Historical lectures and student orations carried the message. High school orations in the period frequently drew on the Constitution as a theme. One example said of the first ten amendments: "They have been called the American Bill of Rights—these first ten amendments—and truly so—for they are the rights, the privileges, the indisputable heritage of the
Fn80 American people."[80]

School textbooks were an important force in reshaping the American understanding of the nature of the Bill of Rights. In the 1920s and 1930s, the Bill of Rights became an important part of American civics education. Tom Donnelly, in his book *A Popular Approach to Constitutionalism*, studied textbooks to analyze how public schools interpreted free speech values and the First Amendment. Donnelly argues that because high school is the final or even only time in which most Americans study U.S. government and the Constitution, textbooks merit consideration in the history of constitutional interpretation. The civic education imparted by textbooks is, he says, "one of the few consistent, sustained ways in which we systematically transmit our canonical constitutional
Fn81 lessons to large groups of Americans."[81] Crucially, Donnelly notes that "the pattern of change in our textbooks' treatment of the First Amendment suggest that transformational shifts in popular constitutional narratives tend to follow periods where both our official lawgivers and broad-based social movements

79. *See, e.g.*, *Stanley Deplores Gain in Regulation: Ex-Senator Tells Democratic Club Congress Seeks to Supervise Everything*, N.Y. TIMES, Jan. 31, 1926, at 15; *Constitutional Bill of Rights Has Undergone No Amendment*, N.Y. TIMES, Oct. 4, 1928, at E5; *Ratification Was Quick: The Speediest Since the Period Just After the Civil War*, N.Y. TIMES, Jan. 24, 1933, at 6 ("The first ten amendments, constituting the 'bill of rights' were adopted between 1789 and 1791."); Norman C. Norman, *Finds Rights Gone Under NRA*, N.Y. TIMES, July 2, 1934, at 18 ("The Bill of Rights in the Constitution are known as the first ten amendments.").

80. Lucille Fletcher, *Winning Oration Likens the Constitution to Tree on Which Grew Blossom of Liberty*, N.Y. TIMES, May 18, 1929, at 7.

81. Tom Donnelly, *A Popular Approach to Popular Constitutionalism: The First Amendment, Civic Education, and Constitutional Change*, 28 QUINNIPIAC L. REV. 321, 324 (2010).

promote similar changes to constitutional meaning."[82]

I argue that Donnelly's view applies well in this case. Textbooks from the 1920s and 1930s adopted language and definitions first published in other sources in previous decades, following the language and descriptions already developed. Thus, they were partially a force in shifting how Americans understood the Bill of Rights because they themselves were influenced by previous sources.

Although most nineteenth century textbooks on government, civics, and the history of American law covered the Constitution and the first ten amendments, they often did not equate the term "the Bill of Rights" with the ten amendments.[83] Andrew Young, for example, does not use the term "the Bill of Rights" in his *First Lessons in Civil Government*, published in 1856,[84] but in the 1885 edition of his *The Government Class Book* (revised by Salter S. Clark), the Bill of Rights is clearly defined as the "name given to the first ten amendments, because they contain a list of the rights deemed most important to the liberty of the people."[85] The end of the chapter review even reinforces the point by asking students, "What is the Bill of Rights?"[86]

Textbooks were probably more likely to take a conservative view of the Bill of Rights and oppose the idea of incorporation. The 1917 edition of Magruder's *American Government*, by far the most dominant textbook in the field, writes that "[t]he first ten amendments to the Constitution of the United States are known as the Bill of Rights because they contain so many guarantees of liberty that are set forth in the English Bill of Rights."[87] Magruder also explains that these amendments only restrict Congress, not the states.[88] Martin J. Wade and William F. Russell, in *Elementary Americanism, The Short Constitution* noted that the first ten amendments do not limit the states, but this text does not define the Bill of Rights as the first ten amendments.[89] Views defining incorporation seemed to arise in other quarters. In 1927, the *New York Times* reported on the Columbia lectures of Mr. Hughes, who defended the view that first ten amendments and the Fourteenth Amendment extended to the states.[90]

Capen and Melchoir's *My Worth to the World: Studies in Citizenship* includes among its "important facts" about government the statement that "The first ten

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82. *Id.* at 339.

83. *See, e.g.*, S.G. GOODRICH, THE YOUNG AMERICAN, OR BOOK OF GOVERNMENT AND LAW, SHOWING THEIR HISTORY, NATURE, AND NECESSITY (1847); WALTER NORDHOFF, POLITICS FOR YOUNG AMERICAN (1876). Nor does Townsend call them one in ANALYSIS OF CIVIL GOVERNMENT 228 (1868), when speaking of the ten amendments. *See* WILLIAM MOWRY, STUDIES IN CIVIL GOVERNMENT 171 (1888).

84. ANDREW W. YOUNG, FIRST LESSONS IN CIVIL GOVERNMENT (1856).

85. ANDREW W. YOUNG, THE GOVERNMENT CLASS BOOK 189 (Salter S. Clark ed., 1859).

86. *Id.* at 193.

87. FRANK ABBOTT MAGRUDER, AMERICAN GOVERNMENT, WITH A CONSIDERATION OF THE PROBLEMS OF DEMOCRACY 208–09 (1917).

88. *Id.*

89. MARTIN J. WADE & WILLIAM F. RUSSELL, ELEMENTARY AMERICANISM, THE SHORT CONSTITUTION 90 (1920).

90. N.Y. TIMES, Feb. 10, 1927 at 22.

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[amendments]—commonly called the Bill of Rights—guarantee certain rights to the individual."[91] Capen and Melchoir instruct the students to read the Constitution aloud, with one person each to read the preamble, the articles, the Bill of Rights, and the remaining Amendments. A question at the end of the chapter asks students to answer, "Why are the first ten amendments called 'the Bill of Rights?'"[92] 1920s-era textbooks not only refer to the ten amendments as the Bill of Rights, but they also generally include a word of patriotic praise for the document.[93] One pair of authors from 1921 speak of the Bill of Rights many times, almost as an abstraction guaranteed by the Constitution, before defining the first ten amendments as "our American Bill of Rights." They claim that it was the most important part of the Constitution.[94]

This bottom-up influence on Americans' views of the Bill of Rights often contrasted with the top-down views of courts and elected officials, but they worked towards the same end of defining the Bill of Rights as a concrete term. Textbook editors and schoolteachers could be motivated by easy, patriotic stories that explained the American founding as a story of a social contract, in which ideas and ideals shaped our founding documents. In the large arc of the Progressive Era and New Deal, however, reformers reinterpreted the Bill of Rights in service of the regulatory state.[95] Progressives from Charles Beard with his *Economic Interpretation of the Constitution* (1913) to Irving Brandt with *Storm Over the Constitution* (1936) emphasized material self-interest over selfless ideology as the motivating factor driving the founders. Americans had learned about the importance of the Bill of Rights just as those in power determined to reshape its influence. This tension played out in American politics in the 1930s and 1940s.

V. ONCE DEFINED, IT BECAME AN ICON IN USE

In the 1930s, the Bill of Rights became a tool for Americans who opposed government oppression. Bill of Rights supporters included civil rights advocates, labor advocates, and businesspeople who wanted to oppose aspects of the expanding reach of the administrative state in the New Deal era.[96] The Bill of Rights "contained in our Constitution" is the "[c]ornerstone of true Americanism and must be jealously guarded if we are to remain a free people," ran an article in the Kansas City *Plaindealer*.[97] Two years later, the *Plaindealer* called the Bill of Rights "one of the greatest defenses for the American Negro and the

91. LOUISE I. CAPEN & D. MONTFORT MELCHIOR, MY WORTH TO THE WORLD: STUDIES IN CITIZENSHIP 469 (1935).

92. *Id.* at 484.

93. GEOFFREY PARSONS, LAND OF FAIR PLAY, HOW AMERICA IS GOVERNED 64, 189 (1920).

94. MARTIN J. WADE & WILLIAM F. RUSSELL, THE SHORT CONSTITUTION 69 (3d ed. 1921).

95. *See generally* THOMAS LEONARD, ILLIBERAL REFORMERS: RACE, EUGENICS, AND AMERICAN ECONOMICS IN THE PROGRESSIVE ERA (2016).

96. LAURA WEINRIB, THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE (2016).

97. THE PLAINDEALER, March 12, 1937, at 3.

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working man . . . a protection, for all Americans seeking jobs, opportunity to educate their children, economic security for those who wish to urge ahead pensions for the aged, for better conditions of life."[98] The *Negro Star* (of Wichita, Kansas) said that the economic depression and heavy taxes violated "our constitutional rights—guaranteed to us in the bill of rights."[99] Frank Gabrutt in the *Los Angeles Times* thought the Bill of Rights was a bulwark against the "bureaucratic collectivists" who wished to enact ever more laws.[100] In a way not seen in newspapers in previous decades, the "Bill of Rights" appears in the defense of liberty in newspapers in the 1930s.[101] For the 147th anniversary of the ratification of the Bill of Rights in 1938, the *Cleveland Gazette* published the ten amendments in full. The Gazette explained its motivation: "It is important in these days of assault upon religious and personal liberties to stress how the Bill of Rights in the Constitution of our country protects fundamental privileges of the individual, guaranteeing freedom of speech and of the press, and safe-guarding the American way of living."[102]

As the 1930s progressed, a cottage industry of Bill of Rights commemorations and campaigns developed. Activity in 1939 seemed particularly pronounced. In that year, Massachusetts, Georgia, and Connecticut each ratified the amendments that they had refused to ratify one hundred and fifty years before. The year 1939 was celebrated as the 150th anniversary of the adoption of the Constitution. Celebrations of the sesquicentennial of ratification would follow in 1941.[103] In 1938, the American Union for Democracy started a national campaign to educate the public about the Bill of Rights.[104] The *New York Times* reported on a "Rally for Bill of Rights" at an American Legion Post.[105] The *Washington Post* told of a presentation on the topic at the Academy of Political Science.[106] Even Franklin Roosevelt got in on the action. Roosevelt was the honorary chairman of a "Bill of Rights Sesqui-Centennial Committee," which produced a book in 1941. The book's introduction called the Bill of Rights "our Prayer Book and our promise of Salvation," and declared "the cause of free-

98. THE PLAINDEALER, Dec. 22, 1939, at 7.

99. W. H. Russell, *Who's the Blame?* NEGRO STAR, Jan. 29, 1932, at 4. ("We must find and fix the blame of this depression, this heavy taxes, this violation of our constitutional rights—guaranteed to us in the bill of rights.").

100. Frank Gabrutt, *Our Bill of Rights*, L.A. TIMES, Aug. 30, 1936, at A6.

101. CLEVELAND GAZETTE, Sept. 4, 1937, at 2; *see also* THE WYANDOTTE ECHO, September 17, 1937, at 1.

102. CLEVELAND GAZETTE, Dec. 24, 1938.

103. THE CIVIL LIBERTIES COMMITTEE OF MASSACHUSETTS, ADDRESSES ON THE BILL OF RIGHTS DELIVERED IN COMMEMORATION OF ITS 150TH ANNIVERSARY AT A DINNER SPONSORED BY THE CIVIL LIBERTIES COMMITTEE OF MASSACHUSETTS: HELD AT THE BOSTON CHAMBER OF COMMERCE, FEBRUARY 2, 1939 (1939).

104. *Will Talk on Bill of Rights*, N.Y. TIMES, May 1, 1938, at 50.

105. *Rally for Bill of Rights*, N.Y. TIMES, Apr. 17, 1939, at 34.

106. *Agnes E. Meyer Presents on the Bill of Rights at the Academy of Political Science*, WASH. POST, May 7, 1939, at B3.

Fn107 dom" is "the cause of God."[107]

In the late 1930s and early 1940s, a form of patriotism developed in which the first ten amendments took on a role as a crucial document to be used for modern political purposes. Despite the efforts to educate American schoolchildren and inform the American public about the Bill of Rights, a poll conducted by the National Opinion Research Center in 1941, determined that out of 2,360 polled, fewer than one in four Americans could identify any part of the Bill of Rights correctly and one in five had never even heard of the term. Many (39 percent) had heard of it but could not identify any part of it. As the Bill of Rights gained popularity, many might have also confused it with new language
Fn108 about human rights and FDR's "second bill of rights."[108]

CONCLUSION

In the nineteenth century, the term "the Bill of Rights" was rarely used when speaking of the first ten amendments to the Constitution. After the American Civil War, and particularly in the 1880s and 1890s, the term entered the common legal lexicon. Gradually, instead of referring to the first ten amendments as being "in the nature of" a bill of rights, American commonly and frequently (but not always) simply called it the Bill of Rights. In the late nineteenth century, legal texts began using the term more commonly. Textbooks in the early twentieth century then introduced the term to a generation of schoolchildren. Civic and patriotic campaigns of the 1930s and 1940s took the process a step further. Drawing on at least a general recognition that the first ten amendments were simply "the Bill of Rights," these campaigns promoted the document as a source of American exceptionalism. As Americans recognized the value of the first ten amendments, the term "the Bill of Rights" became a useful phrase to wield in resisting the expansion of government authority.

The general view is that enumerating the rights in the bill of rights led the government to claim power over other rights. Many thought a bill of rights was not necessary because the Constitution did not have any power to restrict rights that it had not already claimed for the government. But historically, the Bill of Rights, recognized as the written set of ten amendments, has been useful as a tool to push back against government power. If the Bill of Rights would have had remained unwritten, as it was in 1789, or if it would have remained a general concept defended by the first ten amendments as well as other documents, it would not have had as much power in the twentieth century as it did and does because it is the "capital-B, capital-R" Bill of Rights, a written list of ten crucial amendments that we can point to as a physical thing.

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107. OUR BILL OF RIGHTS, WHAT IT MEANS TO US: A NATIONAL SYMPOSIUM 9 (James Waterman Wise ed., 1941).

108. MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE 340–42 (1986).

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Madison, we recall, wanted to incorporate a bill of rights within the text of the Constitution, not as a list amended to the end of it.[109] This would have made quite a difference in the long term, as we could not in that case point specifically to the Bill of Rights as an enumerated list.

Did a written bill of rights actually help defend liberty? It seems so. By pointing to a specific set of rights instead of a broad heritage of ideas, defenders of liberty had a rallying call, a scripture, a source for inspiration in opposing the state. Does a literal meaning of the term "The Bill of Rights" contribute to a literal reading of the Constitution in general? Gone is the sense of the bill of rights as general collection of all the rights of a people, an inheritance from our English past. Recognizing, however, that the Bill of Rights is the product of fallible human beings, or that it gathered its iconic status gradually and accidently over time seems to carry with it an implicit argument against canonization. But in another sense, this history also enriches its meaning.

109. THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 4 (Eugene W. Hickok ed., 1991).

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