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TWO MOVEMENTS OF A CONSTITUTIONAL SYMPHONY:  
AKHIL REED AMAR'S *THE BILL OF RIGHTS*

*Kurt T. Lash\**

A remarkable effort is afoot to justify American constitutional law at the end of the twentieth century. Ground zero in this effort is Yale Law School, and the principle architects are professors Akhil Reed Amar and Bruce Ackerman. Together, these scholars are calling for a reevaluation of commonly accepted doctrines with the goal of grounding judicial review and constitutional interpretation on the principles of popular sovereignty. What makes the effort remarkable is its emphasis on political morality, as opposed to the attainment of a particular doctrinal end. Take, for example, Amar's explanation of his purpose in writing *The Bill of Rights: Creation and Reconstruction*.<sup>1</sup> He writes, "this book has aimed to explain how today's judges and lawyers have often gotten it right without quite realizing why."<sup>2</sup> For a book with over 300 pages of text and 942 footnotes, that may seem a rather modest goal. If, in fact, judges and lawyers have been getting it right, what is the problem?

The problem is one of political legitimacy. Beginning with freedom of speech in 1925, the Supreme Court has "incorporated" most of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment. However just the result, the Court's explanation of its actions as a matter of constitutional interpretation has been less than convincing. Acting under the doctrine of "substantive due process"—the phrase itself the subject of withering criticism—the Court has never embraced one particular test for determining which provisions in the Bill express "fundamental" rights, and are therefore incorporated, or

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1. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998).

2. *Id.* at 307.

whether there are other nontextual rights of equal status with incorporated rights.<sup>3</sup> Only one Justice has attempted to ground incorporation on the intentions of the Framers of the Fourteenth Amendment,<sup>4</sup> but his historical analysis was roundly criticized in the literature<sup>5</sup> and his theory of incorporation has never been adopted by a majority of the Supreme Court. Lacking a textual mandate, a coherent theory, or, until recently, convincing historical support, one is tempted to conclude that the incorporation project is less a matter of constitutional interpretation than it is a striking example of judicial lawmaking.

But however problematic as a matter of constitutional interpretation, it may seem quixotic to challenge incorporation at this late date. Not only is there no realistic chance of the Court abandoning the doctrine, most of us—including Akhil Amar—appreciate the result. Who wants to return to the days when states were free to abridge fundamental freedoms like religion, speech and press? Nevertheless, even if one applauds the end, the means by which the Bill of Rights are incorporated against the states raises critical questions regarding the role of the Court in a constitutional democracy. Hidden behind this seeming *fait accompli* lie fundamental questions of self-governance and it is this issue, popular sovereignty, that drives the work of Amar and Ackerman. Together, they seek to explain how and why our modern Constitution reflects the considered will of the people, and by doing so, inspire a renewed appreciation of each citizen's role in shaping fundamental law. Akhil Amar focuses on 1868 and the impact of the Reconstruction amendments; Bruce Ackerman grapples with 1937 and the impact of the New Deal. In the end, I will argue that one cannot be understood without the other.

Part I of this paper addresses Amar's analysis of the original Bill of Rights and his conclusion that the Fourteenth Amendment was intended to change the substantive meaning of the original Bill. I will conclude that Amar's account, in its essentials, is surely correct: The original Bill of Rights expressed

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3. In his book, Amar discusses the approaches of Justices Frankfurter, Black, and Brennan. *See id.* at 139. Amar's "refined incorporation" is yet another approach, and the most plausible to date.

4. *See Adamson v. California*, 332 U.S. 46, 92 app. (1947) (Black, J., dissenting).

5. *See, e.g., Charles Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949).

values of majoritarianism and federalism. The First Amendment in particular protected state autonomy to regulate matters like religion, speech, and press. This states' rights interpretation, however, changed in the early decades of the nineteenth century, and ultimately, the Bill was reinterpreted by abolitionists and Reconstruction Republicans to stand as an expression of individual freedoms.

Part II addresses the issue of nontextual rights and the relevance of the New Deal. Although Amar believes that the Privileges or Immunities Clause may incorporate nontextual as well as textual liberties, he downplays the main barrier to such an interpretation: the Supreme Court's rejection of "Lochnering" and the impact of the New Deal "switch in time." I will argue that the New Deal is critical to understanding whether, and how, the original vision of the Fourteenth Amendment was modified by later constitutional innovation. If, as Amar's colleague Ackerman argues, the New Deal was a constitutional moment, it is possible that the Court's "switch in time" both expanded government power and, at the same time, restricted the power of the Supreme Court to invoke nontextual rights to strike down the duly enacted laws of the people's representatives.

## I. THE FOUNDING

In both popular and legal culture, there is a lingering belief in a constitutional big bang: the idea that all of our most cherished constitutional values sprang into existence in a single moment at the Founding. Even though most concede the original document contained a number of flaws (the embrace of slavery among them), most errors have been removed and no longer obscure the truly libertarian vision of the Founders. This creation myth<sup>6</sup> is not limited to the legally uninformed: The modern Supreme Court often supports its decisions by relying on the original intent of the Founding generation.<sup>7</sup>

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6. Bruce Ackerman calls this the "Bicentennial Myth." See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 34 (1991).

7. See, e.g., *Clinton v. Jones*, 117 S. Ct. 1636 (1997) (executive immunity); *Printz v. United States*, 117 S. Ct. 2365 (1997) (commerce power); *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842 (1995) (state power to impose term limits on federal representatives); *New York Times v. Sullivan*, 376 U.S. 254, 274 (1964) (speech); *Everson*

In the first half of his book, Akhil Amar explodes the myth. Following the general interpretive categories of Philip Bobbitt<sup>8</sup> (and adding an extra category of his own), Amar considers the text, structure, and history of the original Bill of Rights and reveals a document solidly grounded on the theory of federalism.<sup>9</sup> The first ten amendments to the Constitution were never intended to restrict state power. To the contrary, they were intended to placate Anti-Federalist criticisms by guaranteeing that the regulation of certain subjects would remain a matter of local, not national control.

Amar's approach in this first half of the book itself stands as a significant contribution to the study of constitutional law. In most law schools, the Constitution is dissected and its various parts distributed to various classes for individual study. The first three articles are the subject of a course on the powers of government ("Con Law I"), the First and Fourteenth Amendments are the focus of a course on individual liberties ("Con Law II"), and the Fourth through Sixth Amendments are studied in criminal procedure. Other provisions receive passing mention in other courses; some provisions are not studied at all.<sup>10</sup> However helpful this approach may be to doctrinal mastery, it has the inevitable effect of obscuring the underlying structure of the document.

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v. Board of Educ., 330 U.S. 1, 11 (1947) (establishment). There are many others.

8. See generally PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982).

9. See, e.g., Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992) (emphasizing the Federalist Bill of Rights). Other authors have made similar points with regard to specific provisions of the Bill of Rights. See, e.g., STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* (1995); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085 (1995) (examining the Religion Clause).

10. For example, despite its prominent place in both the Bill of Rights and popular culture, the Second Amendment is rarely addressed in law reviews and probably not at all in most constitutional law courses. See Lewis H. LaRue, *Constitutional Law and Constitutional History*, 36 BUFF. L. REV. 373, 375 (1987) ("[T]he second amendment is not taken seriously by most scholars . . ."). For interesting reevaluations of the Second Amendment, see Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998), Eugene Volokh, *The Amazing Vanishing Second Amendment*, 73 N.Y.U. L. REV. 831 (1998), and Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

Rejecting this piecemeal approach, Amar reveals how the first ten amendments were meant to work alongside Section 9 of Article I.<sup>11</sup> By comparing the amendments to the original Constitution, and comparing them to each other, Amar finds the twin themes of federalism and majoritarianism repeated again and again. By allowing text to interpret text, Amar reconciles the vision of the original Constitution with the Anti-Federalist concerns of state autonomy and presents the reader with a rare vision of the law of the original Constitution. This is marvelous work and it deserves a place in constitutional law courses.

Although Amar's account demolishes the idea that our modern libertarian Bill of Rights reflects the intentions of those who ratified the Clause in 1791, the Founding is not the end of the story. In the decades between 1791 and 1868, the meaning of the Bill of Rights shifted from an expression of federalism to one of individual liberty. Conceding the formal correctness of cases like *Barron v. Mayor of Baltimore*,<sup>12</sup> in which the Supreme Court interpreted the Bill of Rights to apply only against the federal government, the so-called "Barron-contrarians" nevertheless insisted that the words expressed fundamental liberties that ought to be protected from the actions of the states.<sup>13</sup> This new reading of the Bill, Amar argues, ultimately gained constitutional status through the adoption of the Privileges or Immunities Clause of the Fourteenth Amendment.

By establishing early in the book the Federalist origins of the original Constitution, Amar sets up his theory regarding the impact of the Fourteenth Amendment and what Amar calls "refined incorporation."<sup>14</sup> For example, Amar believes that some of the provisions in the original Bill may have been so uniquely Federalist in nature that, even after Reconstruction, they remain inappropriate candidates for incorporation.<sup>15</sup> The

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11. Literally. Madison originally proposed placing protections for speech and press in Article I, Section 9. See James Madison, Proposal to the House (June 8, 1789), reprinted in *THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS* 83 (Neil Cogan ed., 1997).

12. 32 U.S. (7 Pet.) 243 (1833).

13. According to *Barron*, the Bill of Rights in general and the Fifth Amendment in particular restricted only federal, not state, government. "Barron-contrarians" claimed that, despite *Barron*, the Bill should be understood as declaring rights pre-existing the Constitution. See AMAR, *supra* note 1, at 154-55.

14. See *id.* at 218.

15. See *id.* at 215.

obvious example here would be the Tenth Amendment.<sup>16</sup> More controversially, Amar distinguishes the “bland” phrasing of the Establishment Clause (“Congress shall make no law respecting an establishment”) from other First Amendment provisions that speak in terms of freedoms and rights (the “free exercise of religion” and the “freedom” of speech and press).<sup>17</sup> This hyper-Federalist clause may have placed greater restrictions on Congress’s implied powers than the rest of the First Amendment. For example, Amar speculates that, although Congress may have had both the power and the responsibility to protect political speech in the states,<sup>18</sup> the Establishment Clause would have prevented any similar interference with state religious establishments. Since “privileges or immunities” incorporates personal freedoms, not structural guarantees of state autonomy, Amar argues that refined incorporation may include the Free Exercise Clause, but filter out the Establishment Clause.<sup>19</sup>

Once Amar concedes the hyper-Federalist aspect of the Establishment Clause, however, there is a domino effect regarding congressional power over other First Amendment subjects that Amar does not explore. Presumably, the more rigorous the state establishment (for example, regulating public and private religious ceremonies), the greater the impact on the free exercise of religion. Nevertheless, if Congress is truly prohibited from interfering with state establishments, then Congress would be powerless to protect the free exercise rights of individual religious dissenters.<sup>20</sup> For the same reason, the Establishment Clause would severely restrict, if not prevent altogether, con-

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16. It is impossible to incorporate *against* the states a clause that reserves power to the states.

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

18. Under the Republican Guarantee Clause of Article IV. See *id.*

19. See *generally id.* at 246-47.

20. One could, I suppose, imagine a free exercise claim that did not implicate religious establishments. For example, Congress might act to protect religious exercise from the impact of a religiously neutral law. Aside from creating the anomaly of enabling Congress to act upon the lesser but not the greater abridgment of religious freedom, this approach would ascribe to the Founders an interpretation of free exercise that Akhil Amar believes unwarranted by the historical record. See *id.* at 43 & 327 n.96. I agree with Amar that free exercise at the Founding did not include the right to religious exemptions from generally applicable laws. See Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106 (1994).

gressional efforts to protect freedom of speech.<sup>21</sup> In a time when state governments were actively regulating religious exercise and limiting public office to those of particular religious beliefs, it is hard to see how religion would not play a major role in dissenting political opinion—and in fact, it played a major role<sup>22</sup>. To the extent that political and religious expression intertwined, state regulation of such speech would be immune from federal protection.

In fact, the Founders saw no distinction between the kinds of restraints imposed by the various provisions of the First Amendment.<sup>23</sup> For example, according to Thomas Jefferson,

no power over the freedom of religion, freedom of speech, or freedom of the press, being delegated to the United States by the Constitution . . . all lawful powers respecting the same did of right remain, and were reserved to the states, or to the people; . . . [The Tenth Amendment] thus also [] guarded against all abridgment, by the United States, of the freedom of religious principles and exercises, *and retained to themselves the right of protecting the same.*<sup>24</sup>

Likewise, according to James Madison, the “liberty of conscience and freedom of the press were *equally* and *completely* exempted from all authority whatever of the united states”<sup>25</sup> Just to drive the point home, Madison expressly criticized those who tried to drive an interpretive wedge between the restrictions of the Establishment Clause and the rest of the First Amendment.<sup>26</sup>

21. Even if, under the Republican Guarantee Clause, Congress originally had an obligation to protect political speech in the states, that Clause, along with the rest of the original Constitution, was restricted by the adoption of the First Amendment.

22. See generally Lash, *supra* note 20.

23. For a more thorough review of the evidence regarding original federal power over First Amendment subjects, see Kurt T. Lash, *Power and the Subject of Religion*, 59 OHIO ST. L.J. 1069 (1998).

24. Thomas Jefferson, Kentucky Resolutions of 1798 and 1799, *reprinted in* 5 THE FOUNDERS' CONSTITUTION 131-32 (Philip B. Kurland & Ralph Lerner eds., 1987) (emphasis added).

25. James Madison, Report on the Virginia Resolutions (Jan. 1800), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 141, 146 (Philip B. Kurland & Ralph Lerner eds., 1987). For many other examples, see Lash, *supra* note 23.

26. According to Madison's 1800 Report on the Virginia Resolutions:

For if Congress may regulate the freedom of the press, provided they do not abridge it, because it is said only “they shall not abridge it,” and is not said “they shall make no law respecting it,” the analogy of reasoning



But recognizing the common limitation placed upon Congress in regard to all First Amendment subjects is not to quarrel with Amar's basic point. Rather, it is to strengthen it. Amar wants to turn our attention away from the Founding and towards the Fourteenth Amendment period as the source of modern libertarian rights such as religion, speech, and the press. Asserting that the entire original First Amendment was hyper-Federalist only dramatizes the shift in public rhetoric that occurred between 1791 and 1868. This is where Amar's analysis of the abolitionists and the triumph of the "Barron-contrarians" is masterful.

A number of the most influential Framers of the Fourteenth Amendment expected the Privileges or Immunities Clause to protect many of the freedoms listed in the Bill of Rights against state action. The real question is how, not whether, the Framers of the Fourteenth Amendment intended to protect the personal liberties of United States citizens.

#### *Incorporating the Establishment Clause*

In 1947, the Supreme Court held that the Establishment Clause restrictions applied to the states as well as to the federal government.<sup>27</sup> Although the case involved a Fourteenth Amendment claim, the Court based its decision on the separationist views of James Madison and Thomas Jefferson,<sup>28</sup> rather than the Framers of the Fourteenth Amendment. Five years later, in 1962, the Court relied on the newly incorporated right to strike down teacher-led prayer in public schools.<sup>29</sup> The next year, the Court extended this holding to Bible reading.<sup>30</sup> By this time, however, legal historians had produced evidence which called into question incorporation of the Bill of Rights in general and the Establishment Clause in particular.<sup>31</sup> Despite

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is conclusive that Congress may *regulate* and even *abridge* the free exercise of religion, provided they do not *prohibit* it, and is *not* said, "they shall make no law *respecting*, or no law *abridging* it."

James Madison, Report on the Virginia Resolutions (Jan. 1800), reprinted in 5 THE FOUNDERS' CONSTITUTION 141, 146-47 (Philip B. Kurland & Ralph Lerner eds., 1987).

27. See *Everson v. Board of Educ.*, 330 U.S. 1, 11-15 (1947).

28. See *id.*

29. See *Engel v. Vitale*, 370 U.S. 421 (1962).

30. See *School District of Abington Township v. Schempp*, 374 U.S. 203, 222-23 (1963).

31. See generally, e.g., Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949); Alfred M. Meyer, *The Blaine*

public outcry and scholarly dissent, in 1963, Justice Clark dismissed anyone who challenged the "history, logic and efficacy" of establishment incorporation.<sup>32</sup> "Such contentions," huffed Justice Clark, "seem entirely untenable and of value only as academic exercises."<sup>33</sup>

In the next two decades, the Court would produce an ever more Byzantine doctrine regarding forbidden state establishments, and the trickle of scholarship criticizing the Court's historical justification for establishment incorporation would become a steady stream.<sup>34</sup> By now, there is general agreement among legal historians who study the Establishment Clause that, originally, the Clause protected state establishments as much as it forbade federal establishments.<sup>35</sup> In other words, Amar's general point regarding the original Bill of Rights applies in spades to the original Establishment Clause.

So overwhelming is the evidence regarding the Federalist Establishment Clause, that Amar singles out this Clause as an inappropriate candidate for incorporation. According to Amar, refined incorporation looks for those provisions in the original Constitution (both in and outside the Bill of Rights) that protect personal property, personal security, and bodily liberty.<sup>36</sup> Under this approach, some provisions clearly qualify for incorporation whereas others, like the Establishment Clause, might not. In support of this view, Amar points out that a number of Fourteenth Amendment Framers quoted other provisions in the Bill of Rights as exemplifying "privileges or immunities" while leaving out the Establishment Clause.<sup>37</sup>

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*Amendment and the Bill of Rights*, 64 HARV. L. REV. 939 (1951); F. William O'Brien, *The Blaine Amendment 1875-1876*, 41 U. DET. L.J. 137 (1963); Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U. L.Q. 371.

32. See *Schempp*, 374 U.S. at 217.

33. *Id.*

34. See William K. Leitzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191, 1210 (1990); Michael A. Paulson, *Religion, Equality and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 314 (1986); Snee, *supra* note 31, at 407; Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700, 1703 (1992). See generally GERARD V. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* (1987); SMITH, *supra* note 9.

35. See, e.g., LEONARD LEVY, *THE ESTABLISHMENT CLAUSE* 95 (1986); SMITH, *supra* note 9 at 22; Lash, *supra* note 9, at 1091 (1996); Leitzau, *supra* note 34, at 1199; Note, *supra* note 34.

36. See AMAR, *supra* note 1, at 227.

37. Amar also cites Justice Harlan's dissent in *Maxwell v. Dow*, 176 U.S. 581,

Amar concedes that there is some evidence that the originally Federalist Establishment Clause eventually came to be interpreted as an individual right. For example, in drafting their own constitutions, states in the nineteenth century sometimes copied the Free Exercise *and* Establishment Clauses word-for-word.<sup>38</sup> Amar believes this reflects an evolving understanding of the Establishment Clause as a “soft substantive rule,” but still something less than a full “privilege or immunity.” Even though nineteenth century America moved away from tax supported religious establishments and towards a kind of noncoercive non-sectarian brand of religious establishment, Amar believes that this reflects an evolved understanding of free exercise rights. Finally, since coercive establishments (under modern law) would be forbidden under the Free Exercise Clause anyway, Amar concludes that there is no *need* to incorporate the Establishment Clause.<sup>39</sup>

But here, Amar may have underplayed the case for establishment incorporation. True, coercive establishments violate both the Establishment and Free Exercise Clauses. The fact that the clauses overlap somewhat, however, is beside the point. After all, many constitutional freedoms are redundant.<sup>40</sup> This does

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615-16 (1900) (Harlan, J., dissenting), where Justice Harlan describes a hypothetical state religious tax in support of a state religious establishment as violating the citizens privilege of the free exercise of religion. *See* AMAR, *supra* note 1, at 229. Based on the fact that the hypothetical included a religious tax (arguably violating free exercise), and not just a declared state establishment, Amar infers that Harlan has intuitively filtered out the Establishment Clause.

38. *See, e.g.*, Iowa Const. of 1857, art. I, § 3, *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 552, 552-53 (Ben. Perley Poore ed., U.S. Government Printing Office 2d ed. 1878).

39. Amar concedes that coercive establishments may violate rights, but notes that these seem to be textbook examples of “free exercise” cases—noncoercive establishments may not raise the same concerns. *See* AMAR, *supra* note 1, at 252. Amar also notes that there were no noncoercive establishments in the South that would have triggered concerns by the Reconstruction Republicans. Again, however, Amar has made the Establishment Clause disappear by defining its core (prohibiting coercive establishments) as “really” involving free exercise concerns. As noted above, just because the protections of the two clauses occasionally overlap does not mean the clauses are coextensive or that the Framers of the Fourteenth Amendment intended to incorporate one, but not the other. For a discussion of the establishment issues that were at play during slavery, see generally Lash, *supra* note 9. Amar may be right that, even after incorporation, nothing prevents Utah from declaring itself “The Mormon State.” *See* AMAR, *supra* note 1, at 254. This, however, goes more towards the scope of the incorporated Establishment Clause than to whether or not the Clause was incorporated.

40. A federal law suppressing religious expression arguably falls under at least

not make it any less likely that the Framers of the Fourteenth Amendment intended to economize by only incorporating the fewest necessary amendments. The issue is whether those who framed and ratified the Fourteenth Amendment believed non-establishment was a privilege or immunity of citizens of the United States. Although Amar is correct that sometimes the Framers of the Fourteenth Amendment left the Establishment Clause off of the "list" of privileges or immunities,<sup>41</sup> at other times they expressly included the Establishment Clause in their list of "privileges or immunities."<sup>42</sup> Even when Reconstruction Republicans did not quote the Establishment Clause, they often used words or phrases that arguably could include both the Free Exercise and Establishment Clauses.<sup>43</sup> Finally, none of the Framers of the Fourteenth Amendment ever stated that nonestablishment was *not* a "privilege or immunity" of United States citizens. The combined weight of state adoption of the Establishment Clause, express citation by some of the Framers of the Fourteenth Amendment, and the fact that southern establishment of proslavery religion was one of the problems meant to be remedied by the Privileges or Immunities Clause,<sup>44</sup> at the very least, seems to raise a presumption in favor of establishment incorporation.<sup>45</sup>

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five different constitutional provisions: nonestablishment, free exercise, free speech, free press, and the equal protection component of the Fifth Amendment.

41. See AMAR, *supra* note 1, at 253.

42. See 2 CONG. REC. 242 app. (1874) (statement of Rep. Norwood); CONG. GLOBE, 42d Cong., 1st Sess. app. 84 (1871) (statement of Rep. Bingham); CONG. GLOBE, 38th CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864) (statement of Rep. Wilson).

43. For example, Henry Wilson sometimes quoted both Religion Clauses, while at other times he paraphrases the First Amendment as protecting "[f]reedom of religious opinion, freedom of speech and press." CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864). Suppression of religious opinion, of course, can be the result of a coercive religious establishment. See *Ruggles v. New York*, 8 Johns. 290 (N.Y. 1811) (prosecution for religious blasphemy) ("[T]he case assumes that we are a Christian people, and the morality of the country is deeply engrafted upon Christianity."). Similarly, John Bingham sometimes quoted both religion clauses, while at other times speaking of the "rights of conscience." CONG. GLOBE, 42d Cong., 1st Sess. 85 app. (1871). Again, prohibiting coercive establishments would be one way to protect the rights of conscience.

44. For a discussion of the implications of proslavery religious establishments to the incorporation question, see Lash, *supra* note 9, at 1136.

45. Amar rejects, as I do, the most commonly cited evidence against incorporation of the Establishment Clause, the so-called Blaine Amendment. See AMAR, *supra* note 1, at 254 n.\*; Lash, *supra* note 9, at 1145.

By filtering out the Establishment Clause and folding its protections into the Free Exercise Clause, Amar also obscures alternative readings of the Free Exercise Clause. Although the Free Exercise Clause could be read to include a protection against coercive establishments, it is just as plausible that the Establishment Clause forbids coercive establishments, and the Free Exercise Clause does something else altogether. For example, to mid-nineteenth-century Americans, free exercise may have included protections against unnecessary, though nondiscriminatory, governmental burdens.<sup>46</sup> Amar notes such an expansion of free exercise is possible,<sup>47</sup> but his argument regarding the Establishment Clause obscures this potentially broader reading of the Free Exercise Clause.

In fact, popular understanding of both the Free Exercise and Establishment Clauses underwent dramatic change in the period between 1789 and 1868. Prior to the adoption of the federal Constitution, state constitutions contained provisions protecting the rights of conscience and the free exercise of religion. Those provisions, however, existed in the context of state religious establishments.<sup>48</sup> State free exercise clauses thus expressed the principle of "religious toleration," not religious freedom: The state had power to promote and protect religion but guaranteed a minimum level of freedom for religions not threatening the religion or morality of the state.<sup>49</sup> When states recommended adding something like their free exercise clauses to the federal Constitution, it made sense to add something like the Establishment Clause (something without counterpart in the states). This ensured that the Free Exercise Clause would not be read at a federal level the same way that similar provisions were read in the states—as expressions of government responsibility to promote and protect religion. Thus, in the initial period of the republic, the two clauses stood as twin guardians of a single proposition: The federal government had no power to regulate the subject of religion. Under this unitary Federalist reading, there was little reason to distinguish the two clauses. The subject was foreclosed from federal cognizance.

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46. See generally Lash, *supra* note 20.

47. See AMAR, *supra* note 1, at 256.

48. For a list of free exercise guarantees placed alongside of religious establishment provisions, see Lash, *supra* note 23, at 1101 n.112.

49. See *id.* at 1069.

In the decades just prior to the adoption of the Fourteenth Amendment, however, states began to embrace the Establishment Clause as an expression of individual freedom. As I mentioned above, state constitutions adopted both the federal Free Exercise and Establishment Clauses word for word.<sup>50</sup> State courts began to reinterpret state law to follow the principle of separation of church and state and often cited the federal First Amendment as an expression of the full and free rights of conscience—and a rejection of the principle of toleration.<sup>51</sup> As the Establishment Clause came to be read as a substantive liberty, the Free Exercise Clause also broke free from its original Federalist moorings, and was occasionally cited as justifying federal action in support of religious freedom.<sup>52</sup>

By folding protections against coercive establishments into the Free Exercise Clause, Amar misses this dramatic reinterpretation of the Establishment Clause and its implications for free exercise. At the time of the original Bill of Rights, “free exercise” in the states amounted to no more than “religious toleration”—a pro-majoritarian doctrine that is unlikely to have included religious exemptions for dissenting religious minorities. Yoked as it was to the general idea of government power over religion, free exercise could not emerge as an independent freedom until the rise of nonestablishment and the rejection of the idea that free exercise is dependent on the “toleration” of the majority.<sup>53</sup>

By the Reconstruction Era, the two clauses had begun to separate. New readings of the Establishment Clause created “interpretive space” for the Free Exercise Clause. Whether or not the Framers of the Fourteenth Amendment believed free

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50. See IOWA CONST. OF 1857, art. I, § 3, *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 552, 552-53 (Ben. Perley Poore ed., 2d ed. 1878) (stating that “the general assembly shall make no law respecting an establishment of religion or prohibiting the free exercise thereof”); see also CONST. OF THE STATE OF DESERET, art. VIII, § 3 (1849), *reprinted in* 9 SOURCES AND DOCUMENTS OF THE UNITED STATES CONSTITUTIONS, 375, 380 (William F. Swindler ed., 1979) [hereinafter SOURCES AND DOCUMENTS] (Deseret was refused admission to the United States by Congress and incorporated into the Territory of Utah); CONST. OF JEFFERSON TERRITORY, art. I, § 3 (1859), *reprinted in* 2 SOURCES AND DOCUMENTS, *supra*, at 18.

51. See generally Lash, *supra* note 9, at 1105-1118.

52. See Lash, *supra* note 23, at 1137-42.

53. See Lash, *supra* note 9, at 1130 n.219.

exercise occasionally required exemptions from generally applicable laws is a matter for historical debate.<sup>54</sup> The main point, though, is that both clauses by 1868 were read separately and were commonly regarded as fundamental liberties on par with speech and press. To fold establishment protections into the Free Exercise Clause, then, is to miss what nineteenth-century Americans meant when they distinguished the privilege of free exercise from the immunity from religious establishments.

This, however, addresses only a small point with regard to the Religion Clauses. Akhil Amar has set the benchmark for future discussions of incorporated textual freedoms. If the Bill of Rights may legitimately be applied against the states, it must be as a matter of Reconstruction, not Founding intent. Just because one might disagree with Amar's choice of what is incorporated and what is not does not undermine his basic point regarding the legitimacy of incorporation. Most importantly, Amar has made a clear case for focusing on Reconstruction, not the Founding, if we want to understand the intended meaning of incorporated liberties.

But even though Amar successfully introduces a new movement to our constitutional symphony, the work remains unfinished. Just as nineteenth-century America reshaped the Constitution of James Madison and Thomas Jefferson, it is possible that the twentieth century has played its own role in shaping the privileges or immunities of United States citizens.

## II. THE NEW DEAL

According to Amar's theory of refined incorporation, "privileges or immunities" may include more than just certain personal freedoms listed in the text of the first eight amendments to the Constitution.<sup>55</sup> For this reason, Amar criticizes Justice Black's jot-for-jot incorporation approach as unduly restrictive, since it would exclude both important textual freedoms like the writ of habeas corpus and other nontextual liberties.<sup>56</sup> Black's mechanical incorporation approach, however, not only reflected

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54. The evidence makes this quite plausible. *See generally* Lash, *supra* note 20.

55. *See* AMAR, *supra* note 1, at 174.

56. *See id.* at 174-75.

Black's view of history,<sup>57</sup> it also represented Black's assessment of the limited power of the Court to discover nontextual rights. It reflected, in other words, Black's repudiation of "Lochnering."<sup>58</sup> Amar argues that Black's fears of unlimited judicial interference with the political process were unwarranted: Even if "privileges or immunities" include nontextual rights, those nontextual freedoms may prohibit nothing more than irrational discrimination.<sup>59</sup>

The ghost of *Lochner v. New York*,<sup>60</sup> however, is not so easily interred. Although Amar gives but passing attention to this bane of substantive due process, reconciling incorporation doctrine with the lessons of the New Deal is critical to the question of political legitimacy. Even if the evidence supports Amar's general thesis regarding incorporated textual rights, if his method of refined incorporation opens the door to unwarranted judicial intervention in the political process, then we are no better off than we were before: de facto incorporation by way of unjustifiable doctrine. The Court has always known this.<sup>61</sup> Certainly Justice Black did.<sup>62</sup>

Again, Amar seeks to minimize concerns regarding *Lochner* by suggesting that nontextual privileges or immunities might receive no more than low level nondiscrimination protection. Even if one limits nontextual rights to nondiscrimination norms, however, this does not avoid the problem of *Lochner*. *Lochner* itself invoked the rights of business owners to not be subject to laws that discriminated in favor of employees in contract negotiations.<sup>63</sup> In fact, it is possible to argue that

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57. See *Adamson v. California*, 332 U.S. 46, 92 app. (1947) (Black, J., dissenting).

58. See AMAR, *supra* note 1, at 178.

59. See *id.*; see also John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992).

60. 198 U.S. 45 (1905).

61. Witness the Court's long-standing tradition of criticizing the *Lochner* approach. See *Washington v. Glucksberg*, 521 U.S. 702, 760-61 (1997) (Souter, J., concurring); *Planned Parenthood v. Casey*, 505 U.S. 833, 861 (1992) (plurality opinion); *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977); *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965); *American Fed. of Labor v. American Sash Door Co.*, 335 U.S. 538, 543 (1949) (Frankfurter, J. concurring); *Adamson v. California*, 332 U.S. 46, 81-83 (1947) (Black, J. dissenting).

62. See *Adamson*, 332 U.S. at 82 (Black, J., dissenting) (linking nontextual substantive due process to the error of *Lochner*).

63. See generally *Lochner*, 198 U.S. at 45 (striking down a New York law limiting the number of hours bread makers could work on a daily and weekly basis). Almost



*Lochner* itself was based upon Fourteenth Amendment equal protection and due process principles in its strong protection of freedom of contract without government interference.<sup>64</sup> After all, the Civil Rights Act of 1866 expressly protected freedom of contract.<sup>65</sup> If anything, refined incorporation seems to *justify* *Lochner's* nontextual substantive due process analysis. If Amar is right, i.e., if privileges or immunities do in fact include nontextual freedoms, then it appears that the *Lochner* Court was on the right track, even if it reached the wrong result in that particular case.<sup>66</sup>

One could, of course, deny that "Lochnering" is a problem. If the Framers of the Privileges or Immunities Clause meant it to embrace nontextual liberties (derived either by natural law or historical pedigree), then concerns over *Lochner* may be dismissed as yet another example of under-appreciating the impact of Reconstruction and the Fourteenth Amendment. Along with most academics and Supreme Court justices, however, Amar has the fear of *Lochner* in his blood. He legitimizes the concern about nontextual substantive due process even as he explains why his theory poses little threat of the Court returning to the bad old days of pre-1937. Presumably his reasons have nothing to do with the history behind the Privileges or Immunities Clause of the Fourteenth Amendment.<sup>67</sup> That Clause seems tailor-made for the recognition of nontextual fundamental freedoms. Moreover, as Amar points out, the Fourteenth Amend-

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any fundamental right can be described (and protected) in equal protection terms. Nontextual liberties that could be described as involving equal protection concerns include abortion, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (plurality arguing that access to abortion facilitates women's equal participation in the marketplace), assisted suicide, *Vacco v. Quill*, 80 F.3d 716 (1996), *rev'd* 521 U.S. 793 (1997) (circuit court striking down ban on assisted suicide as violation of equal protection), sexual orientation, *Romer v. Evans*, 517 U.S. 620 (1996) (state constitutional amendment banning homosexual antidiscrimination laws violates the Equal Protection Clause), and disability, *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (striking down ordinance requiring special use permit as applied against a home for the mentally retarded). The laws struck down in *Romer* and *Cleburne* failed to satisfy the lowest level of judicial scrutiny, "rational basis review."

64. Bruce Ackerman develops this point regarding the legitimacy of *Lochner*. See 1 ACKERMAN, *supra* note 6, at 100-01.

65. See Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (1866).

66. Whether the result reached in *Lochner* is "wrong" or not is debatable.

67. Certainly Amar cites no evidence regarding the intentions of the Reconstruction Congress regarding nontextual "privileges or immunities." Amar does refer the reader, however, to the work of John Harrison without actually embracing Harrison's theory as his own. See AMAR, *supra* note 1, at 178.

ment seems to signal a popular intent to expand the powers of federal judges (if only to protect the rights of individuals against racist southern juries). Far from reflecting nineteenth-century concerns, the sense that *Lochner* represents judicial error has its roots in a constitutional restructuring that occurred in the late 1930s—a restructuring described in the fourth footnote of an otherwise prosaic 1938 case involving the regulation of filled milk.<sup>68</sup>

Prior to 1937, the Supreme Court had struck down Congress's efforts to regulate the economy as beyond the scope of the Commerce Clause,<sup>69</sup> and struck down state attempts to do the same on the basis of the nontextual freedom of contract.<sup>70</sup> Following the famous "switch in time,"<sup>71</sup> however, the Supreme Court rapidly reversed countless prior cases and announced a new rule of judicial deference towards government commercial and social welfare legislation. In the midst of this new presumption of constitutionality, the Court dropped a footnote in *United States v. Carolene Products Co.*<sup>72</sup> suggesting that some kinds of legislation might still receive heightened scrutiny. According to footnote four, the Court would closely scrutinize legislation which "appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth."<sup>73</sup>

It is no accident that footnote four speaks of heightened scrutiny for legislation that falls "within a *specific* prohibition of the Constitution."<sup>74</sup> This limitation would prevent what many viewed as the primary error of *Lochner*: the Court's willingness

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68. *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938)

69. See, e.g., *Carter v. Carter Coal*, 298 U.S. 238 (1936) (striking down federal attempt to regulate the price of coal as well as wages and hours for minors); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (striking down the National Industrial Recovery Act); *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

70. See generally *Lochner v. New York*, 198 U.S. 45 (1905).

71. In 1937, Justice Roberts abandoned his earlier opposition to New Deal legislation and voted to uphold a state minimum wage regulation. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). His shift was dubbed "the switch in time that saved nine" since it turned the tide against President Roosevelt's attempt to pack the Court with pro-New Deal justices. *THE OXFORD COMPANION TO THE SUPREME COURT*, 203-04 (Kermit C. Hall ed., 1992).

72. 304 U.S. 144 (1938).

73. *Id.* at 152 n.4 (citations omitted).

74. *Id.* (emphasis added).

to discover nontextual fundamental liberties lurking behind the Constitution's broad guaranties of liberty and due process. In the incorporated rights cases that followed the New Deal transformation, the Court was careful to justify its decision as not based on the "vague" contours of due process, but rather on the more "specific" textual provisions incorporated against the states.<sup>75</sup>

The judicial focus on textual specifics highlights the flip side of the New Deal Revolution. Although the Court's change of course signaled a dramatic expansion of government regulatory power, equally dramatic was the Court's renunciation of "Lochnering" and its promise to link future interpretation of liberty to rights having a textual home. The point is not one of "specific meaning." As others have pointed out, there is nothing inherently more "specific" about "establishment of religion" than "due process."<sup>76</sup> Instead, the point is one of legitimacy and popular sovereignty. Maximizing the relationship between judicial intervention and textual mandate enhances the Court's role as guardian of the people's will and limits both the possibility and public perception of judicial adventurism.<sup>77</sup> Thus, when Amar suggests the possibility of nontextual privileges or immunities, he resurrects the ghost of *Lochner*. Not because this is an incorrect reading of the Fourteenth Amendment, but because it contradicts the Court's implicit twentieth-century promise not to interfere with the political process without a clear constitutional mandate to do so.<sup>78</sup>

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75. See generally *West Virginia v. Barnette*, 319 U.S. 624, 639 (1943) ("Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard.").

76. See 1 ACKERMAN, *supra* note 6, at 122.

77. Obviously, for the promise of specificity to have any bite, there would have to be some kind of limit on the level of generality used to describe the incorporated right. Setting that level presumably would involve determining the level intended by those who framed and ratified the right. In the case of the Bill of Rights, this inquiry would focus on "privileges or immunities" as they were understood in 1868.

78. Although footnote four also speaks of protecting nontextual rights like the right to vote, this makes sense in light of the Court's deferral to the political process. See *Carolene Products*, 304 U.S. at 152 n.4 ("It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about the repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."). The right to vote, moreover, is implicit in a number of express constitutional provisions, including the Republican Guarantee Clause, as well as the Fifteenth, Seventeenth, Nineteenth, Twenty-fourth,

There are other ways to look at *Carolene Products* and footnote four. For example, one could view footnote four's emphasis on textual "specifics" as unduly restrictive, and justify protecting nontextual rights like privacy as the proper means of protecting Fourteenth Amendment liberty in the face of the (constitutionally) expanded powers of the modern activist state.<sup>79</sup> This approach, of course, presumes the constitutional legitimacy of the New Deal expansion of federal power. For example, if the New Deal was illegitimate, rolling back the New Deal seems a more obvious solution than invoking nontextual liberties. On the other hand, if the New Deal did not really expand power, but merely restored the "original vision" of the Founders, then there is no textual or historical justification for revising the scope of individual liberty beyond that envisioned by the Founders. In sum, whether the embrace of nontextual rights is an appropriate response to the New Deal depends on one's view of the legitimacy and scope of the New Deal.<sup>80</sup>

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and Twenty-sixth Amendments.

79. See 1 ACKERMAN, *supra* note 6, at 158. Ackerman acknowledges the tension between the nontextual right of privacy and the "specifics" language of footnote four, but raises the possibility that nontextual rights may be a preferable way to synthesize the Constitution's protection of liberty under the Founding, Reconstruction and New Deal constitutions. See *id.* Ackerman does not, however, expressly resolve the issue. See *id.* at 159 ("[M]y aim here has been to begin a story, not to end it."). In *We the People: Transformations*, Ackerman suggests that the Reagan and Bush Administrations attempted to overrule *Roe* as a failed "constitutional moment." See 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 398-99 (1998). Ackerman thus both grants the right to privacy constitutional status and implies that the legitimacy of *Roe* and the right to privacy is intimately connected to the constitutional status of the New Deal. See *id.* at 402 ("[T]he Supreme Court of the 1930s was called upon to confront a contestable question of judgment: Was the bankruptcy of *Lochner's* jurisprudence 'unmistakable to most people?' This was also the ultimate question in 1992 when the status of *Roe*, and the constitutional world that made it legally plausible, was called before the bar."). Ackerman has not expressly repudiated the option of embracing the New Deal and footnote four, while rejecting the concept of nontextual fundamental liberties, though he may do so in the future. See *id.* at 403 ("My next volume, *Interpretations*, will try to clarify the judicial challenges that lie ahead.").

80. Additionally, one might argue that the thrust of *Carolene Products* was to reserve close judicial scrutiny of personal liberties, textual or nontextual. Under this view, footnote four's reference to the Bill of Rights is meant as an example of personal liberties, and not intended to foreclose protection of nontextual personal liberties. This approach not only downplays the Court's use of the word "specific," it also cannot account for the New Deal Court's concern with linking the "vague" protection of due process with clear textual mandates. Even if this approach is correct, however, it *still* requires taking a position on the New Deal. After all, protection of property rights and liberty of contract are examples of "personal rights" just as much as speech, religion, and privacy. Excluding the former, while retaining the latter as "fundamental rights," requires one to give the New Deal revolution constitutional status.

Interestingly, it is here that the myth of the “big bang” may play an important—and constitutional—role. One might criticize the Court for unpersuasively grounding its post-New Deal interpretation of federal power on the intentions of the Founders.<sup>81</sup> One can also agree with Amar that focusing solely on the Founding obscures the vital contributions of Reconstruction Republicans in the cause of individual liberty. Yet, however erroneous as a matter of history, post-New Deal preoccupation with textual specifics and original intent may reflect a legitimate response to the People’s will.<sup>82</sup> If the New Deal was in fact a constitutional moment, that moment seems to have involved a modification of the modes of judicial interpretation as much as it involved a reevaluation of government power. Put another way, the modern tendency to ground judicial opinions on original intent may reflect not so much the will of the Founders as the will of “We the People” of the twentieth century.

Developing the idea that the New Deal has constitutional implications for judicial review deserves much more space than I can devote to it here, and I plan to provide a full treatment of the issue in a future article. Some points, however, are worth mentioning in light of Amar’s invitation to look beyond the original intent of the Founders. First, by seriously considering the procedural impact of the New Deal, the debate over originalism<sup>83</sup> shifts from an argument about the Founders’ in-

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81. See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 129 (1942) (citing for support, Marshall’s opinions in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), and *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)). Marshall left open the door to judicial invalidation of Acts of Congress using an enumerated power as a pretext for regulating an area outside of their proper responsibilities. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819) (“[S]hould Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.”). The New Deal Court, however, expressly rejected this kind of judicial inquiry into the motives of Congress. See *United States v. Darby*, 312 U.S. 100, 115 (1941) (“Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause.”).

82. By analogy, if the Framers of the Fourteenth Amendment erroneously ascribed libertarian views to the Founders, this should not affect the scope of the liberties they meant to protect against state action.

83. There are various forms of originalist interpretation. For the purposes of this essay, I refer to any theory of constitutional interpretation that grounds current meaning (in whole or in part) on the views or expectations of those who framed,

tent to the intent of "We the People" circa 1937. A common criticism of originalist theories of constitutional interpretation is that they were not embraced by the original Founders themselves.<sup>84</sup> Why should we embrace originalism if Madison did not?

It may turn out that the modern emphasis on the original intentions of the Founders is justified by a modern restructuring of the Constitution. Indeed, in the nineteenth century, when law was a brooding omnipresence waiting to be discovered by judges, it may have made perfect sense to proceed as Amar tells us the "Barron-contrarians" did: by consulting not just the text of the Bill of Rights, but also the Declaration of Independence and the English Bill of Rights, as well as the writings of Blackstone and other great legal scholars. Placing that kind of discretion into the hands of non-elected judges, however, seems ill suited for a century marked by the rise of legal realism and the legal canonization of the victory of the political branches over a recalcitrant Supreme Court. Put another way, the old wine of nineteenth-century interpretive methods should not be poured into the new wine skin of post-New Deal constitutionalism. Given the modern acceptance of competing interpretations of liberty, it may be that resolving the meaning of such a vague term is best left in the hands of the people and their representatives. This, of course, was the point of Justice Oliver Wendell Holmes's dissents during the *Lochner* period<sup>85</sup>—dis-

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adopted, or ratified the text.

84. See generally LEONARD W. LEVY, JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY (1972); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

85. See *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) ("I think that the word 'liberty,' in the Fourteenth Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."); see also *Baldwin v. Missouri*, 281 U.S. 586, 595 (1930) (Holmes, J. dissenting) ("I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions.").

sents expressly and implicitly invoked by the Court during its post-New Deal reinterpretation of due process.<sup>86</sup> Under the modern approach, removing a matter from the political process requires sufficient evidence of the people's desire to immunize the subject from majoritarian control.<sup>87</sup> Such evidence would include either the text, or in the case of contested textual interpretations, evidence of the intended scope of the text. Originalism is the search for intended meaning.

Secondly, viewing Amar's "privileges or immunities" through the lens of the New Deal creates the ironic possibility that justifying nonenumerated rights requires de-legitimizing the constitutional status of the New Deal.<sup>88</sup> Most constitutional scholars consider the New Deal expansion of government power and the modern Court's embrace of nonenumerated rights to be two sides of the same judicial coin. Those opposed to nonenumerated rights are more likely to oppose the Court's broad interpretation of federal power to regulate under the Commerce Clause. Those in favor of one are more likely to be in favor of the other. In fact, however, there is reason to think these doctrines are not twins, but opposites. For if the Court's approach to the New Deal reflected a legitimate constitutional change, then this creates the possibility that the rejection of "Lochnering" was itself part of that constitutional change. On the other hand, if the New Deal was either illegitimate, or not reflective of a change in constitutional structure, then this

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86. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963); *State Tax Comm'n v. Aldrich*, 316 U.S. 174, 183 (1942). Holmes's dissent appears to track the current Court's limitation of fundamental liberties to those either mentioned in the text of the Constitution or "deeply rooted in the nation's history and traditions." See, e.g., *Washington v. Glucksberg*, 117 S. Ct. 2258, 2268 (1997). It could be that both footnote four and Holmes's famous dissent play a role in understanding "New Deal Due Process."

87. According to Justice Jackson, "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). Notice how Jackson grounds judicial interference with the political process to both the text of the Constitution (the Bill of Rights) and the intentions of those who adopted the text. Jackson's opinion is a masterpiece of judicial analysis of the scope and impact of the New Deal, and it deserves a deeper analysis than I can provide here. See generally Bruce Ackerman, *Liberating Abstraction*, 59 U. CHI. L. REV. 317 (1992) (discussing the importance of Jackson's opinion in understanding the scope of the New Deal).

88. Conversely, rejecting nonenumerated rights may require the legitimization of the New Deal.

takes the constitutional sting out of footnote four and the rejection of nontextual substantive due process. Regardless of one's ultimate position, considering the impact of the New Deal seems to require rethinking commonly held assumptions regarding the legitimacy of the modern regulatory state and the scope of the Fourteenth Amendment.

For his part, Amar downplays the importance of the New Deal and self-consciously distances himself from "Ackermanian" theories of constitutional moments.<sup>89</sup> According to Amar, treating the New Deal as an amendment is problematic given that the revolution left no textual trace in the Constitution.<sup>90</sup> As an alternative, Amar tentatively suggests that the New Deal expansion of federal power might be justified under the combined impact of the "progressive" amendments of the first decades of the twentieth century. For example, twentieth-century amendments like the Sixteenth (progressive income tax),<sup>91</sup> Seventeenth (election of Senators),<sup>92</sup> and Nineteenth (women's right to vote)<sup>93</sup> collectively contain themes of nationalism and economic redistribution—major themes of the New Deal.<sup>94</sup> Although he declines to expressly take a position, Amar suggests that these amendments in themselves might justify the Court's expansion of government power to enact economic and social welfare legislation.<sup>95</sup>

Even if we accept such a broad interpretation of these amendments,<sup>96</sup> this kind of interpretative approach seems to undermine Amar's analysis of the Fourteenth Amendment. If we can take the Progressive amendments at such a high level of generality, and use that generality to justify reversing prior interpretations of the Constitution, then there seems to be little

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89. See AMAR, *supra* note 1, at 299.

90. See *id.* at 300.

91. U.S. CONST. amend. XVI.

92. *Id.* amend. XVII.

93. *Id.* amend. XIX.

94. See AMAR, *supra* note 1, at 300.

95. See *id.*

96. Ackerman describes these amendments as "super-statutes" and not expressions of major constitutional change. See 1 ACKERMAN, *supra* note 6, at 91 ("Superstatutes do not try to revise any of the deeper principles organizing our higher law; they content themselves with changing one or more rules without challenging anything more basic."). Ackerman also argues that footnote four's emphasis on specifics treats the Fourteenth Amendment "as a superstatute containing 'specific prohibitions' with fixed and relatively straightforward meanings." *Id.* at 157.



need for Amar's exhaustive textual and historical treatment of the Privileges or Immunities Clause. Presumably, the three great Reconstruction amendments could be read as expressing "greater nationalism" and "greater individual liberty" to an extent sufficient to justify incorporation and reinterpretation of the original Bill of Rights. Indeed, if the Progressive-Era amendments can be read to contain the seeds of a remarkable expansion of federal power, it is at least as plausible that the Fourteenth Amendment contained the seeds of *Lochner* and prohibition of government interference with economic individualism (a subject directly tied to the crucible of events surrounding the adoption of the Fourteenth Amendment). In the end, it would take an exhaustive investigation of the Progressive amendments—on par with Amar's treatment of the Bill of Rights and the Fourteenth Amendment—before we can determine whether those amendments constitute the power source for the modern regulatory state.

For now, the only constitutional scholar seriously investigating the constitutional significance of the early twentieth century is Bruce Ackerman and his investigation of the New Deal. If Ackerman is correct, if the New Deal was indeed a constitutional moment, then there are some intriguing implications for what constitutes modern "privileges or immunities." Amar's refined incorporation theory assumes that the same set of words can take on new constitutional meanings when placed in a new constitutional context.<sup>97</sup> But if this is so, then just as the Bill of Rights cannot be understood apart from a proper understanding of Reconstruction, so too the Fourteenth Amendment cannot be understood apart from a proper understanding of the New Deal.<sup>98</sup> There is nothing radical about this. Most legal scholars, Amar included, recognize that the rules of judicial engagement changed in the late 1930s. The Supreme Court continues to grapple with the problems of *Lochner* to this day.<sup>99</sup> Ultimately, until we have come to terms

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97. See AMAR, *supra* note 1, at 224-25.

98. The impact of the New Deal would extend to textual, as well as nontextual rights. For example, legitimizing federal control of commercial matters may have an impact on the freedom of commercial speech. See, e.g., *Glickman v. Wileman Bros. & Elliot, Inc.*, 117 S. Ct. 2130 (1997). It might also justify increased protection of other textual liberties against the inevitable onslaught of the modern regulatory state.

99. See, e.g., *Washington v. Glucksberg*, 117 S. Ct. 2258, 2279 (1997) (Souter, J. concurring); *Seminole Tribe v. Florida*, 517 U.S. 44, 165 (1996) (Souter, J., dissent-

with the legitimacy and scope of the New Deal Revolution, the constitutional symphony Amar has described so beautifully in *The Bill of Rights: Creation and Reconstruction* will remain unfinished.

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ing); *Planned Parenthood v. Casey*, 505 U.S. 833, 836 (1992) (plurality opinion); *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting).

