Book Reviews

THE PEOPLE'S FOREST AND LEVY'S TREES: POPULAR SOVEREIGNTY AND THE ORIGINS OF THE BILL OF RIGHTS

ORIGINS OF THE BILL OF RIGHTS. By Leonard W. Levy.[1] New Haven, CT: Yale University Press. 1999. Pp. xii, 306. Hardcover, $30.00.

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As part of my Cold War era public-school education, I was taught that the Soviet bill of rights guaranteed freedom of speech, freedom of religion, and all manner of rights held dear by Americans.[3] But, my teachers said, the Soviet bill of rights was just lies on paper; the American version was a *real* Bill of Rights.

All true, of course. But why? What makes a bill of rights a source of inspiration and freedom rather than just a source of irony? One reason is tradition: to have a future of rights, a nation must have a history of rights or, at least, a history of striving toward them.

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3. See, e.g., Boris Topornin, *The New Constitution of the USSR* art. 50 at 254 (Progress Publishers, 1980) ("[C]itizens of the USSR are guaranteed freedom of speech, of the press, and of assembly, meetings, street processions and demonstrations."); id. art. 52 at 254 ("Citizens of the USSR are guaranteed freedom of conscience, that is, the right to profess or not to profess any religion, and to conduct religious worship or atheistic propaganda. Incitement of hostility or hatred on religious grounds is prohibited."); id. art. 56 at 255 ("The privacy of citizens, and of their correspondence, telephone conversations, and telegraphic communications is protected by law.").

A second reason is democracy. What the United States had, and the Soviets lacked, was true popular sovereignty. Americans can believe in their Bill of Rights because it is *their* Bill of Rights. If one part of the government violates the rights of the People, the People can use another part of the government to obtain justice. Failing that, the People can mobilize and select a new government. The Soviets? No such luck, no matter what their Constitution said.

Origins of the Bill of Rights, Leonard Levy's thirty-sixth book, presents a stirring account of the first reason, the history and tradition of specific rights in pre-Bill-of-Rights America. But, Levy largely misses the second reason; he gives no sense of how deeply important popular sovereignty is to the Bill of Rights as a whole, both at its origins and in the present day.

Section I of this review describes and discusses Levy's able chronicle of the history and traditions of the Bill of Rights. First, as suggested by the book's title, Levy recounts the individual histories of the rights in the Constitution and Bill of Rights,[4] from their early English origins through their use in the colonies and the early years of statehood. Levy also offers the interesting and ironic political story of the Bill's birth, showing how the Bill was created and promoted by the Federalists (who had originally opposed the entire enterprise) and was passed over the resistance of the Anti-Federalists (who had clamored for the Bill's creation in the first place). These two subjects in *Origins* are well researched and interesting, if not particularly groundbreaking. Above all, they are comforting, offering the iconic image of James Madison, persisting tirelessly until our most beloved rights and freedoms were etched into our national consciousness (and onto a plaque at my old school).

By contrast, Levy's third subject—the meaning of the Bill of Rights as a whole—is decidedly un-comforting. It is here that he shortchanges the notion of popular sovereignty that is so central to the Bill. Levy, never one to mince words, says that the creators and supporters of the Constitution "botch[ed] constitutional theory" by omitting a bill of rights and then gave reasons for their continued opposition to a bill that were "patently absurd"

4. To be precise, Levy covers two rights not in the Bill (concerning habeas corpus and bills of attainder), and discusses only about half of the provisions that are in the Bill, leaving out provisions both vestigial (e.g., the Third Amendment's limitation on quartering troops) and significant (e.g., the Fifth Amendment's Takings Clause, the Tenth Amendment, and several more).

and disingenuous. (pp. 23, 30) Section II of this review is devoted to defending the Federalists' words and ideas rather than blithely reading them out of the Bill. The Federalists' comments, far from being doltish and worthless, make it clear that the Bill was about limiting government through popular sovereignty. Levy's notion of the Bill of Rights as empowering the courts to protect personal spheres of individual liberty may ring true in 1999, but it is incomplete and anachronistic in a book on the *origins* of the Bill of Rights.

I. ORIGINS OF THE BILL OF RIGHTS

General readers should feel free to judge this book by its cover and enjoy it. The bulk of *Origins* comprises Levy's rousing accounts of the histories of various rights, starting with their early English origins and describing their evolution in America up through the post-Revolutionary period. In most cases, Levy also explains how each particular right found its way into the Constitution. Nothing to set the scholarly world afire, to be sure, but Levy does not pretend otherwise: six of the twelve chapters in *Origins* are taken, essentially verbatim, from his 1988 book *Original Intent and the Framers' Constitution*.[5] But after a lifetime of scholarship on constitutional liberty, characterized by exhaustive primary-source research, Levy is both uniquely qualified and uniquely entitled to write a simple, compelling narrative of the history of some of our favorite rights.[6]

A. ORIGINS OF THE RIGHTS

With drama and flair, Levy recounts the histories of habeas corpus, bills of attainder, church establishment, the free press, the right to bear arms, general warrants, double jeopardy, self-incrimination, jury indictment and trial, and the right against cruel, unusual, and excessive punishment.

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5. Leonard W. Levy, *Original Intent and the Framers' Constitution* (MacMillan, 1988) ("*Original Intent*").

6. There are no footnotes or endnotes in the entire book, reinforcing that *Origins* is not breaking any new ground, but enhancing the book's function as an accessible primer on the history of liberty, for a general audience. Those unwilling to give Levy the benefit of the doubt as to his sources can find in most cases a corresponding (identical) passage in *Original Intent* (cited in note 5).

Because *Origins* takes this form, this review concentrates on analyzing Levy's broader themes rather than quibbling with his individual historical accounts.

As Professor Jed Rubenfeld has cogently observed, most of these rights were constructed in response to specific episodes in which the proto-right was violated.[7] Levy tells us about the episodes for each—wrongs committed sometimes by the British, sometimes by a colonial government, and sometimes by both. In doing so, he offers historical insights about these rights that are either missing from the popular discourse on rights or that could bear emphasis. Rather than condense all of Levy's stories here (he tells the gory details better anyway), this subsection will discuss two of Levy's general themes.

First, Levy explains that the Framers of the Bill of Rights were deeply inspired by the experience of English Whigs opposing the Stuart Kings in the 17th century. (p. 4) Led by Lord Coke and others, the Whigs invented a history of liberty from malleable sources such as Magna Carta. (p. 152) America, Levy posits, provided fertile soil for the Whigs' novel notions of freedom to grow; it was encumbered neither by the remnants of feudalism nor by the rigidities and divisions caused by an established church. (p. 2) The Americans continued the Whig tradition of finding rights in ancient, vague, foundational documents; constructing inflated or fictional histories of the right's exercise; and finally declaring the right in formal legal terms. This theme is developed most thoroughly in Levy's chapter on the Fourth Amendment, an impressive catalog of the evolution of doctrine and the corresponding (if lagging) evolution of practice in the realm of searches, seizures, and general warrants. (ch. 7) In the end, under the Fourth Amendment, warrants had to be specific and rest on an oath; the federal government was allowed to search and seize, so long as it did so "reasonably."

Second, and relatedly, Levy notes that the colonial and state governments continued another English tradition: routinely violating the rights they supposedly held dear. Once again, this theme pervades the book, but one chapter, on habeas corpus, stands out most vividly. (ch. 2) Levy describes in detail how colonial legislators, protective of their status and unencumbered by a strong independent judiciary, flouted the Great Writ by ordering jailers to ignore it and keep political prisoners locked up. (pp. 56-63) "The writ was impotent," Levy says, "when confronted by an irate legislature." (p. 61) Although habeas corpus was better respected by the time of the 1787 Convention, the

7. See Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 Yale L.J. 1119 (1995).

principal point of debate there regarding the Writ was the extent to which it could be suspended. (pp. 65-66) A safeguard, to be sure, but a visibly limited one.

Rights formed of vague texts and dubious history, evolving slowly from disrespect to increasing acceptance, but even in the end enshrined in a limited form—it is this fuzziness that makes *Origins* so compelling. The fragile origins of our most treasured rights are both fascinating to behold and critically important to study.

B. ORIGINS OF THE BILL

Levy is concerned not just with the origins of the Rights, but with the origins of the Bill as well. Here too, he tells a story worth reading; one that, if not wholly original, is lively and provocative. Levy shows how the Bill of Rights was produced by an apathetic Congress, spurred into action only by the persistence of James Madison, who was himself driven in large part by sly political motives.

1. "Confounding the Anties"

Why, Levy asks, did the Anti-Federalists oppose Madison's efforts to add a bill of rights to the Constitution, when previously they had said that the lack of a bill of rights was the Constitution's principal flaw? The answer is politics. Constitutional politics, to be sure, but politics nonetheless.

It is easy enough to forget 210 years later, but in early 1789 it was not at all clear that the American constitutional system would survive. Two states, North Carolina and Rhode Island, still refused to ratify the Constitution. Some states had ratified only because of the promise that a bill of rights would be added. (pp. 31-32) Four states, including Virginia and New York, called for a second convention, primarily to prune back important federal powers such as the broad authority to tax. (p. 34)

Given the substantial support for their position, the Anti-Federalists had no desire to make the Constitution more palatable by adding a bill of rights to it. (p. 34) Thus, they either favored adding amendments more stringent than those Madison proposed, or they opposed the Bill outright. (p. 35) They feared (correctly) that passing Madison's bill would deflate the momentum gathering behind a second constitutional convention, and so they denigrated Madison's efforts. (pp. 34-35) As Aedanus

Burke, a sour-grapes Anti-Federalist congressman, colorfully put it, Madison's proposals were "not those solid and substantial amendments which the people expect; they are little better than whip-syallabub, frothy and full of wind. . . . [I]t will be better to drop the subject now, and proceed to the organization of the Government." (p. 39)

Madison too realized that his bill would make the Constitution more acceptable to the public and would take the wind out of Anti-Federalist sails, thereby preventing a second convention and saving the Federalists' labors from the scrap heap. (p. 34) What is surprising is that Madison's partisans (one of whom merrily reported to Madison that the proposed bill of rights had "confounded the Anties exceedingly") were not particularly enthusiastic to pass a bill of rights either. (pp. 36-37) In part, the Federalists had more important business to attend to: setting up a federal government from scratch was no small task. (p. 37) Other Federalists felt that it would be helpful to write a bill of rights later, with the benefit of experience under the new system. (p. 36)

As a result, Madison's proposed bill of rights stirred little support. (p. 37) Six weeks after the introduction, with the proposed bill gathering dust, Madison begged the House to consider it. (p. 37) Rather than debate the bill, the House assigned it to a special committee and then tabled the committee's report. (p. 37) Later, though, perhaps to pacify Madison, the House debated, amended, and approved the bill. (pp. 37-38) The Senate soon followed suit and after a swift conference committee in September 1789, the Bill of Rights was approved in its final form and submitted to the states for ratification.[8] (p. 40)

Even then ambivalence reigned. Ten states (including newcomer Vermont) quickly ratified the bulk of the Bill, but three states just as quickly rejected it.[9] (pp. 40-41) This left Virginia as the deciding state. (p. 41) Finally, after two years of opposition

8. *Origins* features a terrific Appendix, which includes: a chart detailing the states' proposals for rights to be included in the Bill; the English and Virginia Bills of Rights; Madison's proposed Bill; and the Bill's contents after approval by the House Committee, the House, and the Senate. Viewing Madison's proposal is instructive in ways too numerous to mention here. One example is the striking way in which Madison juxtaposes ringing declarations of rights with structural tinkering. As this review argues, it is no accident that both types of proposals were part of the same project. In any case, anyone reading the book should be sure to read Madison's proposal in full.

9. The Bill passed by Congress contained two additional amendments, one on congressional apportionment that never passed, (pp. 40, 291) and one on congressional pay raises that passed 203 years later. (pp. 40, 291) See U.S. Const., Amend. XXVII.

and procrastination, Virginia approved the Bill in December 1791, making it law. (pp. 41-43)

2. Federalist Opposition

Federalists offered several excuses for leaving a bill of rights out of the Constitution. When Elbridge Gerry and George Mason suggested the idea at the Convention, the idea was "passed off in a short conversation." (p. 13) The Convention did, however, add a handful of specific rights to the Constitution, including the ban on religious tests for office, and the prohibitions on passing ex post facto laws, bills of attainder, and laws impairing contracts. The Framers, Levy tells us (in an all-too-brief passage he later seems to forget), were less interested in enumerating natural rights than they were in providing political means for securing those rights. (p. 19)

When the proposed Constitution came under fire for its lack of a bill of rights. The Federalists responded that the omission was of no moment. The Constitution, they said, gave the federal government no power to infringe the basic rights guaranteed by the states. (pp. 20-21) To append a bill of rights would be dangerous, they added, because that would imply that any rights not listed were surrendered. (p. 21) Conversely, they contended, a bill of rights would suggest that the federal government had the power to violate these rights but for the bill, leading people to ignore the Constitution's strictly limited enumeration of federal power. (pp. 20-21)

As discussed in the next section, Levy believes that the Federalists simply dropped the ball, talking themselves into an anti-bill position that was not just untenable, but illogical and indefensible as well. (p. 23) To Levy, if I may put words into his mouth, the Federalist Framers were like used-car salesmen, telling skeptical customers: "I'll admit that this car has no brakes, but you don't *really* need them. Besides, if you had brakes you'd probably drive too fast." Bowing to political reality, Levy concludes, the Federalists eventually dropped the charade and supported Madison's Bill. (p. 43)

It is difficult to reconcile the Federalist ambivalence toward the Bill with the obvious political benefits of "confounding the Anties." Perhaps the Federalists simply were embarrassed by their need to backtrack. Levy shows that Madison could not afford such pride. Madison's opposition to a bill of rights at the Virginia ratifying convention had cost him vital political support

in the state legislature, which rejected him in favor of two Anti-Federalists for the U.S. Senate. (p. 32) Indeed, Madison faced a "tough contest" even to get elected to the U.S. House. (p. 32) Once there, he felt duty bound to honor the promise he made to the Virginia ratifying convention to propose a bill. (p. 34)

Leaving aside Levy's dismissive treatment of the Federalists' arguments against a Bill, his portrait of the political climate attending the proposal and passage of the Bill of Rights is instructive. As with the history of the Rights, his point about the history of the Bill—that it was fueled by partisan politics and passed amid apathy—is a meaningful one to bear in mind, for lawyers and citizens alike. We could use some apathy and partisan politics like that today.

II. THE MEANING OF THE BILL OF RIGHTS

On its face, the Bill of Rights ensured that the federal government did not abuse or exceed its delegated powers. The most important mechanisms for ensuring these limits were structural and majoritarian, and the Bill also served to declare first principles, educating the People who drove this majoritarian process. The People and the politicians they elected all had a role, and duty, as interpreters and enforcers of constitutional rights.[10] The Bill was not supposed to be just fodder for judges. Admittedly, however, the meaning of the Bill has changed over the centuries.[11] The federal government has burst through the constraints on its powers, rendering obsolete the concept of protecting rights simply by limiting government power. Simultaneously, though, the government has become seen as a guarantor of rights as much as a potential threat to them. Rights that were political and majoritarian in scope are now viewed as personal and individualistic. The structural and educative mechanisms of days

10. Indeed, some of the greatest constitutional debates of the early Republic took place amongst and between the legislative branch, the executive branch, and the states. In the pantheon of constitutional debaters of the day, one must include not only John Marshall and Joseph Story but such non-judges as Alexander Hamilton, James Madison, Andrew Jackson, Daniel Webster, and John C. Calhoun.

11. Professor Akhil Amar has argued convincingly that the principal source of change in the meaning of the Bill of Rights has been the prismatic effect of the Fourteenth Amendment. See generally Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (Yale U. Press, 1998). While other amendments to the Constitution have widened the franchise (changing who "the People" are) or tinkered with the structure of the government, the Civil War Amendments (including the Fourteenth) represent the only addition to the Bill of Rights' "enumeration."

past have been supplanted by a near total reliance on federal courts as the arbiters of rights, their extent, and their meaning.

This newer, court-centered notion of American constitutional rights pervades Levy's vision of the Bill, while older, structural/majoritarian concepts of rights are mostly missing from *Origins*. This is a significant omission, given that Levy purports to be writing about the origins of the Bill of Rights and not their subsequent evolution. But Levy's anachronistic view sacrifices more than just lessons of history; it also overlooks the potential lessons—real and relevant—that the Bill's original structure offers us today. This section tries to resuscitate these lessons despite Levy's attempt to discard them.

A. QUITE UN-PREPOSTEROUS

Levy never really asks what the Bill means as a whole, apart from its individual components. Levy says only that the Bill "enshrine[s] personal liberties," the protection of which is essentially the government's *raison d'être*. (pp. 43, 260) An apt description of what the Bill and Constitution mean today, perhaps. The times have changed, the contexts of the rights have changed, but to Levy the Bill of Rights represented the same thing in 1791 that it does now: a collection of spheres of personal liberty to be protected by the federal courts.

1. Taking The States At Their Word

If this is what the Bill was about, then why did so many states, clamoring for a bill of rights at the federal level, lack bills of rights themselves? And of those that had a bill, why did so many omit basic rights such as freedom of speech? Confronted with this question, Levy throws up his hands. He reports that the record on state bills of rights is "inexplicable except in terms of shoddy craftsmanship" that "verged on ineptness." (pp. 11, 186) To Levy, the process of selection was "baffling," and there is "no reasoned explanation" as to why only two states' constitutions protected freedom of speech; only one protected against double jeopardy; only five forbade general warrants; and so on. (pp. 64, 186)

But there are rational explanations. State bills of rights functioned as declaratory provisions as much as, if not more than, they served as positive-law provisions. That is, they reminded the People which rights were most important. Meanwhile, the protection of these rights came not just from the

"parchment barriers" that declared them, but also from the popular sovereignty underlying the system. If the government violated a right, whether the right was enshrined as positive law or was textually invisible, the People—acting as voters, jurors, or armed and "out of doors"—could overrule it. Levy himself provides the stark example of the colonial Boston throngs who prevented execution of general warrants (not yet illegal in a positivist sense) by British customs agents. (p. 159) Given these popular-sovereignty methods of enforcement, it may not have been nearly as important for a bill of rights to be complete, or indeed to be written at all.

2. Taking The Federalists At Their Word

Can we glean any insight as to what the Bill of Rights meant from the anti-bill comments of the Federalists? Levy throws up his hands again, in a passage worth quoting at length:

> That the Framers of the Constitution actually believed their own arguments to justify the omission of a bill of rights is difficult to credit. Some of the points they made were patently absurd, like the insistence that the inclusion of a bill of rights would be dangerous, and on historical grounds, unsuitable. The last point most commonly turned up in the claim that bills of rights were appropriate in England but not in America. [The English precedent] had "no application to constitutions . . . founded upon the power of the people" who surrendered nothing and retained everything. (p. 23, quoting *The Federalist* No. 84)

Despite Levy's harsh view, the Federalist explanation for the omission of a bill of rights seems sincere. In large part this is because the explanation is echoed in the final contents of the Bill itself.[12] The passage quoted above is a fine example; its language is echoed in the Ninth Amendment, as discussed below.

In sum, Levy gives up too quickly, and in doing so he also gives up the chance to treat the Bill as meaning more than the sum of its parts. Indeed, viewed as a whole, and in light of the explanations that Levy so blithely casts away, it is apparent that

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12. Another reason to conclude that the Federalists were sincere is that they used the same explanation for excluding a bill during their closed debates at the Convention, long before the Anti-Federalist uproar demanded a politic response. (p. 13) At that time, the explanation for omitting a bill satisfied not only the signers but also the members of the Convention who refused to sign; none of them gave the absence of a bill of rights as a reason for their dissent. (p. 104)

the Bill of Rights meant to enshrine and protect the larger system of popular sovereignty—majoritarian rule vindicated through structural political mechanisms, fueled by an informed citizenry agitating for its rights. "Standing up" could be done on a soap box, through a ballot box, in the jury box, and, if necessary, with a cartridge box. The Bill of Rights served to fuel this process by educating the citizenry, declaring rights in ringing and legitimated terms. Using a bill of rights as a source of defensive positive law before a judge was but one resort among many.[13]

B. POPULAR SOVEREIGNTY AND THE POLITICAL ENFORCEMENT OF RIGHTS

The quote from *The Federalist* No. 84 recited above—that a bill of rights was not needed in a system based on the sovereignty of a People who retained their rights and powers—illuminates the importance of these myriad popular-sovereignty structural mechanisms.

Under the unamended Constitution, all of the federal government's power was controlled ultimately by the People, and each facet of the People's sovereignty gave them a voice in determining which government actions were permissible in light of the rights they retained. If the People's senators, representatives, or president determined that a law was inappropriate, those elected officials would not let the law go forward; if they did so anyway and the People disagreed, the People could speak up through state governments or "out of doors" and could select different federal leaders the next chance they had. In the meantime, jurors could interpret the law or just nullify it. Thus, the Constitution ensured through multiple structural redundancies that the People would have several opportunities to quell government action, and that their rights would not be blotted out by one unrepresentative and overweening part of the government.

This Federalist vision of the constitutional government was not, as Levy would have it, simply a disingenuous excuse for a

13. Of course, enumerating rights made it much easier to enforce them in court. This was a reason given for writing some rights into the Constitution, even though they were so obvious that some felt they need not be written down at all. See, e.g., Max Farrand, ed., 2 *The Records of the Federal Convention of 1787* at 375-76 (Yale U. Press, 1911) (discussion of ex post facto laws and bills of attainder). As discussed below, my view is that this also constitutes the principal difference between enumerated rights and the unenumerated rights mentioned in the Ninth Amendment—the latter depended wholly on popular and political enforcement, while the former could rely on positive-law judicial protection as well.

simple political error of omitting a bill of rights. The Federalists believed that a republican government of limited, enumerated, and separated powers would not threaten liberty.[14] For their part, the Anti-Federalists disagreed, or at least believed that the Constitution did not provide such a government. Is Levy's implication correct that, in conceding the bill of rights point, the Federalists effectively abandoned their political theories in favor of the Anti-Federalists'? (p. 43)

It seems unlikely. Taking seriously Federalist claims that a bill of rights was needless and dangerous, it seems improbable that the Federalists would have destroyed their Constitution in order to save it. More likely, the Bill of Rights was written and structured to prevent the dangers and *maintain* the Federalist vision of the Constitution, even while amending it. There is substantial evidence to support this view, evidence that tells us quite clearly what the Bill of Rights meant.

1. The Preamble

Let's start at the start. The Bill of Rights—the actual piece of paper—has a preamble that is typically not reproduced in copies of the Constitution. But it is there nonetheless, on the cover of Levy's book among other places, and it states quite clearly what the Bill is supposed to do. It reads as follows:

> The conventions of a number of the States having at the time of their adopting the Constitution, expressed a desire, in order *to prevent misconstruction or abuse* of its powers, that further *declaratory and restrictive clauses* should be added, and as *extending the ground of public confidence* in the government will best insure the beneficent ends of its institution, be it resolved . . . .[15]

Compare this to the preamble of, say, the Virginia Bill of Rights:

> A Declaration of Rights made by the representatives of the good people of Virginia, assembled in full and free Convention; which rights do pertain to them, and their posterity, as the basis and foundation of government. (p. 272)

Read in this context, the federal Bill of Rights can be seen for what it is: a clarification of the Constitution to prevent miscon-

14. See Gordon S. Wood, *The Creation of the American Republic, 1776-1787* at 542 (U. of North Carolina Press, 1969).

15. See, e.g., Robert Famighetti, et al., eds., *The World Almanac and Book of Facts* 535 (World Almanac Books, 1999) (emphasis added).

struction; a statement of principles ("declaratory" ones presumably pre-existing the Bill) for limiting the powers of government and boosting confidence in it. Structure and popular sovereignty. Missing from the preamble (and not missing from the Virginia Bill) is a sense of a positivist codification of the rights of individuals.[16]

2. The Bill

The preamble is, appropriately, just the beginning. In his recent book on the Bill of Rights, Professor Akhil Amar shows how, read as a whole, the entire Bill reinforces the vitality of the structural mechanisms discussed in this review. For the popular-sovereignty method of protecting rights to work most effectively, the people need to have the right to assemble, petition, speak, publish, keep a gun, and appeal to a jury. At the same time, a self-dealing federal government must not be able to quash majoritarian voices by suppressing debate and assembly, confiscating weapons, quartering troops, executing heavy handed searches and seizures using general warrants, confiscating property, utilizing vindictive and unfair prosecutions and trials, or meting out excessive punishments.[17] These structural mechanisms were designed to ensure that the Federalist vision of a limited government and a sovereign People would survive, and that the rights and ideals reflected in the discourse of the day could be vindicated.

3. Ninth Amendment

A final source for understanding the meaning of the Bill of Rights as a whole—and one to which Levy gives a fair amount of attention—is the Ninth Amendment. (ch. 12) The Ninth Amendment declares that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[18] No state proposed an analogue to the Ninth Amendment; it was a second-order amendment, required only in the shadow of the eight that preceded it, and thus it sheds light on the meaning of those eight

16. To be sure, such an individualistic reading of the Bill of Rights did emerge, but not for several generations after the Founding, after the Bill had been transformed by the Fourteenth Amendment and applied against the states. Though the language of the Bill supports these newer uses as well, that should not obscure the fact that the Bill meant something different at its origins.

17. See generally Amar, *The Bill of Rights*, ch. 1-6 (cited in note 11).

18. U.S. Const., Amend. IX.

provisions.[19] The Ninth Amendment makes it clearer that the Bill of Rights is declaratory and educative, not just a source of positive law, and that the Bill was about popular sovereignty and a carefully wrought structure of limited government.

The key to understanding the Ninth Amendment is in the arguments that the Federalists made (and that Levy discards) against having a bill of rights. As discussed above, the Federalists feared the notion of a bill, because it might warp the Constitution through the misconstruction that the federal government would thereby have the power to violate any rights not enumerated. A bill had no use, they said, for a people who surrendered nothing and retained everything. Levy considers these arguments "absurd" and suggests implicitly that the passage of the Bill entailed their abandonment. (pp. 23, 104) But the Federalists said what they meant and meant what they said. They wrote the Ninth Amendment and put it in the Bill to safeguard against those very real fears.

The preamble to the Bill quoted above also reflected this desire to prevent these "misconstruction[s],"[20] but Madison's original proposal for the Ninth Amendment was much starker:

> The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution. (pp. 282-83)

Madison's proposal was designed precisely to assuage the Federalist fears that Levy belittles, and, as rephrased by the House Committee, it was written into the Bill of Rights.[21] The statement is clear. The Bill comprises "exceptions," increasing rights by decreasing government powers, but unenumerated rights, "retained the people," are still protected. Furthermore, some of the enumerated rights had been protected without the Bill, their enumeration being a mere matter of "greater caution." In other words, the People have enforceable rights; the power of their

19. By contrast, the Tenth Amendment (which made clear that the powers not delegated to the federal government were reserved to the states and the People) was widely proposed by states (p. 266), and would have made sense standing alone, without a Bill of Rights preceding it.

20. See Famighetti, *The World Almanac and Book of Facts* at 535 (cited in note 15).

21. The first part of Madison's proposal became the Ninth Amendment, and the second was absorbed into the proposed Tenth Amendment (not covered in *Origins*). The meaning of Madison's statement was fully preserved.

government to take away those rights is restricted; and the Bill does not somehow reduce the enforceability of any rights by enumerating only some of them.

Obviously, the unenumerated rights are protected in ways other than being enumerated as positive constitutional law. What ways are these? The most obvious methods are those that were in place before the Bill. The background of structural, popular-sovereignty protections—the Constitution as a Bill of Rights—remains to perform its functions.[22]

Levy offers a different answer in his final chapter (lifted from *Original Intent*). He argues that natural rights (in 1789) or "rights worthy of our respect" (in 1999) are positively guaranteed by the Ninth Amendment, and that courts have an equal duty to enforce them whether they are enumerated or unenumerated.[23] (p. 260) Regardless of whether Levy's view is valid, however, he again overlooks the importance of structural protections for majoritarian rights, protections which the Framers took seriously and which we generally can still utilize today.

C. AN EXAMPLE—THE SEDITION ACT

The significance and centrality of structural means of protecting rights are revealed very starkly in the case of the Sedition Act of 1798.[24] With the ink on the First Amendment barely dry, the Federalist-controlled Congress passed the Sedition Act, making it a crime to libel federal incumbents. Levy makes a strong case that, just as today free speech excludes obscenity,

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22. Admittedly, on its face the Ninth Amendment is less than explicit about how the retained rights were supposed to be protected. The account given above, emphasizing structural enforcement exclusively through popular sovereignty, has been denigrated. See, e.g., Randy E. Barnett, *Introduction: James Madison's Ninth Amendment*, in Randy E. Barnett, ed., 1 *The Rights Retained by the People: The History and Meaning of the Ninth Amendment* 1, 20-31 (George Mason U. Press, 1989); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 38-44 (Harvard U. Press, 1980). But see John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 Emory L.J. 967, 994-99 (1993). I am in the process of writing an account of the Ninth Amendment that emphasizes these political means of defining and enforcing rights, and promotes their revitalization today.

23. Federal courts *have* enforced unenumerated rights, to be sure, but they have not used the Ninth Amendment to do so. Even Justice Chase, in his famous defense of judicial enforcement of natural law in *Calder v. Bull*, did not mention the Ninth Amendment, just seven years after its passage. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798) (Chase, J.) (seriatim).

24. This is an episode Levy knows well. Indeed, the view of the episode developed here and in *Origins* relies heavily on Levy's earlier trailblazing works, Leonard W. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* (Harvard U. Press, 1960), and Leonard W. Levy, *Emergence of a Free Press* (Oxford U. Press, 1985).

fighting words, and clear and present dangers, in 1798 freedom of the press was broadly understood to exclude seditious libel. (pp. 116-17) Several people were prosecuted under the Act, and only one was acquitted by his jury. (p. 225) The Supreme Court never heard a Sedition Act case, and no subsequent Supreme Court case law clearly held that the Act was unconstitutional, until *New York Times Co. v. Sullivan*, 166 years later.[25] If the First Amendment were nothing more than a positive-law protection to invoke in court, it would have failed an early and important test. It would have been more like a Soviet right than an American one.

But the Bill of Rights meant (and means) more than just fodder for a legal brief. It was a declaration of popular majoritarian rights that could be protected by majoritarian processes. In a way that has become unfamiliar in this era of judges having the first, last, and only word in constitutional interpretation, the other branches of government—the political branches—took seriously their roles as interpreters and protectors of constitutional rights.

As mentioned above, the jury portion of this structural defense system failed in every case but one. But the rest of the system worked. Jefferson and Madison rallied public opinion, through the Kentucky and Virginia state legislatures (whose "speech" in the famous Kentucky and Virginia Resolutions was immune from sedition prosecution) to inform and mobilize public opinion against this outrage, leaping forward to present a new, broader, libertarian theory of a free press in the process. (pp. 125-30) They and their allies also proceeded through the electoral process, appealing to the People to support Jeffersonian candidates for the House and, through their state legislatures, for the Senate. The pinnacle of the strategy was to elect Jefferson himself President in the "Revolution of 1800." The new Jeffersonian majority in Congress allowed the Act to expire. Jefferson himself pardoned the offenders remaining in jail.[26] The

25. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964).

26. Jefferson's action was an unabashed act of constitutional interpretation, not just an act of political grace. As Jefferson himself explained it, "I discharged every person under punishment or prosecution under the sedition law, because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image." Letter from Thomas Jefferson to Mrs. Adams (July 22, 1804), in H.A. Washington, ed., 4 *The Works of Thomas Jefferson* 555, 556 (Townsend Macloun, 1884).

People had spoken and, no thanks to the courts, expanded their First Amendment rights.[27]

Levy knows this history, and tells most of it in *Origins*, but he does not connect it to the larger meaning of the Bill of Rights and the structural processes of popular sovereignty that both vindicate and exemplify it.

III. CONCLUSION

Flip to the back cover of Leonard Levy's *Origins of the Bill of Rights*, and you will find Professor Amar's praise for Levy's work: "Pulling together a lifetime of scholarship on liberty, Levy offers a vivid account of the various rights and freedoms that Americans care most deeply about." Quite true. Levy has written a great book about the Rights. Unfortunately, he has missed an important part of the story of the Bill.

The continuing importance of the structural protections discussed in this review is reflected in the strength of the Bill today. Although it took generations before the Bill began to be utilized as a positive-law source of rights, those same rights were not badly or irreparably abused in the meantime. It is this—protection of rights through popular sovereignty, and constitutional vigilance by the People and their elected proxies—that distinguishes our Bill from the similarly-worded but empty promises of the old Soviet Bill of Rights. Rights thrive in a democracy constructed so that the real power to protect rights is retained by the People who cherish them.

27. Or they had protected their Ninth Amendment rights, to the extent that the Sedition Act implicated an unenumerated right beyond the scope of freedom of the press.