FROM APPENDIX TO HEART: TRACING THE HISTORY OF THE BILL OF RIGHTS

THE HEART OF THE CONSTITUTION: HOW THE BILL OF RIGHTS BECAME THE BILL OF RIGHTS. Gerard N. Magliocca.[1] New York: Oxford University Press, 2018. Pp. xii + 235. $29.95 (Hardcover).

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I. INTRODUCTION: THE THINGS WE TAKE FOR GRANTED

The upper level of the National Archives museum features three documents, grandly presented in a marble rotunda: the Declaration of Independence, the Constitution, and the Bill of Rights. When the hall is open for visitors, the documents are displayed behind bulletproof glass and constantly attended by guards; at night, the documents are stored still more securely in a bomb-proof vault.[3] "In this Rotunda are the most cherished material possessions of a great and good nation," President George W. Bush said in 2003 at an event reopening the hall after a major renovation.[4] Every branch of government was represented at the event, offering encomiums to the documents enshrined in the hall. Many commentators have observed that these documents are a kind of American scripture, sacred texts that every good citizen professes to honor.[5]

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3. Hilary Parkinson, *The Men and Women Who Guard the Constitution*, NAT'L ARCHIVES: PIECES OF HISTORY (March 29, 2016), https://prologue.blogs.archives.gov/2016/03/29/the-men-and-women-who-guard-the-constitution/; ATOMIC AUDIT: THE COSTS AND CONSEQUENCES OF U.S. NUCLEAR WEAPONS SINCE 1940, 322 (Stephen I. Schwartz ed., 1998).

4. *The Rotunda for the Charters of Freedom Reopens at the National Archives*, PROLOGUE MAGAZINE, Winter 2003, Vol. 35, No. 4, https://www.archives.gov/publications/prologue/2003/winter/rededication.html.

5. I borrow the language of "American scripture" from PAULINE MAIER,

It was not always this way. In *The Heart of the Constitution*, Gerard Magliocca explains that the Bill of Rights was not just relegated to the status of afterthought for many years—it was in fact not even recognized as a single, unified document for much of its history. The Bill of Rights was not always known as "the Bill of Rights."

Magliocca has crafted a work of history about the idea of the Bill of Rights. The book is less a history of the Bill of Rights as law than it is the history of the Bill of Rights as concept and as rhetoric. This is not a history of the ways that legally enforceable provisions of the document were interpreted, applied, litigated, or enforced. The focus is on how people's ideas about a particular set of amendments to the Constitution evolved to see them as a single and iconic embodiment of American ideas and legal ideals.

This review highlights three of Magliocca's key arguments before concluding by considering the open questions that Magliocca leaves. Part II considers his evaluation of the bill of rights genre in the late eighteenth century. Part III turns to Magliocca's account of neglect—the long period in which the Bill of Rights just didn't appear in American discourse. Part IV describes (and offers some qualifications to) his explanation for increased interest in the Bill of Rights. Part V reflects on the limits of Magliocca's methodology.

II. THE BILL OF RIGHTS AS GENRE

The first "bill of rights" to claim the name was the English Bill of Rights of 1689, and this is where Magliocca starts his story. The English Bill of Rights was a product of the Glorious Revolution (1688), when Parliament deposed James II and installed William of Orange on the throne. James had posed a threat to the rights of Englishmen, said the theorists of the revolution, and Parliament's action had vindicated those rights. Parliament, convened irregularly without a king, issued a declaration of rights. After William took the throne, Parliament

AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE (1997) (describing the creation and constant reinterpretation of the Declaration of Independence) and from Gordon Wood, *Dusting Off the Declaration*, THE N.Y. REV. OF BOOKS, Aug. 14, 1997 (reviewing Maier's book and referencing the National Archives' display as an example of the veneration of the document). Maier later extended the observation to the Bill of Rights: Pauline Maier, *The Strange History of the Bill of Rights*, 15 GEO. J.L. & PUB. POL'Y 497 (2017).

was properly assembled as such. It then put the rights into a bill and enacted that through its normal process, creating the Bill of Rights.

Magliocca argues that this established a template that would influence another generation of "bills of rights" enacted by the American colonists almost a century later, during their conflict with crown and Parliament. Magliocca argues that the phrase "bill of rights" was associated with a particular kind of document in the seventeenth and eighteenth centuries: a document with rhetorical flair, introduced by a rousing preamble, issued either as a stand-alone declaration or at the start of a constitution. The Continental Congress followed the example of the English when it drafted the "Declaration of Rights and Grievances" in 1774. As the newly-independent American colonies became states, several of them drafted their own bills of rights. Virginia was the trendsetter. Magliocca points out that the Virginia Declaration (1776) took cues from the English Bill of Rights. Like the English version, the Virginia Declaration was also issued as a stand-alone document and was used to justify a revolution. He also argues that both documents placed the enumeration of individual rights as secondary to its more philosophical statements on the nature of government. Shortly thereafter, the Declaration of Independence itself drew on the example of the English Bill of Rights. Magliocca argues that both documents had parallel emphases: they placed blame for violations of the law and of the (unwritten) English constitution and then enumerated those violations.

Magliocca makes two points about this history. The first is that a bill of rights was a useful rhetorical tool used during times of political unrest. His more surprising and provocative point is that bills of rights were political and not legal documents. They helped to explain and justify controversial decisions, such as revolution. The enumeration of rights was not done with an eye to legal enforcement. Their drafters did not seriously contemplate these rights being invoked in court.

With this backdrop, Magliocca turns to the subject of this book, the first ten amendments to the United States Constitution that we now call the "Bill of Rights." Magliocca situates this in a crisp but conventional narration of the controversy over the United States Constitution and the call for a "bill of rights."[6] But

6. The story has been told many times as part of the larger story of the debate over

he has something new to offer when he gets to the actual enactment of the Bill of Rights. Magliocca's point is that, by the time the first Congress began creating what we now think of as the bill of rights, the project had stopped looking like a "bill of rights"—that is, not what people at the time would have recognized as a bill of rights. It wasn't enacted as a freestanding statement of rights. It was a set of individually-enacted amendments to a legal document. The amendments could be voted on and ratified one at a time, not as a single statement. (The first two amendments proposed by Congress in 1789 were not ratified by the states. The original second amendment would be ratified two centuries later as the Twenty-Seventh Amendment.) It lacked the preamble that gave previous American bills of rights thematic coherence. The amendments had a political function, to be sure. But the form the set of amendments as a whole took was different from prior bills of rights that explicitly justified major government change. *This* bill of rights was part of a deal to handle challenges to the Constitution's legitimacy, but that's not quite the same as justifying the change directly, as previous bills of rights did. In short, Magliocca has made a case that there was a recognizable form for bills of rights in the late eighteenth century—and that the "Bill of Rights" of 1789 didn't fit the genre.

III. THE BILL OF RIGHTS AS FORGOTTEN TEXT

The theme for the next hundred years of the Bill of Rights' history is neglect. Many commentators have noted that individual provisions of the Bill of Rights appeared only rarely in the nineteenth century courts.[7] This was partly a consequence of the Supreme Court's ruling in *Barron v. Baltimore*,[8] that the limitations on government provided in the amendments bound only the federal government, not the states. In *Barron* itself, the Court described the amendments to the Constitution as just that—"amendments," not a bill of rights.[9]

ratification of the Constitution. The current benchmark source on the ratification debates is PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788 (2011). The first academic monograph devoted to the Bill of Rights as a whole was EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY (1959).

7. *See, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 290 (1998).

8. Barron v. Baltimore, 32 U.S. 243 (1833).

9. *Id*. at 250.

On the scattered occasions when Magliocca finds Americans using the phrase "bill of rights" in the nineteenth century, they often aren't even referring to the first ten amendments. In *Barron*, for instance, Chief Justice John Marshall's opinion references the Constitution's Article One, Section Nine, as "in the nature of a bill of rights."[10] Other cases cited the limitations on the states in Article One, Section Ten, as a "bill of rights."[11] In broader public discourse, newspapers, speeches, and pamphlets referred to the Declaration of Independence as a national bill of rights.

Reconstruction marked an extraordinary exception to the general neglect of the Bill of Rights. Representative John Bingham, one of the key architects of the Fourteenth Amendment, spoke loudly and often about the importance of safeguarding the Bill of Rights against state infringement. A substantial literature and jurisprudence has built up around the question of whether the Fourteenth Amendment incorporates the Bill of Rights (in whole or in part) against the states (and, if so, what clause of the amendment actually accomplishes this result).[12] Magliocca avoids this debate. His point is conceptually prior to this debate: when Bingham and other Congressional Republicans

10. *Id*. at 248.

11. Fletcher v. Peck, 10 U.S. 87, 138 (1810) (describing Article One, Section Ten, as "what may be deemed a bill of rights for the people of each state"); Piqua Branch of State Bank of Ohio v. Knoop, 57 U.S. 369, 392 (1853) ("It is, in the emphatic language of Chief Justice Marshall, a bill of rights to the people of the States, incorporated into the fundamental law of the Union.").

12. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 341–43 (1963) (describing incorporation via the Due Process Clause); Malloy v. Hogan, 378 U.S. 1, 4–6 (1964) (same); McDonald v. Chicago, 561 U.S. 742 (2010) (applying the modern approach of selective incorporation); Timbs v. Indiana, 139 S. Ct. 682 (2019) (same); Adamson v. California, 332 U.S. 46, 71–72 (1947) (Black, J., dissenting) (arguing for total incorporation); *id*. at 59–68 (Frankfurter, J., concurring) (arguing against incorporation); *McDonald*, 561 U.S. at 806–13 (Thomas, J., concurring in part) (arguing for incorporation via the Privileges or Immunities Clause). If this isn't enough, the scholarly literature offers still other options. S*ee, e.g.*, Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992) (arguing the Due Process Clause incorporates only those Bill of Rights provisions that safeguard the rights of citizens); KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP (2014) (claiming the Privileges or Immunities Clause protects all enumerated rights in the Bill of Rights and elsewhere); Randy E. Barnett & Evan D. Bernick, *The Privileges or Immunities Clause Abridged: A Critique of Kurt Lash on the Fourteenth Amendment*, 95 NOTRE DAME L. REV. (forthcoming 2019) (contending the Privileges or Immunities Clause protects enumerated and unenumerated rights alike); and CHRISTOPHER R. GREEN, EQUAL CITIZENSHIP, CIVIL RIGHTS, AND THE CONSTITUTION: THE ORIGINAL SENSE OF THE PRIVILEGES OR IMMUNITIES CLAUSE (2015) (arguing the Privileges or Immunities Clause protects the equality of similarly-situated citizens of the United States).

started talking about the "Bill of Rights," they were taking an unusual step to give a name to this first group of amendments to the Constitution. Democratic members of Congress who opposed the Fourteenth Amendment did not adopt the name, "Bill of Rights," but persisted in referring to them as "'limitations'" on Congressional power or "'clauses of the Constitution'" (p. 64). And as the debate progressed, it became clear that even among the Amendment's supporters, there was disagreement about how many of the Constitution's amendments deserved the "Bill of Rights" title. Some Congressional Republicans talked about the first ten amendments but others talked about only the first eight—excluding the Ninth Amendment's reference to unenumerated rights and the Tenth Amendment's limitation of the federal government to delegated powers. The confusion about what exactly was meant when the term was used was just another indication that the document which we take for granted now was not thought of as a unified piece of the American heritage at the time.

In any case, the era of enthusiasm for the "Bill of Rights"—however many amendments that included—was brief. "Like most of the lofty ideals of Reconstruction," Magliocca writes, "[Bingham's] understanding of the first set of amendments fizzled during the 1870s and 1880s." (p. 66). The Supreme Court didn't adopt the term "Bill of Rights" in the aftermath of Reconstruction. It referenced amendments to the Constitution, collectively or individually. In a lecture in 1880, Justice Miller insisted, "'Our Constitution . . . does not contain any formal declaration or bill of rights.'" (p. 67). New state constitutions drafted by former Confederate states modeled their bills of rights on the Virginia Declaration of Rights rather than the federal Constitution's first several amendments. The one exception was that many of them included a state analogue to the federal Thirteenth Amendment prohibiting slavery—demonstrating, Magliocca argues, that the "assumption . . . that only a constitutional amendment proposed in 1789 can be part of the Bill of Rights" was a still more modern invention. (p. 68). The Reconstruction conception of the Bill of Rights was not gone entirely. It made a brief but notable appearance in a dissent by Justice John Marshall Harlan. The Supreme Court majority had decided that the Fourteenth Amendment did not apply the Fifth Amendment's Grand Jury Clause or the Sixth Amendment's Jury

Trial Clause to the states—and it did so without describing the rights as part of a bill of rights.[13] Harlan argued for incorporation of these limits on the states and described the first ten amendments as "the national Bill of Rights" throughout his opinion.[14] It was a hint at what was to come.

IV. THE BILL OF RIGHTS AS JUSTIFICATION FOR GOVERNMENT POWER

Up to this point, the book's primary focus has been on deconstructing the naïve idea that the Bill of Rights is a constant in the American experience. To the contrary, Magliocca shows that it was not even thought of as a single, unified document for a substantial part of its own history. But when the book's narrative reaches the end of the nineteenth century, it takes a turn toward a new, positive argument about *how* the Bill of Rights came to prominence in American law and culture. According to Magliocca, the Bill of Rights came to prominence when Americans wanted to justify broader government powers.

In popular culture, the Bill of Rights is thought of primarily as protecting individual rights and constraining the government. But Magliocca argues that in practice it often worked in the opposite manner. It's not as though the Bill of Rights grants the government additional power. Rather, Magliocca suggests that the existence of the Bill of Rights diverted opposition and assuaged fears that might otherwise arise about expansive government power. Justice Robert Jackson made the point in his famous opinion in *West Virginia State Board of Education v. Barnette*: "Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support."[15]

This pro-government-power function of the Bill of Rights goes all the way back to the beginning, as Magliocca reminds readers. In the debates over ratification of the Constitution, some diehard antifederalists suggested that talk of adding a bill of rights was a distraction from the real danger: the powerful federal government that would be created by the new Constitution. Eighteenth-century whalers would distract their quarry by tossing

13. *See* Maxwell v. Dow, 176 U.S. 581 (1900).
14. *Id*. at 607 (Harlan, J., dissenting).
15. West Virginia State Board of Education v. Barnette, 319 U.S. 624, 636 (1943).

a tub into the sea; antifederalists said that any bill of rights would be nothing but a tub thrown to the whale.[16] But the tub was tossed, the Constitution amended, and what followed was roughly a century of inaction for the "Bill of Rights."

Magliocca argues that the surprising turning point for the Bill of Rights was the introduction of formal American empire. In the aftermath of the late nineteenth century, the United States acquired overseas holdings that almost no one anticipated making into states. (This at least helps distinguish this colonies from the "domestic empire" that characterized so much prior American expansion.)[17] The largest population among these imperial holdings was in the Philippines. Critics of empire argued that it was hypocritical of the United States to proclaim its adherence to liberty while governing territories captured and held without traditional American protections for individual liberties. And strikingly, these complaints increasingly invoked the "Bill of Rights" as the paradigmatic example of the rights held by Americans. President William McKinley answered the critics by sending instructions to the Philippine Commission, led by William Howard Taft as the interim government for the islands. The Bill of Rights wouldn't be applied entire, but the government did have to respect a substantial subset of the federal Bill of Rights. This became a debating point as the election cycle got underway in 1900. It also made its way into the Supreme Court.

The first case in which a Supreme Court majority called the first set of amendments the "Bill of Rights" was *Kepner v. United States*,[18] one of the so-called "Insular Cases," which considered which federal constitutional provisions applied in the territories acquired by the United States in the Spanish-American War. (Magliocca notes that it is also unique in being the only case to suggest that the first *nine* amendments to the Constitution constituted the Bill of Rights.) Magliocca points out that there's still something strange going on: the Court used the "Bill of

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

17. On the various facets of empire in American history and historiography, *see* Paul A. Kramer, *Power and Connection: Imperial Histories of the United States in the World*, 116 AM. HIST. REV. 1348 (2011). For accessible treatments of empire in American history, see WALTER NUGENT, HABITS OF EMPIRE: A HISTORY OF AMERICAN EXPANSION (2008) and DANIEL IMMERWAHR, HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES (2019).

18. *See* Kepner v. United States, 195 U.S. 100 (1904).

Rights" terminology repeatedly in this opinion, but had not done so in other cases decided shortly before *Kepner*, which involved the question of incorporation against the states. Why the difference? Magliocca suggests that it was another version of the "tub to the whale" scenario: the Court was likely "supportive of congressional power over the Philippines and wanted to shore up the legitimacy of that authority by underscoring how it was used to apply the Bill of Rights" (p. 83). By contrast, "in incorporation cases the Court (save Justice Harlan) was not supportive and wanted to delegitimize extending the first set of amendments to the states" (p. 83).

In Magliocca's telling, the next really big breakthrough for the Bill of Rights taking its place in the conceptual maps of Americans was the New Deal. The "master politician" and communicator, President Franklin D. Roosevelt, invoked the Bill of Rights repeatedly as he defended his New Deal policies against detractors. Again, the main function of this rhetorical use of the Bill of Rights was to "legitimate the growth of federal power" (p. 93). Critics of the New Deal said that the expansion of federal regulation came at the expense of personal liberty. Roosevelt responded that so long as the Bill of Rights was intact, liberty was preserved. The Bill of Rights didn't have to authorize New Deal policies to nonetheless help validate them, when Roosevelt could explain that he was acting within the scope of his lawful conduct. Roosevelt becomes a key figure in Magliocca's search for the turning point, where the Bill of Rights goes from being merely a set of disparate amendments to the Constitution to being a totem of American freedom.

Magliocca notes that Roosevelt's critics also picked up references to the Bill of Rights. The Republican Party platform in 1936 cited the Bill of Rights when it proclaimed its devotion to "'a government of laws'," as opposed to "'the autocratic perils of a government of men.'" (p. 94). This was an obvious jab at Roosevelt, who was regularly accused by conservative critics of being a potential authoritarian.

The Bill of Rights was back again during the debate over the court-packing plan in 1937. Frustrated with the Supreme Court's repeated holdings that aspects of the New Deal exceeded congressional authority, Roosevelt proposed adding new seats to the Supreme Court, which of course he would get to fill. This time, Roosevelt's critics wielded the Bill of Rights to successfully

oppose his plans: they argued that Roosevelt threatened judicial independence and that this in turn weakened the protections provided by the Bill of Rights.

The New Deal and its surrounding controversies propelled the Bill of Rights toward the center of national conversation as never before. But the final step toward securing their place was World War II. Roosevelt's "four freedoms" nodded to the Bill of Rights when establishing the Allies' wartime ideology of defending freedom. For American audiences in particular, Roosevelt frequently invoked the freedoms protected by the Bill of Rights as among the most cherished American values at stake in the war. Lose the war, and authoritarians would destroy these safeguards.

At the same time, the Supreme Court too took up the banner of the Bill of Rights. After abandoning the protection of freedom of contract and expanding the commerce clause, the Supreme Court fell back on the Bill of Rights as the final constraint on the federal government. Magliocca writes that Justice Felix Frankfurter was the first justice to make the Bill of Rights a regular feature of the Court's rhetoric, even though Frankfurter himself was more skeptical than many of his colleagues about aggressive judicial enforcement of individual rights claims. Magliocca highlights the famous pair of rulings on whether compulsory recitations of the Pledge of Allegiance in public schools were constitutional—the Court first said yes in *Gobitis*,[19] only to reverse itself in *Barnette*.[20] Magliocca reads *Barnette* as a wartime case, with allusions to the Nazi threat in the majority opinion's castigation of enforced conformity. It is also one of the great paeans to the Bill of Rights in the Supreme Court's history. In it, Magliocca finds a bridge between the government-empowering Bill of Rights that the book has highlighted up to this point, and the libertarian Bill of Rights[21] that Magliocca has used as his foil. The Court's majority opinion by Justice Jackson was written with the New Deal in view—this is the case in which Jackson explained that the Bill of Rights made possible a robust government. But he also articulated the libertarian view of the

19. *See* Minersville School District v. Gobitis, 310 U.S. 586 (1940).

20. *See Barnette*, 319 U.S. at 642.

21. "Libertarian" here is simply a useful shorthand for the cluster of attitudes that often characterize contemporary treatment of the Bill of Rights—viewing the document as a restraint on government power and a protection for personal liberty.

Bill of Rights in powerful prose that has deeply influenced several generations of lawyers and jurists: "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."[22]

There's reason to quibble with Magliocca's emphasis at this point. Both in the treatment of the New Deal in general and in his treatment of the court packing controversy, he gives only cursory coverage to Roosevelt's opponents. Part of this may be a product of Magliocca being less than precise in defining his argument about government power. To the extent Magliocca is simply intent on making the case that the Bill of Rights has functioned to enable government power, it's understandable that his coverage of the other side is brief—his readers already know that the Bill of Rights can function to criticize government power. But to the extent Magliocca wants to make a stronger claim, that the Bill of Rights was *more often* used to support enhanced government power, or was *more effective* in this role, the point is weakened by his failure to seriously engage with the opposition to the New Deal. And to the extent Magliocca's objective is to identify turning points in the rhetoric around the Bill of Rights, it is curious that there isn't more attention devoted to the Bill of Rights rhetoric wielded against Roosevelt.

A considerable body of scholarly work has argued that the New Deal catalyzed a conservative critique along many fronts, playing an important role in the origins of modern political and legal conservatism.[23] The Bill of Rights appeared repeatedly in the

22. *Barnette*, 319 U.S. at 638.

23. For sampling of this literature, and its internal debates over the importance of the New Deal relative to other issues in the development of modern conservatism, consider KIM PHILLIPS-FEIN, INVISIBLE HANDS: THE MAKING OF THE CONSERVATIVE MOVEMENT FROM THE NEW DEAL TO REAGAN (2009) (discussing the role of business leaders in constructing modern conservatism); GREGORY L. SCHNEIDER, THE CONSERVATIVE CENTURY: FROM REACTION TO REVOLUTION (2009) (discussing conservatism's transition into a democratic political movement); CONSERVATISM AND AMERICAN POLITICAL DEVELOPMENT (Brian J. Glenn & Steven M. Teles, eds. 2009) (studying the influence of conservatism on domestic policy and how the growth of the government has shaped conservatism); DAVID FARBER, THE RISE AND FALL OF MODERN AMERICAN CONSERVATISM (2010) (starting the history of modern American conservatism with the opposition to the New Deal); GORDON LLOYD & DAVID DAVENPORT, THE NEW DEAL AND MODERN AMERICAN CONSERVATISM: A DEFINING RIVALRY (2013) (focusing on the economic debates that have defined liberalism and conservatism since the Great Depression); KATHRYN S. OLMSTED, RIGHT OUT OF

rhetoric of the opposition. A quick search through the *New York Times* archive is illustrative. A Letter to the Editor in 1933 complained that a proposal to add a "child labor amendment" to the Constitution (supported by Secretary of Labor Frances Perkins), permitting government regulation, would enable the state to interfere with the liberties of families which otherwise were shielded by the Bill of Rights.[24] When Theodore Roosevelt, Jr., son of the former president, took the helm of the National Republican Club in 1934, he announced that the Republican theme in the fall congressional election cycle would be a fight "for personal liberty, for the Bill of Rights—a fight for the spirit of America."[25] Former-president-turned-administration-critic Herbert Hoover used the Bill of Rights as his main theme in a major speech broadcast nationwide in 1935.[26] A 1934 Letter to the Editor took Roosevelt to task for disregarding the Bill of Rights: "In some instances my rights have been violated. In others Mr. Roosevelt has attempted, unsuccessfully, to take away from the people some of the liberties guaranteed under the Bill of Rights."[27] The list of examples could go on—and this is just from one newspaper.

The presidential rhetoric about the Bill of Rights in the early New Deal—which is highlighted in *The Heart of the Constitution*—is actually quite reactionary. A Letter to the Editor in the *New York Times* defended Roosevelt by referencing the Bill of Rights, an echo of the president's own rhetoric in responding to these critics: the president "has not scrapped our Bill of Rights and he has not suppressed our organs of public expression."[28] That's a defense answering a critique, not a strong affirmative case for the New Deal program.

CALIFORNIA: THE 1930S AND THE BIG BUSINESS ROOTS OF MODERN CONSERVATISM (2015) (arguing modern conservatism grew out of Californian agribusiness manipulating fears of cultural change); KEVIN M. KRUSE, ONE NATION UNDER GOD: HOW CORPORATE AMERICA INVENTED CHRISTIAN AMERICA (2016) (linking the rise of religious references in conservative public discourse with backlash against the New Deal).

24. *See* J. Gresham Machen, *Child Labor Amendment: It Is Regarded as Invasion of the Liberty of American Family Life*, N.Y. TIMES, Nov. 6, 1933, at 18.

25. *Col. Roosevelt Sets Fall "Issue": He Asserts Fall Campaign Will Be Based on "Defense of Bill of Rights*," N.Y. TIMES, May 19, 1934, at 14.

26. *See Hoover on Air Tomorrow: Will Speak on "Bill of Rights" at San Diego Constitution Day*, N.Y. TIMES, Sept. 16, 1935, at 2.

27. Norman C. Norman, *Finds Rights Gone Under the NRA: One Who Heard the President Checked Up for Himself*, N.Y. TIMES, July 2, 1934, at 18.

28. Leo M. Glassman, *Not a Dictator: President Is Fulfilling a Trust by Constitutional Means*, N.Y. TIMES, Mar. 18, 1933, at 12.

Shifting the emphasis to the critics suggests a possible alternative framing. Magliocca emphasizes the employment of the Bill of Rights in rhetoric defending robust government programs. He's right that it could and did have that function on occasion. But in every example Magliocca offers, it's very much in a reactionary mode: someone asserts that the Bill of Rights ought to restrict some exercise of governmental power, and the proponent of power then finds a way to invoke the Bill of Rights in defending that power. In 1787, the federalist supporters of the Constitution were confronted by antifederalists insisting that a bill of rights in some form spell out limits on the federal government; the federalists eventually compromised and amended the Constitution, using the amendments to legitimize the more powerful national government (the "tub to the whale," as cynical antifederalists observed). A century later, critics of America's colonial government in the Philippines excoriated the denial of constitutional rights by the United States; the President and Supreme Court then invoked a partial application of the Bill of Rights to shore up the legitimacy of American rule. And then with the coming of the New Deal, critics alleged that the expansion of federal power and activity would offend the Bill of Rights. Again, the proponents of government power developed a counter-strategy for invoking the Bill of Rights. In this narrative, the Bill of Rights emerges as a weapon in the arsenal of groups opposed to expansive federal power—a weapon, but not a very effective one, given the fluency of power proponents in finding answering arguments.

In the New Deal period specifically, more attention to the critics would help link the story that Magliocca tells with other recent historical scholarship on the transformation of rights litigation in the period. Specific rights within the Bill of Rights, particularly free speech, got renewed attention as business leaders realized that they could provide a legal basis for opposing the regulatory apparatus of the expanding New Deal state, as works by Laura Weinrib and Jeremy Kessler have demonstrated.[29] They found themselves in an unlikely alliance with labor activists, who

29. *See* LAURA WEINRIB, THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE (2016) (discussing the changing conception of civil liberties from its radical roots to constitutional compromise); Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915 (2016) (arguing critics overstate the novelty of using the first amendment for libertarian purposes and underestimate the difficulty of disentangling judicial tendencies to do so).

had become interested in using the First Amendment's free speech clause to protect labor protest.[30] As business and labor coalesced around their shared interest in a libertarian and anti-regulatory rights regime, the Bill of Rights became shared ground. Perhaps it's from this, as much as from Roosevelt's invocation of the Bill of Rights, that the document began to take a larger place in the American imagination and popular discourse.

This addition to the narrative would perhaps lessen the punch of one of Magliocca's arguments, namely, that the libertarian use of the Bill of Rights is contingent and relatively recent. A modest version of this argument is persuasive: Magliocca has amply documented the fact that the Bill of Rights were used for other purposes and read in other ways in the past. Magliocca, to his credit, doesn't claim more than this. But readers might be inclined to see in the book a more lopsided story, in which the libertarian turn really is an innovation from the middle of the twentieth century. That would be a mistake.

In any case, Magliocca's next point is certainly right: the libertarian reading was reiterated through the Cold War. Though some worried that the protections of the Bill of Rights might handicap American efforts to defend itself against Communism, others took the opposite perspective. Many cited the Bill of Rights as protecting the United States from "'Communist tyranny'" (as the 1960 Democratic Party platform put it) (p. 139). And the American "rights talk" had international reverberations; Magliocca notes that the Bill of Rights also influenced the Universal Declaration of Human Rights at the very outset of the Cold War era. By the end of the Cold War, the Bill of Rights had a cultural resonance, even a mythology, built around them. It *felt* to Americans as though it had deep historical roots. But this is because memories of a different era are short. Magliocca has made it clear how much change the "Bill of Rights" has undergone as a concept in the American imagination.

V. BILL OF RIGHTS AS PHRASE?

The Heart of the Constitution is a significant contribution to the history of the Bill of Rights. It's not entirely a new observation that the Bill of Rights was an afterthought and did not have much

30. *See id*.

practical, observable effects for many years.[31] But Magliocca has provided the most thorough treatment of this history to date as it relates to American political and legal discourse. And he has done so in an accessible form. That's no mean feat and in itself makes this a valuable work. Magliocca's second argument, that the Bill of Rights has a longer and richer history of facilitating robust government action, is again not an entirely new observation.[32] Various historical actors covered in the book made this observation, from the antifederalists (who predicted it with their "tub to the whale" analogy) to Justice Jackson (who endorsed it, as we have seen). Again, Magliocca has greatly enriched our understanding by demonstrating how often the Bill of Rights was used to facilitate power throughout its history.

But many questions are left unanswered. Not all of them are of equal importance. There are points where answering some questions about methodology might have helped clarify the strength of his arguments. At other places, the unanswered questions are really just a wish list of research topics for future work. There is only so much one can do in a short volume like this, so it should not detract from the book's accomplishment to say that this book leaves many interesting questions unanswered, even as it has helpfully opened up lines of inquiry that should lead to further historical study and analysis.

A. CONCEPTS AND METHODOLOGY

The Heart of the Constitution is really a history of three things: first, a text proposed by Congress and enacted as a set of amendments to the Constitution; second, a concept that gradually became associated with the document; third, a phrase ("Bill of Rights") that was associated with the document and the concept, but not consistently. But Magliocca doesn't separate these out and treat them distinctly. Much (not all) of the book is spent on the third subject, simply tracking the phrase across American history (and mostly in statements by legal and government actors) and examining when it does and doesn't mean what we today think it

31. *See, e.g.*, Michael J. Douma, *How the First Ten Amendments Became the Bill of Rights*, 15 GEO. J.L. & PUB. POL'Y 593, 593 n.a1 (2017); Lael Daniel Weinberger, *Enforcing the Bill of Rights in the United States*, *in* JURISPRUDENCE OF LIBERTY 93 (Suri Ratnapala & Gabriël A. Moens, eds. 2011).

32. Magliocca previously presented this argument: *see* Gerard N. Magliocca, *The Bill of Rights as a Term of Art*, 92 NOTRE DAME L. REV. 231 (2016).

does. Through this history of the phrase, Magliocca also seeks to tell a story about the other two subjects, the document and the concept. On the whole, he does quite well in getting the maximum mileage out of this material. Changes in the use and frequency of the phrase can shed light on changes in the understanding of the text and of the conceptual object that we think about when we say "bill of rights." He's sensitive to the subtly different uses made of the same words in different places and times. All of this is good as far as it goes—but it isn't so very far. Tracking particular language across time can be enlightening but really is just a starting point. Even the most thorough tracing of a phrase leaves a lot out that we might care about when we want to understand the history of the text and the concept.[33]

A bit more explanation about Magliocca's method would have been helpful. First, to the extent that the focus is on tracing a particular phrase, it would be nice to know how Magliocca found the references that he discusses: keyword searches, presumably, formed an important part. But for what terms? Across what databases? And what, if anything, did he rely on besides keyword searches to turn up relevant materials? This is what Michael Douma did in an article on the changing usage of "Bill of Rights"[34] (which Magliocca cites). If much of Magliocca's work is really driven by word searches across databases, it would be nice to know more about the limits of the enterprise. And from there I have a wish-list of additional data that I would suspect he could have easily provided. For instance, Magliocca could have offered some basic quantitative information: if he can isolate a number of recurring alternative names for the Bill of Rights, could we get counts of how often particular usages turned up across time, or relative to each other? Does it matter what genre Magliocca is examining? (He focuses primarily on statements by courts and government actors. He doesn't spend much time discussing other cultural reference points—school textbooks, for instance.[35]) More information here would have made it possible to evaluate

33. For analysis of the relationship between terminology and concept, and an argument about how to use the former to write a history of the latter, *see* PETER DE BOLLA, THE ARCHITECTURE OF CONCEPTS: THE HISTORICAL FORMATION OF HUMAN RIGHTS (2013). For critical analysis of de Bolla's approach, *see* Michael Gavin, *Intellectual History and the Computational Turn*, 58 EIGHTEENTH CENTURY 249 (2017).

34. *See* Douma, *supra* note 31, at 598.

35. Douma has argued that textbooks were a key site for defining and developing the idea of the Bill of Rights. *See* Douma, *supra* note 31, at 608–11.

Magliocca's comparative assessments of how often people referred to the text by one name or another. As it is, it is hard to know how often people talked about the first ten amendments to the Constitution by other names relative to later references to the "Bill of Rights."

The book is short and is written so as to be accessible to a broad audience. Its confident narrative voice does this effectively. But it also tends to push these methodological issues out of the text. It certainly seems like a plausible judgement that lay readers would rather read a story with clear narrative lines than see a chart with numbers of occurrences of words or terms. But academic readers are poorer for this choice, understandable though it may be.

B. NEXT STEPS FOR THE HISTORY OF THE BILL OF RIGHTS

While Magliocca has provided a rich account, there's plenty to be done to develop a better understanding of the Bill of Rights history. Future work would do well to scrutinize about what's going on with the "Bill of Rights" as text and concept even when the label isn't present. It is not as though Magliocca's book ignores the Bill of Rights when it isn't labeled as such. The book talks about the alternative labels offered for the text as a whole. But there is little treatment of an even bigger issue: how did individual amendments (within the ten that make up the Bill of Rights) change over time, and how did their trajectories affect the history of the Bill of Rights as a whole? This is an enormous subject and it's understandable that it needs to be cabined to keep this book to a manageable length. But it's worth considering what kinds of questions, and possibilities, this introduces. And it's worth wondering if one can actually tell a complete story about the Bill of Rights as a whole without telling a lot of individual stories about specific rights.

Start with the simple methodological move that's at the heart of the book as it stands—tracing particular language across time. Some of this language appears in court cases. But courts don't deal in abstract principles but in concrete disputes between parties suing each other. Courts don't apply "the bill of rights" as a whole. They apply particular provisions to the case in front of them. The courts of course aren't operating in a vacuum. Judges' ideas about the structure of government, legal interpretation, and the place of particular constitutional amendments in the broader

whole of the Constitution all affect their reasoning in individual cases. But the point is that courts will deal with individual provisions of a particular amendment often without having any occasion to reflect on the larger functions of the Bill of Rights. It's then hard for me to imagine that the kinds of decisions they make with individual provisions don't affect the judge's broader interpretation of Bill of Rights as whole.

The effects of individual provisions on broader views of the Bill of Rights isn't just a matter for the courts. The legal issues that arise relating to the Bill of Rights also might matter for putting the issue in the public eye. For instance, maybe it matters that the Fifth Amendment, with its mix of criminal procedure issues and takings issues, was more likely to bring the Bill of Rights into the Supreme Court in the nineteenth century, while the First Amendment only became a serious issue in the Supreme Court in the mid-twentieth century.[36] One might think that the Bill of Rights might be more interesting and meaningful to a broader swath of Americans when those Americans could imagine themselves benefitting from its protection. And maybe a wider swath of Americans could imagine themselves claiming the benefits of the free speech clause than could imagine themselves in run-ins with law enforcement or with eminent domain. Maybe the property-protecting cases were so embroiled in the political controversies of the Progressive era that it was impossible to imagine a bipartisan constituency rallying around these issues as part of a quintessentially American Bill of Rights. It's easy to hypothesize possible variations on the relationship. In any case, it certainly seems likely that the kinds of cases that were brought mattered in terms of who thought about, and what attitudes people would form toward, the Bill of Rights. And to the extent they matter, they at least complicate the story that Magliocca tells, in which he looks almost exclusively at the ways that the Bill of Rights as a whole were invoked.

One could take this a step further. Perhaps the cultural and intellectual history of the Bill of Rights requires considering

36. For a rough comparison, the Supreme Court Database (1791–1945) lists only twelve cases involving the First Amendment before 1921. *See* generally HAROLD SPAETH ET AL., SUPREME COURT DATABASE CODE BOOK (2017), http://supremecourtdatabase.org (searching LG04-TREEHOUSE-2438). By contrast, it lists 126 cases involving the Fifth Amendment in that same period. *Id.* (searching LG04-BIRDDOG-6670).

"rights talk" beyond even the direct content of the Bill of Rights. To take an episode that Magliocca mentions but doesn't reflect on at much length: the popularity and cultural cache of the Bill of Rights during World War II is tied to the "four freedoms," and vice versa. Two of the four freedoms are derivative of the Bill of Rights. Magliocca briefly discusses the Four Freedoms, but suggests that they are less informative about attitudes toward the Bill of Rights, precisely because half of the content is not from the Constitution. But maybe the relationship is still more complicated. Maybe Americans became more excited about the Bill of Rights when they paid less attention to what was in the Bill of Rights and more to the general idea of freedom for which the Bill of Rights was just a symbol. The Bill of Rights today is a potent symbol and yet there's widespread ignorance of its contents; one study in 2015 found that about 12% of Americans thought that the Bill of Rights included a right to own a pet, while one in four thought that it protects a right to "equal pay for equal work."[37] A 2019 survey found that 1 in 5 respondents thought that "the first 10 amendments of the U.S. Constitution are called the Declaration of Independence instead of the Bill of Rights."[38] Maybe part of the Bill of Rights' history is a story about public ignorance of its actual contents.

VI. CONCLUSION

The Bill of Rights is one of those texts that seems to stand for principles as old as the nation. *The Heart of the Constitution* unsettles this assumption. Gerard Magliocca reminds us that the Bill of Rights was not always just one thing—indeed, for a while, it wasn't a "thing" at all. Its name, its recognition as a single, thematically-coherent document, its rise to the status of venerated text were products of history. Magliocca has provided a rich account of the Bill of Rights' place in American culture across two centuries, in this crisp, concise, eminently readable book. One need not agree with every detail of Magliocca's account to

37. *Is There a Constitutional Right to Own a Home or a Pet?*, ANNENBERG PUB. POL'Y CTR. (Sept. 16, 2015), https://www.annenbergpublicpolicycenter.org/is-there-a-constitutional-right-to-own-a-home-or-a-pet/; Matthew Shaw, *Civic Illiteracy in America*, HARV. POL. REV. (May 25, 2017), https://harvardpolitics.com/culture/civic-illiteracy-in-america/.

38. *ABA Survey of Civic Literacy*, A.B.A.: YOURABA (May 2019), https://www.americanbar.org/news/abanews/publications/youraba/2019/may-2019/aba-survey-of-civic-knowledge-shows-some-confusion-amid-the-awar/.

recognize that it is a valuable contribution to our understanding of constitutional history.