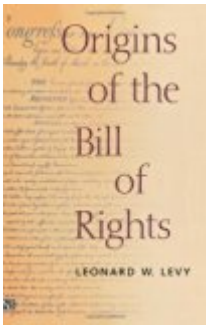
H-Net Reviews
in the Humanities & Social Sciences

Leonard W. Levy. *Origins of the Bill of Rights.* New Haven and London: Yale University Press, 1999. xii + 306 pp. $30.00 (cloth), ISBN 978-0-300-07802-2.



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Published on H-Law (October, 1999)

Synthesizing the Origins of the Bill of Rights

Leonard W. Levy, dean of American constitutional historians, has produced another book on the Bill of Rights, a subject on which, for four decades, he has been prolific, instructive, and controversial. By Levy's own admission, *Origins of the Bill of Rights* draws "heavily" on his earlier writings, although it represents his "first attempt to be systematic and comprehensive concerning the origins of rights" (p. ix).

His attachment to the subject is deep and profound. For him, the Bill of Rights and the Constitution (also protective of rights) represent one of history's noblest themes – "the triumph of individual liberty against government power" (p.12). They remind Americans of "their view that the citizen is the master of the government, not its subject" (p. 194).

The first of the book's twelve chapters – "Why We Have a Bill of Rights" – traces its origins from the first Virginia charter (1606) through the ratification of the U.S. Bill of Rights by the states (1791). To retain their English liberties (embodied in the great liberty documents and the common law), colonial Americans resisted imperial encroachments, while they simultaneously created new rights in their frames of government and charters of liberties. For them, "broad libertarian practices were the rule, not the exception" (p. 3). By 1776, "the dominant theory" in America "was that the fundamental law limited all branches of the government," not just the Crown (p. 24). When Americans broke with England, they drafted new constitutions because the word "constitution" had come to mean "a supreme law creating government, limiting it, unalterable by it, and paramount to it" (p. 8). Beginning with Virginia's Declaration of Rights (1776), several states also drafted declarations of rights as another means of restraining government. The hasty and unsystematic drafting of these declarations bordered on "ineptness." "Those documents which we uncritically exalt, were imitative, deficient, and irrationally selective" (p. 186). The rights omitted "were as numerous and important as those included" (p. 23). Nevertheless, state constitutions and declarations were "the most important, creative, and dynamic constitutional achievements in history" (p. 167).

When the Constitutional Convention (1787) drafted a new constitution to replace the Articles of Confederation (1781), many Americans objected to the Constitution's lack of a bill of rights – a fact that made its ratification difficult. Both sides heatedly debated the question, committing dangerously misleading rhetorical excesses. In some states, ratifying conventions recommended scores of amendments, many of them based upon rights protected in state declarations of rights. These conventions recommended every part of what we now know as the Bill of Rights, except the Fifth Amendment's just compensation clause.

In 1789 James Madison, who had opposed a bill of rights during the Constitution's drafting and until the very end of the ratification controversy, brilliantly and persistently shepherded through the U.S. House of Rep-

resentatives, against much opposition and apathy, seventeen amendments that he was largely responsible for drafting. The Senate adopted twelve of them, of which the states ratified ten. In drafting some clauses, Madison – moved by reasons of "statecraft and political expediency" (p. 32) – was an innovator; in others, what he recommended was commonplace. For his efforts, he deserves to be called "father of the Bill of Rights" (p. 34).

Madison outmaneuvered Antifederalists who wanted Congress to recommend sweeping structural amendments to the Constitution; if Congress did not recommend such changes, Antifederalists desired the calling of a second constitutional convention, which Madison feared might drastically alter the Constitution. His amendments quieted people's fears raised in the debate on ratifying the Constitution and the opposition to the Constitution disappeared.

In Chapters Two and Three, Levy considers the Constitution itself as a bill of rights, focusing on its provisions protecting the writ of habeas corpus and banning bills of attainder. Levy traces the writ's development from its beginnings (predating Magna Carta [1215]), analyzing and discussing the great liberty documents, court cases, and parliamentary statutes. In his *Commentaries on the Laws of England* (1765-1769), the English jurist William Blackstone called the writ "the most celebrated in the English law"; it was issuable at any time to anyone in the king's dominions, superseding other proceedings. Americans used the writ sparingly since imperial authorities restricted its use by vetoing colonial laws incorporating provisions of the Habeas Corpus Act (1679). Moreover, the writ was ineffective against a powerful executive or legislature. Some state constitutions protected it. Although the right is not mentioned in many state constitutions, it is protected through the states' incorporation of the common law.

Bills of attainder (legislation imposing penalties on named persons without due process of law) originated in fourteenth-century England and were used there until 1798. In America, they were rare except during the Revolution, when governments often employed them against Loyalists. Levy discusses Virginia's "notorious" Josiah Philips case (1778) and criticizes, for their roles in it, his two favorite whipping boys –Patrick Henry (a "first-rate demagogue") and Thomas Jefferson (an endorser of outlawry). Several state constitutions and the Northwest Ordinance (1787) prohibited bills of attainder, while the Constitutional Convention (1787) prohibited them without discussion.

Chapters Four and Five cover the First Amendment's establishment and free press clauses. Levy states that a freedom against an establishment of religion has no "superior"; such a freedom belongs in the First Amendment because establishments bring up "historical memories associated with religious persecution" (p. 79). Levy notes that American colonial establishments were different from European ones, which were limited to state support of one church. In America, "an establishment of religion meant government aid and sponsorship of religion, principally by impartial tax support of the institutions of religion, the churches" (p. 101). Therefore, the First Amendment prohibits both state preference for one religion and nonpreferential support for many or all. "Above all the establishment clause functions to protect religion from government, and government from religion" (p. 102).

Levy maintains that, in defining freedom of the press, Americans at first accepted Blackstone's notion of no prior restraints. They too believed that printers could be punished for publishing false opinions and malicious scandals against government. But before 1789 the press, acting as if the law of seditious libel did not exist, was rarely punished. Seditious libel did exist, states Levy, although "the threshold of public tolerance had significantly widened" (p. 123) – a fact the free press clause recognizes.

In chapter six Levy states that the right to bear arms – a right connected to freedom – was treasured in England, where it was both an individual and a collective right. In America, it was the personal right of freemen to protect themselves against lawbreakers, especially since they distrusted standing armies. Therefore, gun ownership was common. Another protection against standing armies was a person's right to serve in a disciplined militia. The Second Amendment's preamble does not refer only to a collective right of individuals. "The right to bear arms is an individual right … even if it is a right that must be regulated" (pp. 134, 149). The Second Amendment also prohibits the national government from destroying state militias.

Chapter Seven treats the Fourth Amendment's right against unreasonable searches and seizures. This ancient right, based upon Magna Carta and the delightful fiction that a man's house is his castle, was not secure before 1776. Colonial opposition to general warrants in the early 1760s, particularly in Massachusetts, was probably the beginning of the American Revolution. At the same time, John Wilkes, the radical En-

glish Whig politician and member of the House of Commons, led the fight in the mother country against general warrants. Framers of state constitutions condemned general warrants, often inserting specific clauses restricting searches and seizures. When Madison proposed the Fourth Amendment, he employed the broadest language, some of it borrowed from state constitutions. But he went beyond state constitutions, using the admonitory "shall not" instead of the ineffectual "ought not" and employing the term "probable cause."

Chapters Eight, Nine, and Ten discuss the Fifth and Sixth Amendments, which declare and protect, respectively, rights against self-incrimination and double-jeopardy, and rights to a grand jury indictment and to a jury trial of one's peers. In England, the right against self-incrimination was "above all ... closely linked to freedom of speech and religious liberty" (p. 201). It was invented by individuals guilty of religious and political crimes. The right grew slowly in America, but it was well known by the mid-eighteenth century, when Americans associated it with Magna Carta and the law of nature. Once such a connection is made, a right "receives genuflection and praise, not critical analysis; and it gets exalted as a fundamental liberty that receives constitutional expression" (p. 202). Madison's clause on the right was broad because, although he was silent about his intent, he sought "to incorporate into the Constitution the entire scope of the common-law right" (p. 181). This meant that the right applied to criminal and civil cases, to the deposition stage, and to the initial questioning stage in a criminal case. Like other Fifth Amendment rights, it was basic to the survival of other "treasured rights."

The right against double-jeopardy goes back to the era of the Bible and ancient Rome. It was accepted in criminal cases (felonies only) by the seventeenth century, both in England and America. Few states, however, inserted the right in their constitutions. By including the right, Madison showed how conscientiously he drafted his amendments. Levy believes the clause was meant to apply to all crimes, not just felonies, but he is uncertain. "The Framers of the Bill of Rights were rarely exact with respect to their intentions and as often as not failed to say what they contemplated or mean[t] what they said" (p. 208).

The double-jury system (under which individuals are indicted or charged with crimes by a grand jury and tried by a trial or petit jury) developed from the inquest used in English law in the era of Henry II. Trial by jury developed first in civil cases and then in criminal ones. By the latter half of the fourteenth century, the practice of a unanimous vote of twelve jurors (in felony cases) had developed; such a vote represented the sense of the community. Jurors were often punished by royal officials for not rendering desired verdicts, but that practice ended with Bushell's case (1670). Most public trials were fair. "The grand jury, like the trial jury, evolved into a bastion of popular rights rather than a crown agent" (p. 219). Grand juries defended individual freedoms, protecting people against unfair and spiteful prosecutions. They stood between the royal prosecutor and the trial jury; representatives of localities, they often criticized government policies.

In America, the jury trial was perhaps the most common right – a particular right of Englishmen. Between 1774 and 1776, Americans frequently asserted this right and criticized Britain for using jury-less vice-admiralty courts. Every state constitution and the Northwest Ordinance (1787) secured the right; the Constitution,itself provided for jury trials in criminal cases. Madison's amendments also called for guarantees of speedy and public trials and jury trials in civil cases. Grand juries were common in colonial and revolutionary America, where they mimicked their English counterparts.

The Eighth Amendment, the focus of chapter elevan, came from the English Bill of Rights (1689). Six state constitutions also copied that liberty document. The relevant provision in the English Bill of Rights was derived from the case of Titus Oates, whose punishment for his involvement in the Popish Plot (1678), was deemed excessive and cruel. Madison's version of the amendment, in which he employed the admonitory "shall not" with respect to punishments, was accepted verbatim by Congress.

Levy finds the notion of non-barbarous punishment as early as the Bible and Magna Carta. The English were proud that their punishments were not as barbarous as European ones; American punishments were even more lenient. Death was an acceptable punishment in England and America, providing the accused received due process of law and the punishment was proportionate to the crime.

Levy declares in chapter twelve that Madison wanted the Ninth Amendment to protect unenumerated rights against endangerment from the enumeration of particular rights. The amendment also avoided the difficult task of a systematic and complete enumeration of rights. The Ninth "is a repository of natural rights, including the right to pursue happiness and the right to equality of

treatment before the law" (p. 254). The commonplace notion of natural rights, of which the pursuit of happiness was one, is crucial to understanding this amendment. The Framers were as committed to this pursuit as they were to liberty and property. The amendment – intended to have vitality – also protects positive rights, such as voting, free elections, and office holding, all of which are also protected in state constitutions and statutes. Levy even maintains that the Ninth was possibly meant to protect rights not yet known.

Has Levy fulfilled his stated purpose? The book is not as "systematic" and "comprehensive" as he seems to intend it to be, but he succeeds admirably in summarizing in vivid and compelling prose his writings on liberty. More than twenty-five rights are embedded in the Bill of Rights. Excepting the right to keep and bear arms, Levy treats only those rights on which he has previously written. He ignores the First Amendment's right to assemble and right of petition clauses and the free exercise clause; the Fifth Amendment's due process and just compensation clauses; and the Sixth Amendment's right to counsel and confrontation clauses. The Third Amendment's prohibition on the quartering of troops receives no mention, even though it demonstrates concern for the sanctity of homes, the protection of property, and the subordination of the civilian to the military – all themes of Levy's other scholarship. Levy omits discussion of some rights found in the Constitution – the prohibition of ex post facto laws and religious tests for office-holding and the narrow definition of treason. Although *Origins of the Bill of Rights* does not consider all rights, it is a lucid and valuable examination of those it does address, and it surpasses all comparable overview studies in its analysis and presentation of the English background.

Levy probably tackled the Second Amendment for the first time in these pages because the amendment and its interpretation concern modern Americans greatly. Neither gun-control advocates nor the National Rifle Association will be happy with his interpretation, while proponents of citizen militias will be outraged. Levy describes the views of militia advocates as "bizarre" and "loony." He lands smack in the middle of the debate, which is probably where, based upon the available historical evidence, he should land. As a true believer in rights, his stance is understandable; the amendment gives individuals the right to keep and bear arms.

That Levy mostly draws together his own writings without doing very much more is further demonstrated by his book's brief bibliography and lack of footnotes. This bibliography, which includes only the work of other historians, has a mere dozen titles, most published before 1980. Levy refers in his text to still other historians; he is generous to the fine work of two of his students, Thomas J. Curry (religion clauses) and William Cuddihy (searches and seizures). The page facing the title page lists more than thirty of Levy's publications and as such it constitutes a second, more significant bibliography. Levy's bibliography of the works of other historians is supplemented by the extensive bibliography found in his *Original Intent and the Framers' Constitution* (New York and London: Macmillan, 1988). Substantial bibliographies also appear in his *Origins of the Fifth Amendment: The Right Against Self-Incrimination* (New York: Oxford University Press, 1968; rev. ed., New York: Macmillan, 1988), and his *Emergence of a Free Press* (New York and Oxford: Oxford University Press, 1985) – the latter a thorough revision and updating of his pathbreaking 1960 study *Legacy of Suprression* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1960).

Although Levy scores both Federalists and Antifederalists for their rhetorical excesses, he is overly harsh about the sincerity of Antifederalist leaders, often dismissing them as demagogues. Many Antifederalist leaders unquestionably preferred sweeping structural changes to the Constitution, but the fears of many others were sincere respecting the document's lack of a bill of rights. The Constitution created a powerful central authority and fear and suspicion of such an authority had deep roots in American history. Revolutionary Americans –influenced by their experience with a powerful central authority (imperial Britain) – insisted on written constitutions and declarations of rights to protect their rights and liberties. Why then should the Constitution not have a bill of rights? Such thinking was part of the Revolution's constitutional heritage, so eloquently praised by Levy.

Levy seems oblivious to the burgeoning literature that looks favorably on Antifederalist contributions to political and constitutional thought. Antifederalists are being taken more seriously; few scholars now dismiss them as intellectually deficient or demagogic "men of little faith." Many were intelligent, complicated, and diverse, representing a variety of interests and positions. Moreover, it is important to understand their thought because their arguments did much to shape Federalist arguments. Antifederalists were the primary shapers of the ratification debates on the Constitution and the Bill of Rights. Levy also seems to be unaware of (or has chosen to disregard) the work of several historians, such as Gor-

don S. Wood, who have convincingly questioned Richard Henry Lee's authorship of the *Letters from the Federal Farmer*.

Nonetheless, *Origins of the Bill of Rights* is an excellent synthesis of a lifetime of scholarship by an unabashed champion of rights and liberties. It is a splendid addition to Professor Levy's bulging bookshelf of monographs and edited works. It gives historians, lawyers, and the general public considerable insight into a document that defines Americans as a people.

Citation: Gaspare J. Saladino. Review of Levy, Leonard W., *Origins of the Bill of Rights*. H-Law, H-Net Reviews. October, 1999.

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