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The People's Forest and Levy's Trees: Popular Sovereignty and The Origins of the Bill of Rights

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Brian C. Kalt

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. 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.

1. Mellon Professor Emeritus, Claremont Graduate School; Distinguished Scholar in Residence, Southern Oregon State College.
2. Assistant Professor-Designate, Michigan State University–Detroit College of Law. Associate, Sidley & Austin, Washington, D.C.
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, 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 "botched constitutional theory" by omitting a bill of rights and then gave reasons for their continued opposition to a bill that were "patently absurd"

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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. 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.

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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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. 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. Led by Lord Coke and others, the Whigs invented a history of liberty from malleable sources such as Magna Carta. 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. 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. 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. 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. “The writ was impotent,” Levy says, “when confronted by an irate legislature.” Although habeas corpus was better respected by the time of the 1787 Convention, the

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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-syllabub, 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

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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. The Bill was not supposed to be just fodder for judges. Admittedly, however, the meaning of the Bill has changed over the centuries. 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, struc-
tural-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 of-
fers us today. This section tries to resuscitate these lessons de-
spite 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 "en-
shrine[s] personal liberties," the protection of which is essen-
tially the government's raison d'être. (pp. 43, 260) An apt de-
scription 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' constitu-
tions 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 re-
minded the People which rights were most important. Mean-
while, 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.\(^1\) 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

\(^1\) 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.\footnote{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 . . . .\footnote{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-
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.\textsuperscript{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.\textsuperscript{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."\textsuperscript{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

\textsuperscript{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.

\textsuperscript{17} See generally Amar, \textit{The Bill of Rights}, ch. 1-6 (cited in note 11).

\textsuperscript{18} U.S. Const., Amend. IX.
provisions. 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]," 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. 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.


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.

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 (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. 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, cd., *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).

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.\(^2\) 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.\(^6\)

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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.\textsuperscript{27}

Levy knows this history, and tells most of it in \textit{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.

\section*{III. CONCLUSION}

Flip to the back cover of Leonard Levy's \textit{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.

\begin{footnote}
\textsuperscript{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.
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LIBERALISM LOST


\textit{Daniel A. Farber}\(^2\)

In his latest book, Stanley Fish attacks liberal political theory in general and First Amendment theory in particular.\(^3\) To read this book is not merely to encounter a critique of liberalism but to confront Fish himself, as a forceful polemical presence. In his earlier writings about literary theory, Fish observed that the reader actively participates in bringing a work to life.\(^4\) In that spirit, what follows is a reader’s encounter with \textit{The Trouble with Principle} and with the “author”—not the real human being whose picture appears on the back cover, but the author who emerges from the text itself.

\textit{Imagine then a room at twilight. A balding man with an intense look sits in a leather chair next to a reading lamp. From the shadows, a voice is heard. As the dialogue proceeds, the shadows gradually darken. (Italicized passages within the dialogue are quotations from The Trouble with Principle.)}

\textbf{Reader:} Hello, Dean Fish. May I call you Stanley? I feel as if I know you, which I suppose in a sense I do, since you’re the

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2. Henry J. Fletcher Professor and Associate Dean for Faculty and Research, University of Minnesota Law School. I would like to thank Jim Chen, Dianne Farber, David McGowan, Mike Paulsen, and Suzanna Sherry for helpful criticisms.
3. “Liberal” here, by the way, refers to philosophical liberalism, which includes everyone from Richard Epstein and Robert Nozick, to Frank Michelman and John Rawls.

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authorial voice I’ve drawn from the text. There’s a lot I agree with in your views: our need to act morally despite unresolvable uncertainties, your call for a pragmatic approach to the First Amendment, and your skepticism that political philosophy can provide much help in resolving hard questions. But I find your prose style a little off-putting—as if I had been cornered at a party by a very interesting person who is also very loud and unrelenting. There’s also a lot of what you say that I find puzzling—which is partly Minnesotan for saying that I strongly disagree and partly a reflection of genuine puzzlement. I thought maybe we could start by discussing the relationship between theory and practice, which is one aspect of your thought that I honestly don’t understand.

Stanley: I’ve always believed that theory had nothing to do with practice. Theory is just the professional practice of theorists, which has nothing to do with the rest of life. The truth is that neither the benefits nor the troubles of professional practices come along with us when we leave their precincts and enter another. (p. 302) So my years of work on Milton changed my Milton scholarship but otherwise were completely irrelevant to my life. True, I was a Milton scholar by profession, but that meant only that I had the kind of understanding [that] qualifies one to be an authority on Milton.... [W]hen I did decide about what Milton believed, the decision led me not to live my life differently than I had before but to interpret Milton differently than I had before. (p. 273)

Reader: You’re speaking in the past tense. Did something change?

Stanley: Yes, not that long ago. My own thoughts... coalesce around a moment in a Milton seminar I taught several years ago. The students were discoursing glibly (as my example had instructed them) about some matter or other—the intricacies of Milton’s verse, or the import of his allusions to Virgil—and I without thinking burst out “No, no, he doesn’t want your admiration; he wants your soul!” Was this a professional comment? ... Had something happened to me of which I was only dimly aware? Was I in danger (or in hope) of no longer being an authority and becoming something else? God only knows. (p. 275)

Reader: I found that a very dramatic, intriguing passage—I’m glad you included it in the book. I do wonder if you’ve worked through its implications completely. Have you noticed any changes in yourself since then?
Stanley: Yes, my speech patterns seem to have changed. As you know, I'm the world's leading Milton expert, but now I can't seem to stop quoting his poetry, even when the subject is something seemingly unrelated like contemporary First Amendment scholarship or liberal political theory.

Reader: As a layperson, I found the references interesting though sometimes difficult to follow. Sometimes, though, bringing in Milton worked wonderfully. For example, I loved it where you compared philosophical inquiry to "Milton's fallen angels who try to reason about fate, foreknowledge, and free will and find themselves 'in wandering mazes lost.'" (p. 63) Very nice!

Stanley: Yes, but my Milton-mania may be a bit out of control. Here's an example. I discuss a First Amendment scholar named Rod Smolla and comment that some of his phrases don't seem to fit the logic of the First Amendment but instead seem to represent meaningless fragments of a different morality. Of course that reminds me of a passage from Milton. Smolla calls to mind a fallen angel. Particularly, the inability of the fallen angels... to produce sentences that do not fall apart in their mouths. Having severed their connection with the only source of value in the universe, they are reduced to saying things like we are "Surer to prosper than prosperity / Could have assur'd us..." (p. 78) Smolla is just as incoherent. It would be as hard put to assign a meaning to "sure" or "prosperity" in Satan's utterance as we are to assign meaning... [to] Smolla's. (p. 78)

Reader: Apart from the fact that you're drawing on Milton, I notice that you seem to verge on demonizing the opposition there. At least indirectly, you seem to be comparing traditional First Amendment scholars and their utterances to Satan. (When I write this up, I wonder if I can work in a reference to Rushdie's Satanic Verses here.) Is the theological comparison apt?

Stanley: The similarity runs very deep, as you can see from Paradise Lost. The First Amendment demands disinterested judgment about the permissibility of speech, but truly disinterested judgment is an impossibility: judgment without partiality—judgment delivered from nowhere and everywhere—is not an option for human beings and is available only to Gods and machines. The strong First Amendment promise is the promise that Satan made to Adam and Eve, that we shall be as Gods... (p. 113)
Reader: But even if they’re wrong, don’t you think that First Amendment scholars might have a reasonable point of view?

Stanley: “Listen to both sides” — what an empty platitude. I know that a lot of people think that the very existence of opponents who are as well-educated and (in most things) as sensible as oneself is a reason for relaxing the aggressiveness of one’s polemical assertions—the logic is “Maybe they know something I don’t know” or “Maybe God knows something neither of us knows”—but if it is a reason for anything, it is a reason for wonder at the persistence of error, even on the part of those who have had all the educational advantages. That there is resistance by well-credentialed persons to your own views is a (regrettable) political fact from which no moral or normative conclusions follows, unless of course among the resisters are some whose words and writings you regard as holy writ. (p. 290)

Reader: Wow, I wish I were that self-confident! Your view of the First Amendment seems to mirror your attitude toward academic debate in an interesting way. I don’t know whether to think that you’re projecting your own adversarial personality on the world at large or whether you’re being admirably coherent in unifying your own scholarly style, your personality, and your general theories. But I’m also not sure how serious you are about this “talking as warfare” thing. You really don’t think you might be able to learn something from a dialogue with those on the other side?

Stanley: The idea of learning something from the other side is one of the fallacies I’ve tried to expose. [N]arrow partialities . . . will always inform the activities of human actors. And by the same reasoning, communication is not a vehicle for harmonizing those partialities—not, as Habermas would have it be, a cooperative venture. Rather, it is a competitive one, and the prize in the competition is the (temporary) right to label your way of talking “undistorting,” a label you can claim only until some other way of talking, some other vocabulary elaborated with a superior force, takes it away from you. (p. 306) By the way, have I mentioned how much I detest Habermas? As far as I am concerned, any positive reference to Habermas in the course of an argument is enough to invalidate it. (p. 122)

Reader: I guess I’ll let Habermas defend himself. Don’t go away, though, I promise not to include any positive references to him in this dialogue. You seem to view communication as ad-
versarial. It’s understandable, given your view of communication, that you don’t believe in the marketplace of ideas.

**Stanley:** The marketplace of ideas is an abomination. It leaves decisions up to everyone and therefore no one. *Because none of us is a god some of us must decide, lest the imperatives of the moral life be given over to forces—called the marketplace of ideas—that are accountable to no one and bound to no vision except the antivision of chance and random fate.* (p. 92)

**Reader:** But shouldn’t people be willing to put their ideas forward to be criticized and assessed? That kind of free debate is what is captured by the marketplace metaphor.

**Stanley:** Free debate isn’t necessarily a bad value, but it’s a value like any other. There is no reason to expect everyone to share it. In fact, it’s mostly a value held by people who don’t have any strong substantive convictions and therefore don’t care much about winning or losing. The world looks quite different to someone with powerful convictions, most notably to the true religious believer. *To put the matter baldly, a person of religious conviction should not want to enter the marketplace of ideas but to shut it down, at least insofar as it presumes to determine matters that he believes have been determined by God and faith. The religious person should not seek an accommodation with liberalism; he should seek to rout it from the field.* (p. 250) Religion can’t really compete in the so-called marketplace with secular ideas because they are based on entirely different ways of looking at the world. *It is a tenet of liberal Enlightenment faith that belief and knowledge are distinct and separable and that even if you do not embrace a point of view, you can still understand it. This is the credo Satan announces in Paradise Regained.* . . . (p. 247)

**Reader (aside):** I gather that one of his objections to free speech is that it’s relativist. As Stanley says somewhere, saying all viewpoints are alike is akin to *the mentality that finds no difference between wearing rings on your finger and inserting rings into your penis.* (p. 28) But I wonder whether requiring a particular actor—the government—to remain neutral is really the same as moral relativism? . . . Enough of substance—back to style!

**Reader:** “*The credo Satan announces in Paradise Regained.*” (p. 247) Old Scratch seems to come up quite a bit in your discussions. (Actually, I’m beginning to wonder whether your position is postmodern or pre-modern.) You were talking about the role of the truly religious, or I assume others with
strong substantive views. (Or do you consider religion to be a special case, as you seem to indicate on pages 296 to 297, where you say religion has the only vocabulary that resists pragmatist deconstruction?) Shouldn't the religious person be willing to live in a liberal society, where religion is not a matter of state mandate?

**Stanley:** That's the last thing that someone with true religious views would want. He should want an end to the public/private split which, by fencing off the arena of political dispute from substantive determinations of value, assures the continual deferral and bracketing of value questions. He should want what Milton wants, a unified conception of life in which the pressure of first principles is felt and responded to twenty-four hours a day. (p. 253)

**Reader:** "[W]hat Milton wants." Didn't you just use the present tense in reference to Milton's views?

**Stanley:** Yes, I guess I did. Slip of the tongue.

**Reader:** Very interesting. Milton does seem to be a real presence in this conversation, doesn't he? I'd bring him in on a three-way call, but I don't think I could pull it off. (And maybe I don't need to "bring him in" anyway.) Anyway, you were speaking about the public/private distinction. What's wrong with it?

**Stanley:** What is not allowed religion under the private/public distinction is the freedom to win, the freedom not to be separate from the state but to inform and shape its every action. (p. 254)

**Reader:** Again, you don't seem very open to the idea of dialogue. I'm interested in your tendency to analyze the world in terms of transcendental battles between radically opposing forces. Isn't some kind of accommodation, rather than battle to the death, a possibility in social life? Even for those like the truly religious, who have powerful viewpoints of their own?

**Stanley:** Here is what truly religious people would demand: not the inclusion of religious discourse in a debate no one is allowed to win but the triumph of religious discourse and the silencing of its atheistic opponents. (p. 261) Religion can't compromise any more than God could compromise with Satan.

**Reader:** So while liberalism purports to be fair, it isn't because it rules out in advance the possibility of a victory by the other side?
Stanley: Fairness! [F]airness—the impartial treatment of all points of view no matter what their substantive content—is the liberal's virtue; it is liberals who wish to push conflict off the public stage in favor of a polite and endless conversation in which everyone has his or her say in the confidence that not very much, and certainly not anything really disturbing, will come of it. (p. 221) But of course, liberals don’t have any real substantive values anyway. Strong believers, however, have another goal. They aren’t concerned that the conversation continue and display the widest possible participation; they want the conversation to take a certain turn and stay there. They don’t want to be fair, they want to be victorious, and they won’t have a chance of victory if they spend their time fighting over title to their opponents’ vocabulary. (p. 221)

Reader: I’m a little confused. Don’t religious believers want fair treatment?

Stanley: They only do if they fall into the trap of liberalism. In the eyes of a democratically reasonable person, what is owed to the strong religious believer is fairness, but fairness is not what the strong religious believer wants; what he wants is a world ordered in accordance with the faith he lives by and would die for, and liberal democracy (or pragmatism) isn’t going to give him that, ever. (p. 298) Fairness is a liberal canard, a philosophy for those whose beliefs are weak.

Reader (aside): This is actually beginning to make liberal theory sound a bit better to me. It sounds to me like, according to Fish, the religious have no real ground of complaint that they can raise within liberalism. In other words, they may have no basis for invoking liberal concepts such as constitutional rights. So the liberal could be right in saying that restricting socially dangerous religious practices doesn’t violate the constitutional rights of participants. In response, the participants can say that they are morally right to act nonetheless and the state is morally wrong to intercede. But what the participants can’t authentically say, while staying within their own worldview, is that their constitutional rights are being violated, because that is a concept that only makes sense within liberalism itself. So in fact, the liberal is right to reject their constitutional claim. But does Stanley really mean what he says about fairness? Let’s test this a little further.

Reader: So you don’t think much of fairness either? You seem to feel that it’s a trap devised by these liberal theorists
whom you are so worried about—a trap you have avoided somehow or another.

Stanley: *Fairness is the virtue that mitigates against winning* (p. 240) That’s what’s wrong with liberalism. *Immorality resides in the mantras of liberal theory—fairness, impartiality, and mutual respect—all devices for painting the world various shades of grey.* (p. 242)

Reader (aside): The reference to “winning” is interesting. Stanley mentions somewhere the idea that liberalism could have a Hobbesian justification, in a world where in fact no one has the power to “win” but everyone has the collective power to “lose” by reducing the world to constant warfare. (p. 109) This sounds to me like a kind of Prisoner's Dilemma game, in which the trick is to devise ways to maintain cooperative strategies. But I suppose it wouldn’t be fair to ask an English professor, even one who has also been a sometime professor of law, to discuss game theory. I must make a note, though, to write up the idea of liberalism as a kind of “tit-for-tat” strategy. How rude of me, though, to keep Stanley waiting while I go off on these tangents.

Reader: Sorry, I was woolgathering. You just said that liberalism was immoral because it was a device for painting the world in shades of gray. I must say that you don’t seem to be prone to fine gradations yourself.

Stanley: Seeing shades of gray merely weakens one for the struggle. *Shades of gray are never honored in the world of John Milton, where the only question is whether you stand in the light with God or in the dark with Satan.* (p. 243)

Reader: Milton, again. Sometimes it seems unclear whether it is our world or Milton’s you are discussing. Are we talking about the 17th century or the dawn of the 21st? Am I talking to him or to you, I almost wonder. Or is it all the same? Anyway, you seem to favor Milton’s view of religion over those of many religious people today. But aren’t there contemporary religious views that are compatible with liberal democracy?

Stanley: You could call them religious, I suppose, in some watered-down sense or another. *To be sure, those religions that put “openness of mind” at the center of their faith—or rather at the center of their rejection of faith—will be welcomed into the political process and accorded a role in American public life, but only because in their stripped down and soft-edged form they are indistinguishable from other Enlightenment projects and are hardly religious at all.* (p. 189)
Reader (aside): Is it problematic that he’s purporting to decide for other people what it means to be religious? This seems to make Khomeni the paradigm religious figure. In that case, it’s no wonder that liberal society can’t really accommodate such people.

Reader: You don’t seem to think that liberalism is capable of tolerating true religion. But that’s the whole point of liberalism, I would think. Isn’t liberalism based on tolerance even of radically different views?

Stanley: Another canard. As I’ve said, liberal theory cannot tolerate real religion. Religions are not tolerant; that’s why they are religions and not philosophical systems. . . . Religious claims do not . . . respect any line between the private and the public. That is why liberalism cannot tolerate them; they violate its religion of tolerance. . . . (p. 297)

Reader: If liberal theory cannot define the limits of tolerance, how is the line to be drawn? Who is to judge?

Stanley: Who is to judge? How about the people whose job it is to judge—judges, administrators, mayors, governors, college presidents—all of those who by virtue of the positions they occupy have been assigned, and have accepted, the task of making decisions even when the lines are not perfectly clear and they are less than infallible. (p. 91)

Reader: You yourself are one of those people, a college administrator. What do you think about campus speech codes?

Stanley: Liberals view hate speech as irrational and therefore a problem to be cured. This is wrong. If you think of hate speech as evidence of moral or cognitive confusion, you will try to clean the confusion up by the application of good reasons; but if you think that hate speakers, rather than being confused, are simply wrong—they reason well enough but their reasons are anchored in beliefs. . . . you abhor—you will not place your faith in argument but look for something stronger. (p. 71)

Reader: So you don’t think education or dialogue would help? These people are just “bad to the bone”?

Stanley: The real question is strategic. Speech codes are a possible strategy. You can ask if in this situation, at this time and in this place, it would be reasonable to deploy them in the service of your agenda (which, again, is not to eliminate racism but to harass and discomfort racists). (pp. 71-72)
Reader: You seem inclined to personalize conflicts, with one side incorporating good and the other, to be fought to death, incorporating evil. It’s not racism which is the enemy, but individual bad people. No wonder you are so angry at those who disagree with you... Actually, I’m still puzzled by the degree of your passion about issues of legal theory. Didn’t you say earlier that it was your view that theory doesn’t matter, outside of the confines of theory itself?

Stanley: “Why am I so vehement about putting theory in its place?”... The answer I would give is a political, not a theoretical one. Although the vocabulary of liberal theory is incoherent and empty (unless filled by the substantive judgments it pushes away) and cannot do the work (of clarifying, ordering, illuminating) claimed for it, it can nevertheless do work; and sometimes that work is, according to my lights, bad. (pp. 290-91)

Reader: Sorry, I’m not sure I get that. Just what is the bad work that liberalism is supposed to do, and which you are battling against?

Stanley: Liberalism frames issues in the wrong way. [T]he point of the theoretical terms that make up strong liberalism—justice, fairness, impartiality, mutual respect, autonomy, and on and on—is to de-emphasize historical considerations in favor of the abstract moral considerations that should always apply, no matter what the configuration and hierarchies of social and political forces. (p. 291) The eye is deflected away from the whole—history, culture, habitats, society—and the parts, now freed from any stabilizing context, can be described in any way one likes. (p. 312)

Reader (aside): I’m not sure what to make of this apparent demand for contextuality and pragmatism. It seems to fly in the face of the whole tone of the The Trouble With Principle, whose critique of liberalism is relentlessly abstract and ahistorical. Maybe inconsistency is a failing too common to be considered a major flaw. Yet his relentless anger at theory does seem at odds with his general belief in its irrelevance, something that is surely worth further probing.

Reader: So your view, then, is that liberalism is deceptive? It persuades people to look at current employment practices like affirmative action without remembering the history of race in this society. (pp. 6-7) Why is it successful in its deception?

Stanley: But why is the sleight of hand successful?, you ask. Why don’t more people see through it? Because it is performed
with the vocabulary of America’s civil religion—the vocabulary of equal opportunity, color-blindness, race neutrality, and, above all, individual rights. (p. 312)

Reader: It seems that you’ve taken quite a battle upon yourself, doesn’t it—Stanley versus the whole of the American civic religion? Is it really possible to change such widespread beliefs through argument?

Stanley: Unclear. Sometimes I don’t think so: It is simply too late in the day to go back. . . . As someone once said, “We already had the Enlightenment and religion lost.” The loss is not simply a matter of historical fact; it is inscribed in the very consciousness of those who live in its wake. That is why we see the spectacle of men . . . who set out to restore the priority of the good over the right but find the protocols of the right—of liberal proceduralism—written in the fleshly tables of their hearts. (p. 262) Even those who should be most at odds with the Enlightenment seem powerless to resist its spell.

Reader: That bit about “the fleshly tables of their hearts” is very neat, by the way. I’ll bet if I were more erudite I would recognize it as a quotation, so it’s doubly effective. Not only is it a great metaphor, but it puts the reader on the cultural defensive. The bottom line, though, is your rejection of autonomy. Apparently, you don’t think people have much control over their beliefs, if you view those beliefs as inscribed in their very flesh.

Stanley: Autonomy, another liberal watchword, is a mirage. If autonomy is compromised by the shaping force of culture, and if consciousness cannot exist without having a shape it did not choose, and if our exposure to shaping forces increases as we get older, then what adulthood and maturity bring is not more but less autonomy, and not less but more indoctrination. (p. 160) Freedom of thought is a nice slogan, but it doesn’t survive rigorous analysis.

Reader: There doesn’t seem to be much room for freedom of any kind in your vision of the world. It’s admirable that you’re able to battle on with such a fundamentally grim perspective on life.

Stanley: The bottom line conclusion is that freedom has always and already been lost. (p. 159)

Reader: Already lost, eh? Just like paradise?

Stanley: Exactly.
The two fall silent. The reading light is turned out, and “Stanley” disappears into the same darkness as the “Reader.”


Stephen B. Presser

Richard Posner is one of my heroes. I mean, the guy has written 23 books, he’s Chief Judge on the prestigious 7th Circuit U.S. Court of Appeals, he was one of the most famous law professors at the University of Chicago, and if he didn’t invent it, he certainly did more to popularize law and economics than any man alive. Perhaps it does not go too far to say that most late twentieth century legal scholarship is really a dialogue with Posner, who has taken on virtually every trendy theory in the legal academy, and found it wanting. He is the foremost exponent of practical reason in our time, and, for most practical purposes, might be viewed as a latter-day Oliver Wendell Holmes, Jr. He is a surprisingly self-effacing man in person, and, if you point out all of his glorious accomplishments, and how much you hold him in awe, he will explain that you are mistaken, that he is really nothing special, as his wife has told him. Mrs. Posner not with-

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2. Raoul Berger Professor of Legal History, Northwestern University School of Law, and Adjunct Professor of Management and Strategy, Kellogg Graduate School of Business, Northwestern University.
5. You’ll have to trust me on this, but he did say it to me when the two of us appeared on the radio program Extension 720, WGN Radio, September 29, 1999, to discuss.
standing, I do find Posner extraordinary. Trying to understand how one person could produce so much, and so much of it of a high caliber, the best I’ve been able to do is free associate on the movies. Perhaps you can remember one of the final scenes in Close Encounters of the Third Kind, when the aliens emerge out of the giant flying saucer. There is one tall, bald alien in the center of them, who is obviously their leader, and who radiates serenity, bemusement, and intelligence. Could something similar be the origin of Posner?

In any event, the task at hand is to review the latest from the judge’s laptop, by way of the Harvard University Press, his new book on the impeachment of President Clinton. The judge’s prior qualities are very much in evidence here. The learning is prodigious—Posner’s analysis is informed by drawing on Clausewitz’s On War, (pp. 13, 148, 250) Shakespeare, (pp. 143, 254) Tolstoy, (p. 264), George Orwell on Salvador Dali, (p. 214) and the notion of “confirmation bias” from cognitive psychology, (p. 216) just to pick a few suggestive examples. The perspective is, as always, Olympian in detachment, and the judge has bon, or perhaps I should say mauvais, mots to hurl at virtually everyone involved in the impeachment imbroglio. The double-entendre in the title, An Affair of State, furnishes the judge more than a little bit of sport, and it is sometimes difficult to tell how seriously we are to take this tome. In the beginning of the book is a list of “Dramatis Personae,” (p. vii) many of whom are barely referred to in the text which follows, and the metaphor of drama is seldom pursued, leaving us to wonder whether Judge Posner believes he is reviewing a comedy, a tragedy, or perhaps a problem play. The judge pauses to explain the meaning of such things as “phone sex” (a form of mutual masturbation, he informs us, citing to the spicy work, VOX, which the President and his nubile paramour, Ms. Lewinsky, shared, (pp. 18, 263)) while, some pages later, he excoriates Kenneth Starr for including so much salacious detail about a cigar in his famed Report. (p. 82)

The Judge seems critical of those who condemn fooling around, and Posner is pleased that the “Affair of State” made Americans much more realistic and open about sex. He appears to applaud the fact that America, if it hasn’t yet become France, has at least moved closer to the kind of mature attitude Posner himself manifested in his Rosenthal Lectures delivered at
Northwestern University, subsequently published as the book *Sex and Reason* (1992). But there is often a disturbing dissonance about the judge's conclusions regarding the impeachment proceedings. For example, while he states that "it is clear beyond a reasonable doubt, on the basis of the public record as it exists today, that President Clinton obstructed justice, in violation of federal criminal law, by (1) perjuring himself repeatedly in his deposition in the Paula Jones case, in his testimony before the grand jury, and in his responses to the questions put to him by the House Judiciary Committee; (2) tampering with witness Lewinsky by encouraging her to file a false affidavit in lieu of having to be deposed, and to secrete the gifts that she had received from him; and (3) suborning perjury by suggesting to Lewinsky that she include in her affidavit a false explanation for the reason that she had been transferred from the White House to the Pentagon,"6 (p. 54, footnote omitted) and while he concludes that the President's criminal conduct, were he anyone else but the President, would have merited a federal sentence of imprisonment from 30 to 37 months, (p. 55) the Chief Judge is curiously of two minds about the impeachment itself.

Thus, in a crucial passage, which is also blurred on the back dust jacket of the book, Posner lays out what he claims to be two feasible, and inconsistent, "narratives" of the circumstances that led to the "Affair of State," and then reaches an impossible conclusion:

[I]n one, [of the two possible "narratives"] a reckless, lawless immoral President commits a series of crimes in order to conceal a tawdry and shameful affair, crimes compounded by a campaign of public lying and slanders. A prosecutor could easily draw up a thirty-count indictment against the President. In the other narrative, the confluence of a stupid law (the independent counsel law), a marginal lawsuit begotten and nursed by political partisanship, a naive and imprudent judicial decision by the Supreme Court in that suit, and the irresistible human impulse to conceal one's sexual improprieties, allows a trivial sexual escapade (what Clinton and Lewinsky

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6. And that's not all, apparently. Posner adds that the President, "may also have tampered with potential witness Currie, conspired to bribe Lewinsky with a job that would secure her favorable testimony, and suborned perjury by Lewinsky by suggesting that she include in her Paula Jones affidavit the 'delivering documents' cover story; but these offenses cannot be proved with the degree of confidence required for a criminal conviction." (p. 54). Nevertheless, according to Posner, "An imaginative prosecutor could doubtless add counts of wire fraud, criminal contempt, the making of false statements to the government, and aiding and abetting a crime." (p. 54)
called “fooling around” or “messing around”) to balloon into a grotesque and gratuitous constitutional drama. The problem is that both narratives are correct. (p. 92, footnote omitted)

But what if everyone but Posner believes that both narratives are not correct? I for, one, think the first narrative is true, while the second is wishful thinking. Here we have what may well be a demonstration of Posner’s Olympian even-handedness and serenity masking a preference for particular values. Perhaps one can concede that the Independent Counsel law was “stupid” or at least agree with the suddenly conventional wisdom that Justice Scalia was right in his sole dissent to *Morrison v. Olsen.*

Even so, I remain unconvinced that Paula Jones’ lawsuit was “marginal” or that the Supreme Court was “naive and imprudent” when it decided the suit could proceed while President Clinton remained in office. I am not at all sure that the “human impulse to conceal one’s sexual improprieties,” if one exists, is “irresistible,” nor, when the married leader of the free world is repeatedly “fellated” (to use Judge Posner’s marvelous past participle (p. 48)) in the Oval Office by a subordinate half his age, and eventually on the government payroll, would I describe it as a “trivial sexual escapade,” “fooling,” or “messing” around.

To take the last point first. Posner assures us that “Clinton’s affair with Monica Lewinsky, [was] an affair intrinsically (that is, as long as it was secret) devoid of any significance to anyone except Lewinsky[.]” (p. 13) But, even if the President was as stunningly boorish as Posner exquisitely proves that he was, wasn’t the affair intrinsically significant to him, as well as Lewinsky, to say nothing of its significance (even if undiscovered) for the President’s relationship to his wife and daughter and for the President’s own purportedly expressed belief that his conversations (up to and including the “phone sex” presumably) were monitored by foreign governments, raising the possibility of blackmail and international intrigue? Posner is able to draw a distinction between public and private conduct and to argue that if the majority of Americans weren’t troubled by the President’s peccadilloes, neither should we be. But a number of us testified before the House of Representatives Judiciary Committee’s

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Subcommittee on the Constitution that the Framers, at least, had a more holistic conception of integrity and virtue and would not have drawn a sharp distinction between private acts and public requirements. For them, virtue was paramount in the office of President, and a President who twisted the law to serve his own ends, as Posner admits this President did, would not have been seen as fit to continue in office. George Washington, who took the oath seriously, would have wanted Bill Clinton, to whom an oath meant nothing, turned out of office.\(^8\)

Nor do I find Posner's other assertions—that the Paula Jones' suit was "marginal" or that the Supreme Court was wrong to allow it to go forward particularly persuasive.\(^9\) Posner repeatedly describes Ms. Jones's lawsuit as one for "sexual harassment"—and one that was a "long shot" at best. (pp. 7, 13, 28, 91, 146, 218) It is true that the suit was eventually dismissed by Judge Susan Weber Wright (p. 141) (a Bush appointee (p. 141), but a Clinton law student, by the way,\(^10\) which Posner does not tell us), but it seems likely that Judge Wright's dismissal of the lawsuit would have been reversed by the Eighth Circuit (as other of her decisions regarding the lawsuit were). Judge Wright's fining the President almost a hundred thousand dollars for contempt suggests that she at least took the lawsuit seriously, and, it should be stressed, the lawsuit is properly seen not as about garden variety "sexual harassment," but rather about abuse of power by the President when he was Governor. Posner never explores the factual allegations of the Jones lawsuit, nor, it appears, has he studied the pleadings, because the suit was one for a federal claim of abridging federal civil rights under cover of law and for a state claim of intentional infliction of mental distress and defamation.\(^11\) Posner is convinced that Ms. Jones suf-


9. I should disclose that I was among the lawyers and academics who signed an amicus brief on behalf of Mrs. Jones's position before the Supreme Court. We were right then, and we're still right.


fered no real harm, (pp. 91, 149) but she claimed that she did, she had voluminous evidence which raised the possibility that Mr. Clinton's conduct toward her was replicated in his conduct toward many other women, and there were reports that the reason the President initially refused to settle the Jones case was his fear that many of those other women would similarly bring suit against him. Can it really be true that Judge Posner believes that the conduct of a Governor who (1) exposes himself to a state employee, (2) urges her to kiss his revealed member, and (3) has a burly state trooper (purportedly familiar with his boss's proclivities) guarding the door and implicitly underscoring the Governor's direction (implied threat?) to remain silent about what happened is inconsequential?

Could it be that Judge Posner's own feelings about the danger of our becoming overexcited about sexual matters is driving his analysis? Is he really "reasonable" where sex is concerned? At one point Posner tells us that "... seriously believing Christians (also seriously believing Jews and Muslims) are more likely than other people to be outraged by sexual misconduct." (p. 66) The implication appears to be that only the extremely religious tend to get upset about sex, and the corollary is that realistic pragmatists like him do not, but has his anti-prudishness made him forget about some of the most important jurisprudential notions, or what our Country is supposed to be all about?

Judge Posner is admirably clear about where he stands. "[N]ormative moral theory, and cognate forms of legal and political theory, have little to contribute to the public life of the nation," he tells us, in language that the framers would have found shocking. (p. 12) Referring to a couple of recent titanic national struggles, Posner explains that "American participation in

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World War II and the Cold War was motivated (primarily any-
way) by national interest rather than by considerations of mo-
rality. Nor is morality central to our politics and attitudes. Freedom and wealth are.” (p. 155) Somehow I think Washing-
ton, Jefferson, Madison, and even Hamilton would have thought that we were about something more. No doubt Posner's single-
minded focus on “freedom and wealth” are part of what gives his writing such clarity and power, but his critics have always won-
dered whether life wasn’t about more than just free individuals pursuing wealth maximization.¹⁴

The American experiment in nationhood was surely con-
cerned with the preservation of freedom, and the protection of the rights of property, but these means were supposed to be in the service of promoting virtue,¹⁵ and advancing morality and re-
ligion, even though, like Posner, most American legal academics appear (I am tempted to say, “blissfully”) unaware of this simple truth. The goal of virtue in our leaders is not one to which Pos-
ner subscribes. (p. 165) “Americans,” he tells us, “have reached a level of political sophistication at which they can take in stride the knowledge that the nation's political and intellectual leaders are their peers, and not their paragons. The nation does not de-
pend on the superior virtue of one man.” (p. 266) Posner thus appears to believe in the gradual evolutionary unfolding of sophis-
tication in the American people's exercise of sovereignty, but I don't believe we've ever surpassed the “political sophistic-
tion” of Hamilton, Madison, and Jay writing in The Federalist,¹⁶ and they were convinced that popular sovereignty could only flourish in America if the President possessed the kind of virtue and integrity that meant that he could be trusted with great power.¹⁷

There is another curious inconsistency in Posner’s views about what we ought to expect of the President, and to what ex-
tent we have a right to inquire into his private life, or to compel him to submit to the Courts in a civil suit. A President, Posner seems to suggest, is really just another regular guy, no different

¹⁴. For the most pungent criticism of Posner on this point see Arthur Allen Leff, Economic Analysis of Law: Some Realism About Nominalism, 60 Va. L. Rev. 451 (1974).
¹⁵. See Presser, Recapturing the Constitution (cited in note 13), and sources there cited.
¹⁶. See, e.g., Hamilton, Madison, & Jay, The Federalist Papers 75-76 (Isaac Kram-
nick ed., 1987), making the point that Clinton Rossiter believed that The Federalist was the “one great American contribution to the world's literature on politics,” and quoting other commentators to the same effect.
from the rest of us. Thus, Posner's summation of what can now be gainsaid about both the President and his detractors from this "Affair of State," is that "We have learned that powerful, intelligent, articulate, well-educated, and successful people who would like us to submit to their leadership whether political or intellectual are, much of the time, fools, knaves, cowards, and blunderers, just like the rest of us." They are "ordinary people, with all the ordinary vices...." (p. 265) In particular, Posner writes that after L'Affaire Lewinsky, it is now "difficult to take Presidents seriously, as superior people, for the same reason that an even greater novel, The Remembrance of Things Past, made it impossible by dint of its riveting detail to take aristocrats seriously as superior people." (p. 266) Proust may not be a particularly good authority for Posner here; Evelyn Waugh for one, believed that Proust never really got close to the real aristocrats in France, and was actually writing about second-raters. But if Posner is right about Presidents, at least, isn't it bizarre for him repeatedly to suggest that a pragmatist (of which Posner claims to be one) should have been able to work out a way for Clinton to be above the law during his incumbency?

"I don't think it is monarchical," writes Posner "to suggest that a President should be entitled to a uniquely generous exercise of prosecutorial discretion in his favor—so generous, indeed, as to excuse him from being prosecuted for criminal behavior committed before or during his term of office that could not reasonably be described as monstrous. Would not the disgrace of being labeled a criminal by a censure resolution be punishment enough for such a lofty figure? The fall from grace is greater, the higher the altitude from which the fall begins." (p. 194) Which is it, then, an "ordinary person," who presumably should be subject to the law, like everyone else, or "a lofty figure," for whom special rules should be applied? More troubling still, Posner's "lofty figure" is supposed to be capable of shame, and the shame is supposed to be punishment, but, as Posner himself understands, Bill Clinton is uniquely incapable of shame.

Or again, perhaps projecting the Posnerian world-view on the American people, the Judge states that Americans are not Kantian in their regard for the rule of law, but rather they are "prepared to allow that a President may be a little above the law,

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that felonies can be excused when they seem the harmless consequence of human weaknesses that should never have been a subject of legal proceedings, that prosecutorial excess can mitigate a defendant's guilt, and that pragmatic considerations should bear heavily on the decision whether to force a President from office." (p. 230) But what if being "a little above the law" is like being a little pregnant? The pragmatic Posner skates a bit too close, for my taste, to dispensing with justice and the rule of law altogether. To be entirely fair to Posner, he does recognize that some chastisement of the President was called for. "[T]he American public, he notes, "wants some punishment for [Clinton's] actions," it wants, he continues, "a balance between the kind of legal rigorism advocated by the Republican critics of the President and the alarmingly free-wheeling 'equitable' or even populist concept of justice advocated by the most extreme of his defenders." (p. 230) Endorsing what he claims the public wants, Posner claims that "[w]e might call that balance 'pragmatism.'" (p. 230) It seems to me, though, that this "balance," purportedly desired by the American people, but clearly preferred by Posner, might just as easily be called "Holmesian legal realism," or "total discretion," or even "tyranny." Is it so clear that there is an acceptable middle ground here? Perhaps it is only a matter of faith or historical tradition, and rigorous argument cannot yield scientific or even pragmatic truth, but perhaps sometimes extremism in the defense of the rule of law is no vice, and moderation in allowing some to be above the law is no virtue.

In the end, the pragmatic Posner is able to conclude that Clinton should not have been made to pay with his job because the Supreme Court erred in allowing Paula Jones to pursue what he regards as an essentially frivolous claim, a claim spearheaded by the President's political enemies. Posner is only able to make that argument because of his belief that the President's peccadilloes were private in nature, without a public dimension. (pp. 148-49) But even Posner himself concedes that he may go too far here. Posner observes that the President's private conduct (in engaging in perjury, obstruction of justice and the slandering of his opponents) was inexcusable, but still one could be a "private monster but a public saint." (p. 173) And thus private conduct should not be allowed to drive a person the American people believe is an effective public official from office. And yet, Posner makes the best argument for obliterating this idea: "But if I am wrong about this [notion that one can separate public
from private character], then the inference from private to public conduct cannot reasonably be confined to cases in which the private conduct is a particularly heinous crime.” (p. 173) As he suspects, Posner is wrong about this, and thus a President who can, with impunity, lie before a judge, a grand jury, and the American people about having sexual relations with “that woman, Ms. Lewinsky,” is uniquely capable of ignoring other legal mandates.

Posner repeatedly blames the Supreme Court for failure to understand that it should not have allowed the Paul Jones lawsuit to proceed, and blames the Independent Counsel Law, (and the Court’s upholding of that law) for the President’s troubles, and by implication for the wrenching “Affair of State,” through which the nation suffered. A Supreme Court bench composed of Justice Posners would not have made that mistake and the President would not have been put in an excruciating position. For after all, “Clinton acted under considerable provocation—perhaps provocation so considerable that few people in comparable circumstances would not succumb—in stepping over the line that separates the concealment of embarrassing private conduct from obstruction of legal justice.” (p. 174) If the Supreme Court had decided the Paula Jones case the other way, Posner assures us, “there would have been no occasion for President Clinton to obstruct justice while he was President.” (p. 218) But this is a post hoc propter hoc fallacy of a kind of which I would have thought Judge Posner, pragmatist or no pragmatist, incapable. The Judge focuses on Paula Jones, and forgets that the Clinton administration has managed to generate more scandals per square inch than any other Presidency since that of U.S. Grant. After all, the Independent Counsel Act may well have been a mistake, but it was the Whitewater investigation, Travelgate, the Rose Law Firm Billing Records, etc. etc. that put Ken Starr in business, not Paula Jones. Lewinsky, who was called as a deposition witness in the Jones case,” only became part of his investigation when it looked as if Vernon Jordan may have attempted to buy Lewinsky’s silence (presumably aiding the President) in the same manner he may have operated as a go-between for Webster Hubbell.”

Had Paula Jones never existed, instead of believing that the President would have never obstructed justice,

19. For the details here see the Starr Report, H.R. Doc. No. 105-310 (Referral from Independent Counsel Kenneth Starr in Conformity With the Requirements of Title 28, United States Code, Section 595(c)).
one might just as easily believe the President would have invented another excuse to do it.

Posner bends over backwards to be even-handed (if I may be forgiven an egregious and twisted mixed metaphor), and it looks to me like he snaps. Take, for instance, his confident assurance that "[o]ne just knows that if the shoe were on the other foot—if everything were the same except that the President was a Republican—the Republicans would have denounced the investigation in the same terms that the Democrats used. And with perfect sincerity." (p. 91, emphasis Posner's) But one just doesn't know that. (Emphasis mine) When Republicans are trapped in scandal, they may denounce investigations, but it's not in the same terms, they don't fight on shamelessly, and instead, guilt-ridden, they resign, as did Nixon, Gingrich, and Livingston. Republicans don't stage defiant pep rallies at the White House after their man is impeached; they slink back home. There are differences between the parties. The Republicans, particularly the House Managers, though they may have been poor tacticians, were fighting for a solid cause grounded in morality and the rule of law, perhaps even against their long-term political interest, while the Democrats, knowing they had no legal case, outrageously pressed claims they knew to be without merit, and played every devious political card in the deck. As Posner puts it, "[The President's lawyer David] Kendall gave no impression of believing what he was saying. [His colleague, Charles] Ruff, the better actor, gave a convincing impersonation of a person who believes what he is saying. The lawyers made the Senate Chamber an echo chamber of the President's untruths." (p. 246)

And so, in the end, I still don't buy into Posner's even-handedness and pragmatism. Perhaps the difference between us is that he's a Circuit Judge, above the fray, a happy and lucky man, in full command of stunning descriptive powers. I read Posner, and I feel a bit like Solieri listening to Mozart. I wish I could deliver such lethal blows to my fellow academics as Posner effortlessly tosses at Clintonphiles Alan Dershowitz, (p. 216) Ronald Dworkin, (p. 238) Bruce Ackerman, (p. 129) or Sean

20. That's what Posner says, anyway; and, in particular, he thinks the House Managers blew it because they were not politically correct enough. Posner believes that it was a mistake for the House Managers to parade before the Senate a large number of Christian White Males, and that they would have done better to be more like the White House, which fielded a team of lawyers including persons who were physically challenged, female, Jewish and Black. (p. 253)
Wilentz (pp. 235-36). I wish I could have, within a year after the event, assimilated thousands of pages of raw data, and produced a highly readable account, which has the virtue of giving each side its due, clearly staking out a position in the middle (albeit an untenable one, I think), and grounding it all in a legal philosophy that, if problematic, is at least brilliantly limned, and of which Holmes would have been envious.

I wish I were as Olympian, but then again, maybe I don’t. Posner is fair enough in his treatment so that the virtue and even the nobility of the impeachment effort can still be discerned, even if it is not highlighted. And Posner’s even-handedness is particularly useful when employed to do things like rescuing Judge Starr from the obloquy to which the Clintonistas subjected him. (p. 69) Still, for Posner, “[a]bout all that can be said is that moral rigorist would be inclined to think that the President committed impeachable offenses, while a pragmatist would lean, though perhaps only slightly, the other way.” (p. 187) But more, much more can be said. I don’t pretend to objectivity here. I was called as an impeachment witness before the House Judiciary Subcommittee on the Constitution by the Republicans, I think they were right,” and I think Henry Hyde, to whom Posner gives rather short shrift, was superb to invoke my testimony as authority in his speech opening the floor debate on impeachment. Said Hyde, quoting Presser, “Impeachable offenses are those which demonstrate a fundamental betrayal of public trust. They suggest the federal official has deliberately failed in his duty to uphold the Constitution and laws he was sworn to enforce.” No hint of Posnerian pragmatism there, just pure Kantian morality and the Rule of Law. It’s good enough for Hyde, and it’s good enough for me. It was right to impeach the President, and he should have been convicted and removed. *Fiat justica, ruat coelum.*

21. In what follows I wallow in the reviewers prerogative of implying that the author should have paid more attention to the reviewers’ work. I also fault Posner for not giving any consideration to the testimony offered by my fellow witnesses Gary McDowell, John McGinnis, and Jonathan Turley, all three of whose efforts suggest Posner is a bit too quick to characterize the academic testimony offered as shallow. (p. 218) See generally the pieces cited in note 8.

22. See, e.g., p. 208, where Posner accuses Hyde of hypocrisy in defending Oliver North’s obstruction of justice and attacking Clinton’s. Posner gives the impression of believing that Hyde is an insufficiently pragmatic Puritan and an unthinking zealot. I disagree. I think Hyde showed considerable courage in battling against insurmountable political odds, particularly in the Senate, where the deck was clearly stacked against him.