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Review, Inherent Rights, the Written Constitution, and Popular Sovereignty: The Founders' Understanding

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narrow legal understanding of free speech rights. In the case of search and seizures, fairly broad legal assertions coexisted with a practical tendency to construe the right narrowly when necessary to fight the British. Thus, a problem exists deciding the extent to which a provision should be interpreted consistently with existing legal arguments or existing practice. Political scientists will fund in the text further evidence that textual declarations of rights do not provide an adequate guide to political practice. Second, Levy frequently observes that for various reasons, rights provisions in constitutions were sloppily drafted. State constitutions apparently contained a random set of rights, including some and excluding others for no apparent reason. *Origins* claims that the "task" of writing those documents" was executed in a disordered fashion that verged in ineptness" (p. 186). The Bill of Rights, owing perhaps to its low priority among many framers, similarly contains sloppily drafted provisions. In many cases history makes very clear that the framers did not mean what the clearly said. "The Framers of the Bill of Rights," Levy notes, "were rarely exact with respect to their intentions and as often as not failed to say what they contemplated or mean what they said." Although the Fifth Amendment speaks of "jeopardy of life or limb," this should not be interpreted as "authoriz[ing] tearing people part as a punishment for crime" (p. 208). this and other instances of poor draftsmanship suggest that constitutional scholars should not parse words too carefully on the assumption that word choices in 1787 actually meant something very precise.

Origins is hardly the definitive word on the Bill of Rights. The lack of citations will frustrate scholars looking to build on Levy's work. Political scientists and others may question Levy's celebratory approach to the Bill of Rights, given his recognition that legal declarations of right in 1787 (and at present) often apparently bear little relationship to practice. Indeed, while Levy scorns the Federalist claim that a Bill of Rights was unnecessary, history does provide some evidence that such provisions are least useful when they are most needed. Fruitful debates in American constitutionalism have been going on while Levy has been pursuing his studies in proud isolation. As Levy has vastly improved those debates, so those debates might have helped him as well. If, for these reasons, his work should not be considered the last word on American constitutionalism, *Origins* and earlier volumes still ought to be considered the first.

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THOMAS B. McAFFEE, *Inherent Rights, the Written Constitution, and Popular Sovereignty: The Founders' Understanding.* Westport, Conn.: Greenwood Press, 2000. xii, 190 pp. $65.00.

In this short and carefully focused study Thomas McAffee critically examines a historical claim common in American constitutional scholarship. That is the assertion that the enactment of the Constitution of 1787 was understood by its creators to be consistent with the judicial enforcement of fundamental natural rights nowhere enumerated or described in its text. This idea, sometimes phrased as an argument for an "unwritten constitution," has obvious implications for the function of courts in constitutional judicial review. McAffee's conclusion, amply documented, is that whatever the contemporary desirability of such wide judicial authority, the "unwritten constitution" has very little support in historical fact.

The position criticized in this book has more than one form. It is sometimes suggested that the creation of the Constitution was not meant to displace a supposed pre-existing judicial power to enforce fundamental rights.[1] In other versions the enforcement of unenumerated rights is claimed to be authorized by the constitutional text itself. Such arguments cite variously the "necessary and proper" clause of Article I, the Tenth Amendment or, most prominently, the Ninth Amendment.[2] McAffee marshals the evidence against these claims by a careful parsing of the historical record associated with the adoption of the Constitution. He focuses particularly on the debates surrounding the provisions specially invoked. He similarly casts doubt on the relevance of a series of Confederation-era cases sometimes claimed to exemplify a practice of judicial enforcement of unwritten natural rights in the teeth of contrary positive law.

McAffee readily agrees that fundamental natural rights played a vital part in the founders' philosophy. But he insists that, by the time the national constitution was enacted in 1787-89, there was a widely held consensus that the protection of those rights would emerge out of the project of writing a positive law constitution defining strictly limited governmental powers. He stresses the founders' frequently expressed insistence on the plenary authority of "the people" to make and unmake any government whatsoever and the tension between that notion and the idea of rights superior to the exercises of power granted by the constituent act.

The book presents a coherent and persuasive reconciliation of the constitutional enactors' simultaneous commitment to fundamental rights and positive law constitutions. Central to this analysis is the special character of the federal Constitution as one of limited and defined powers. Thus it was agreed that most *state* constitutions were properly interpreted as providing a general grant of legislative authority. In such cases it was reasonable to presume that no rights were immune from such broad state powers and some explicit reservation would be necessary. Even in that case, however, the uncertainty over the legal force of such rights caused the writers of early state constitutions to phrase their declarations of rights in hortatory terms in contrast to the mandatory language they used for the structural provisions.

The Federalist claim that the new government was—unlike other governments—strictly confined to the powers granted is the central element in McAffee's account of the founders' attitude toward unenumerated rights, as well as the intended meaning of the Ninth and Tenth Amendments. If the new national government were, like the state governments, vested with undefined general powers, it would follow that the activities understood to be the object of natural rights would be vulnerable to limitation. It was exactly that fear that stimulated the Antifederalists' objection to the omission from the 1787 Constitution of a provision similar to Article II of the Articles of Confederation. That article had stated that all powers not "expressly delegated" to the national Congress were left in the people and in the state governments. If that interpretation of the Constitution were correct, there would be a need for an express reservation of rights, as they would otherwise have been surrendered into the hands of the new leviathan which explicitly was to be supreme over state law.

The Federalist response was on exactly the same grounds. The protection of rights by express reservation was superfluous with respect to a government like that proposed—one with defined as opposed to plenary authority. In "a government like the proposed one," James Wilson insisted "the people never part with their power" (p. 160). Indeed, any specification of rights presupposed some power to limit them and placed the overarching structural protection in jeopardy. Hence

the resulting solution—an express declaration of some rights along with cautionary rules of construction in the Ninth and Tenth Amendments.

The evidence McAffee presents for this focus in the constitutional debate—one shared by Federalists and Antifederalists—is overwhelming, and it is in tension with the conclusion that the constitutional enactors provided for, or assumed, the legal (judicial) enforceability of unwritten fundamental rights. It shows that such rights were profoundly important to the founders but that they agreed that the critical issue on which their protection turned was the character of the new national government. There would have been little point in such a debate, nor in the particular resolution chosen, had those rights been understood to be directly enforceable by the courts.

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GAIL WILLIAMS O'BRIEN, *The Color of the Law: Race, Violence, and Justice in the Post-World War II South.* Chapel Hill: University of North Carolina Press, 1999. xiii, 334 pp. $45 (hardback). $18.95 (paperback).

At first glance, a reader might question the sweeping title selected for Gail O'Brien's study of a series of racial confrontations in a single community, but her masterful analysis more than justifies the title. Like the best studies of American violence, O'Brien's books uses an outbreak of racial conflict to explore power relations that undoubtedly characterized everyday life in numerous southern communities, especially as experienced through the criminal justice system.

In the opening chapter, O'Brien documents in telling detail the 1946 events that became known as the "Columbia, Tennessee, Race Riot." The trouble began with the arrest of a black veteran after he fought with a white veteran over the price of repairing a radio. When a mob of white residents threatened lynch law, the local sheriff released the arrested man to leaders of Columbia's African-American community, who spirited him out of town. When police then tried to enter the black section of town, four of them were shot, leading to the dispatch of state highway patrolmen who went on a rampage, destroying property and beating many of the more than one hundred African Americans placed under arrest. Two days later highway patrolmen killed two black prisoners who allegedly grabbed weapons while in a jail office. Twenty-five African Americans were subsequently tried on charges related to the shooting of the Columbia policemen, but an all-white jury in another town found twenty-three defendants not guilty. (The two convictions were later overturned on appeal.) As the first significant racial conflict after World War II, the Columbia "riot" and its aftermath attracted national attention. Seeking to avoid the pattern of anti-black violence that followed World War I, the NAACP marshaled a publicity campaign and supplied attorneys for the mass

1. E.g., Suzanna Sherry, "The Founders' Unwritten Constitution," *University of Chicago Law Review* 54 (1987): p. 1127.

2. E.g., Gary Lawson & Patricia B. Granger, "The 'Proper' Scope of Federal Power: A Jurisdictional Reading of the Sweeping Clause," *Duke Law Journal* 43 (1993): p. 267; Norman G. Redlich, "Are There Certain Rights . . . Retained by the People?" *New York University Law Review* 27 (1962): p. 787; Randy E. Barnett, "Reconceiving the Ninth Amendment," *Cornell Law Review* 74 (1988): p. 1. McAfee's previous published work has already impressively demonstrated the limited purpose of the Ninth Amendment. See McAffee, "The Original Meaning of the Ninth Amendment," *Columbia Law Review* 90 (1990): p. 125.