The Origins of the Bill of Rights

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RIGHTS, as the legal philosophers say, trump all other claims and values. Everybody these days has rights, and not just humans; animals have rights, and maybe even trees have rights. Not all these rights have constitutional protection yet, but many of them do; and in so far as they do, that protection comes from the Bill of Rights—the first ten amendments to the Constitution—and from the Fourteenth Amendment through which the Bill of Rights was gradually extended during the past two generations to encompass the state governments as well as the federal government.

We Americans have always been rights conscious, but we have not always been conscious of the Bill of Rights. It is really only in the twentieth century that the Bill of Rights has assumed the constitutional significance we now attribute to it—appropriately so, as governmental power, at both the federal and state levels, has become stronger and more intrusive than ever before in our history. Since the power of the national government was so weak during the first century of our history, we paid little attention to the Bill of Rights. Although there was a hearty centennial celebration of the Constitution in 1887–88, there was apparently little notice taken of the Bill of Rights in 1891. Discovery of the importance of the Bill of Rights had to await the sesquicentennial celebration in 1939–41, at which time the three original states—Massachu-

This paper, in slightly different form, was given at the annual meeting of the American Antiquarian Society held on October 16, 1991.

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setts, Connecticut, and Georgia—that had never ratified the Bill of Rights finally did so.

Because our interest in the first ten amendments is of such recent origin, one is naturally curious about how the Bill of Rights got added to the Constitution in the first place. Certainly Americans of the Revolutionary era, much as we are today, were interested in their rights, but most of the delegates in the Philadelphia Convention did not believe that these rights ought to be specified and attached to the Constitution. In fact, the Convention had scarcely discussed the matter. As James Wilson said, a bill of rights had 'never struck the mind of any member,' until George Mason, author of the Virginia Declaration of Rights of 1776, almost as an afterthought in the last days of the Convention brought the issue up, when it was defeated by every state. Even what semblances there were in the Constitution of a bill of rights, such as the prohibition in Article I, Section 9, on the Congress's enacting bills of attainder and ex post facto laws, had been opposed by some delegates as irrelevant and useless provisions that would only bring 'reflexions on the Constitution.'[1] Most of the Federalists, as the supporters of the Constitution of 1787 were called, including the father of the Constitution, James Madison, initially believed that a bill of rights would be dangerous both to the new national government and to individual rights. Indeed, much of their theoretical understanding of the new constitutional system came out of their need to explain the irrelevance of a bill of rights to the national government. But the opponents of the Constitution, or the Anti-Federalists, soon found that the Constitution's lack of a bill of rights was the best and most politically potent argument they had against the document, and they used it with great effectiveness in the ratifying conventions. Ultimately, however, it was the Federalists and particularly James Madison who led the fight in Congress to add amendments to the Constitution;

1. Wilson, in John Bach McMaster and Frederick D. Stone, eds., *Pennsylvania and the Federal Constitution, 1787–1788* (Lancaster, Pa., 1888), p. 253; Wilson, in Max Farrand, ed., *The Records of the Federal Convention of 1787* (New Haven, 1911, 1937), II, 376.

and it was the Anti-Federalist leaders who ended up opposing the Bill of Rights.

Consequently, in light of these shifts, fluctuations, and reversals the eventual addition to the Constitution of the Bill of Rights in 1791 was anything but natural, purposeful, and orderly; indeed, the adoption of the Bill of Rights, the bicentenary of which we are celebrating this year, was so fortuitous, so confused, and so inadvertent that it can only be regarded as a striking example of those many historical events whose monumental significance comes to transcend their petty and haphazard origins.

It all began, as much of our history did, in England. It is not very fashionable these days to talk about the contributions of Western Europeans to American culture, but in the case of our Bill of Rights we owe most of its importance to our English heritage. The English had a Bill of Rights long before ours of 1791. Indeed, they have just completed celebrating the tercentenary of their Bill of Rights of 1689, from which the name of our first ten amendments to the Constitution is derived. This indebtedness for our sense of rights to the English forebears of America is not without its irony, for among the nations of Western Europe at present Great Britain is probably the one with the least constitutional protection of individual rights against the power of government. In fact, many Britons concerned with individual liberties today look longingly at America with its written constitution, Bill of Rights, and judicial review as an ideal model for changing their own constitution. Although the English share a common legal and libertarian heritage with us, they certainly do not allow individuals the freedom from governmental restraints that we Americans do. One only has to compare the different ways Americans and the English treat the issue of freedom of speech and the press to realize the extent to which our right to say and print more or less what we want in defiance of the government exceeds that of the English. For example, the British Race Relations Act, which forbids speech that inflames racial hatred, would undoubtedly be declared unconstitu-

tional by our courts. Of course, as the English are quick to point out (and as Tocqueville noted long ago), we Americans have other private and more subtle but no less powerful ways of curbing speech and print than by governmental statute. So that despite their legal and public prohibitions, in their private affairs the English permit many more eccentric and outrageous expressions of opinion on race relations and other sensitive matters than we Americans do. Still, the fact remains that we Americans enjoy a greater degree of personal freedom from governmental power than the English or any other people. Indeed, it seems at times that we have only private rights and little sense of a public or general will. Certainly no other country in the world places the kinds of constitutional limits we have placed on the power of the whole community to make laws against the private rights of its citizens. And no other country grants its judiciary such responsibility and power to protect these rights from the law-making authorities as we have done. The American governments are limited in ways that the British government is not.

It is not just that we Americans have a written constitution and the British do not. Not only is much of our constitutional business, including the practice of judicial review, a product of unwritten custom and convention, but the British constitution contains many written documents, including the Bill of Rights of 1689, that are just as specifically codified as the American Bill of Rights of 1791. It is not just written or unwritten constitutions that separates the British from the Americans; the separation runs deeper than that. American rights are not merely the rights of the people against the power of the government; they are the rights of individuals against the power of the people themselves. Such rights set against the will of the whole society have given a permanent individualist cast to our law and our constitutionalism—much more so than the English law and constitutionalism from which ours are derived.

The origins of the Anglo-American idea of rights reach back deep into the medieval past of England. More than any other

European people, the early English had a strong sense of their personal liberty and property—a sense that was embedded in their common law. The common law had deeply-held principles including, for example, the notions that no one could be a judge in his own cause and that no one, even the king, could legally take another's property without that person's consent. These rights and liberties belonged to all the people of England, and they adhered in each person as a person. Their force did not depend on their written delineation; they existed in the customary or unwritten law of England that went back to time immemorial.

Against these ancient rights and liberties of the people were set the rights and privileges of the king, usually referred to as the king's prerogatives. These prerogatives or royal rights to govern the realm were as old and sacred as the privileges and liberties of the people. In that distant medieval world the king had sole responsibility to govern—to provide for the safety of his people and to see that justice was done between them. Much of the king's government was carried out in the king's courts through the enforcement of the law common to those courts and to the realm; hence the development of the term common law. The king's highest court of all—parliament—arose sometime in the thirteenth century and was composed both of the feudal nobles that eventually became the House of Lords and of agents from the boroughs and counties of the realm that eventually became the House of Commons. Unlike the modern English parliament this medieval predecessor was convened by the king only sporadically and as yet did not have any direct responsibility for governing the country. Instead, its responsibility was mainly limited to voting supplies to the king to enable him to govern, presenting petitions to the king for the redress of popular grievances, and correcting and emending the common law so as to ensure that justice was done. This correcting and emending of the law was not regarded as legislation in any modern sense, for medieval men thought of law not as something invented but as something discovered in the customs and precedents of the past. The modern idea of law as the command of a

legislative body was as yet inconceivable; indeed, law was equated with justice, and its purpose was to protect the rights of people.

Thus the king had his rights to govern, and the people had their equally ancient and equally legitimate rights to their liberties and their property. Indeed, it is perhaps not too much to say that the whole of English constitutional history can be seen as a struggle between these two competing sets of rights. Because the king in trying to fulfill his responsibility of governing the realm often infringed upon the customary rights of the people, Englishmen periodically felt the need to get the king to recognize their rights and liberties in writing. These recognitions in the early middle ages took the form of coronation oaths and assizes and charters issued by the crown. In 1215 the barons compelled King John to sign what became the most famous written document in English history—the great charter or Magna Carta. In it the king explicitly acknowledged many of the customary rights of the English people, including the right of a freeman not to be imprisoned, exiled, or executed 'unless by the lawful judgment of his peers, or by the law of the land.'

The succeeding centuries of English history saw more struggles over rights and more attempts by the English people to place limits on their kings. These struggles came to a climax in the seventeenth century. When in 1627 King Charles I attempted to raise money by forced loans, five English knights resisted, and Charles had the resisters arbitrarily imprisoned. This in turn led to the popular reinvocation of Magna Carta and the reiteration of the rights of a subject to his property and to no imprisonment without the legal judgment of his peers. In 1628 the House of Commons presented these grievances in a Petition of Right which the king was compelled to accept.

Yet this hardly resolved the conflict between the rights of the king and the liberties of the people. Only after a bloody civil war and one king had been beheaded and another driven from his throne was the struggle between king and people finally settled in the Glorious Revolution of 1688–89. In 1688–89 the convention-

parliament set forth a Declaration of Rights that quickly became enshrined in English constitutionalism. In this listing of rights, which became a statute or a Bill of Rights when the new king William III approved them, parliament declared illegal certain actions of the crown, including its dispensing with laws, using prerogative power to raise money, and maintaining a standing army without the consent of parliament. At the same time parliament asserted certain rights and freedoms possessed by Englishmen, including the right to bear arms, to petition the king, to have free elections and frequent parliaments in which speech would be free, and to have no excessive bail or fines.[2]

It is important to understand that this delineation of rights in 1689 was an act of parliament consented to by the king. The English Bill of Rights was designed to protect the subjects *not* from the power of parliament but from the power of the king. The only threat to the subject's liberty was thought to come from the crown; parliament was thought to be the bulwark and guardian of the people's rights and liberties and did not therefore need to be limited. Consequently there were no legal or constitutional restrictions placed on the actions of the English parliament; and there are still none today, which makes the English parliament one of the most powerful governmental institutions in the world.

So convinced were Englishmen in the decades following 1689 that tyranny could come only from a single ruler that they could hardly conceive of the people tyrannizing themselves. Once parliament became sovereign, once the body that represented and spoke for them—the House of Commons—had gained control of the crown authority that had traditionally threatened their liberties, the English people lost much of their former interest in protecting their personal rights. Charters defining the people's rights and contracts between the people and government no longer made sense if the government was controlled by the people themselves. By the time of the American Revolution most educated English-

2. Lois G. Schwoerer, *The Declaration of Rights, 1689* (Baltimore, 1989).

men had become convinced that their rights existed only against the crown; against their representative and sovereign parliament, which was the guardian of these rights, they existed not at all.

In the 1760s and 70s during the crisis that eventually tore apart the British empire, the American colonists had this long English heritage of popular rights to draw upon. Like all Englishmen, they were familiar with the persistent struggle of the English people to erect written barriers against encroaching power. 'Anxious to preserve and transmit' their rights 'unimpaired to posterity,' the English people, declared a Connecticut clergyman in 1775, had repeatedly 'caused them to be reduced to writing, and in the most solemn manner to be recognized, ratified and confirmed,' first by King John, then Henry III and Edward I, and 'afterwards by a multitude of corroborating acts, reckoned in all, by Lord Cook, to be thirty-two, from Edw. 1st. to Hen. 4th. and since, in a great variety of instances, by the bills of right and acts of settlement.'[3] Their own colonial past was just as full of written documents delineating their rights. From the 'Laws and Liberties' of Massachusetts Bay in 1648 to New York's 'Charter of Liberties and Privileges' in 1683, the early colonial assemblies had felt the need to acknowledge in writing what William Penn called 'those rights and privileges ... which are the proper birth-right of Englishmen.'[4] In fact, the colonists often claimed rights and privileges that, as James Logan of Pennsylvania complained in 1707, were 'unknown to others of the Queen's subjects.'[5] New York's 1683 charter, for example, claimed not only the usual rights of trial by jury and no taxation without consent but also the freedom of conscience in religion and the right of married women to have their property sold or conveyed only with their written consent.[6]

3. Moses Mather, *America's Appeal to the Impartial World* ... (Hartford, 1775), pp. 8–9.

4. William Penn, *England's Present Interest Considered* (1675), in Philip B. Kurland and Ralph Lerner, eds., *The Founders' Constitution* (Chicago, 1987), 1, 429.

5. Logan, quoted in James H. Hutson, '"A Nauseous Project,"' *Wilson Quarterly* (Winter, 1991), 57.

6. The New York Charter of Liberties and Privileges (1683), in Merrill Jensen, ed., *English Historical Documents: American Colonial Documents to 1776*, IX (New York, 1955), 228–32.

As government and law stabilized in the eighteenth century, however, the need in the colonies for these sorts of explicit codifications of rights declined just as they did in the mother country. But the Englishman's instinct to defend his rights against encroachments of governmental power was always latently present and was easily aroused. And getting the ruler to recognize these rights on paper was part of that instinct. By the time of the imperial crisis it was natural for colonists like Arthur Lee of Virginia to call in 1768 for 'a bill of rights' that would 'merit the title of the *Magna Carta Americana*.'[7]

By the eve of the Revolution the colonists' charters that the crown had granted to them in the previous century had come to be seen as just so many miniature magna cartas. They had become transformed into what, 'from their subject matter and the reality of things, can only operate as the evidence of a compact between an English King and the American subjects.' These charters, continued Joseph Hawley of Massachusetts, were no longer franchises or grants from the crown that could be unilaterally recalled or forfeited: 'Their running in the stile of a grant is mere matter of form and not of substance.' They were reciprocal agreements 'made and executed between the King of England, and our predecessors,' contracts between ruler and people, outlining the rights of each but particularly the rights of the people.[8] Like Magna Carta, these charters were the evidence, not the source, of the people's rights.

Not only did this idea of a contract between ruler and people explain the obedience of the people to the prerogatives of the crown, since unlike acts of parliament consent was not involved, but it also helped to make sense of the Americans' notion, widely attained by 1774, that the people of each colony were distinct subjects related solely to the crown in a 'private bargain' to which

7. Lee, quoted in Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, Mass., 1967), p. 189.
8. Hawley, in Worcester *Massachusetts Spy*, Apr. 6, 1775.

the British people and their parliament were 'total strangers,' even though 'they have in some instances strangely intermeddled.'[9]

Throughout the debate of the 1760s and 70s most Americans never accepted the British claim that parliament was in any way the creator or defender of their rights; for parliament was the source of the unconstitutional taxation and much of the tyranny they were resisting. Hence the logic of the Declaration of Independence, which never mentioned parliament by name and declared independence only from the king, was present from the beginning of the crisis. Ultimately, by declaring independence from Great Britain in 1776 the American had to abstract their rights and liberties from British institutions and law. If their rights were to be truly inalienable and immutable, then they could no longer rest on their being English and on what had been; they now had to rest on their being natural and on what ought to be.

When in 1776 the Americans rid themselves of the hated British crown and began drawing up their new state constitutions, many of them were not sure that they needed any separate declaration of rights anymore. After all, with the elimination of prerogative powers and the radically weakened executives, the much strengthened assemblies that presumably spoke for the people no longer felt the former pressing need to write out the people's rights. Thus only five states in 1776—Virginia, Pennsylvania, Maryland, Delaware, and North Carolina—prefaced their revolutionary constitutions with bills of rights, though four others guaranteed certain common law liberties in the bodies of their constitutions. Some of these declarations of rights combined ringing statements of universal principles, such as all men being by nature free and independent, with motley collections of common law procedures, such as restricting search warrants and prohibiting excessive bail.

Yet so confused and partial were these various declarations of rights that one modern scholar has accused these state constitu-

9. Boston *Massachusetts Spy*, Feb. 23, 1775, quoted in Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (Chapel Hill, 1969), p. 270.

tion-makers of 'careless' drafting and 'shoddy craftsmanship' because they 'inexplicabl[y]' omitted from their declarations many rights that we have come to consider important, including freedom of speech and protection against double jeopardy.[10] Such a present-minded judgment is surely anachronistic, for the constitutional drafters in 1776 were not even certain that they needed any bills of rights, and if they did, they were not yet clear against what part or parts of the government they ought to aim them—whether, as in England, only against the executive, or as well the popular representative legislatures. Although Albermarle County in Virginia admitted in 1776 that the state's new 'Bill of Rights will be an honorable monument to the memory of its compilers,' it still seemed evident to the country 'that the true sense of it is not generally understood.' For what was really needed was 'a proper and clear line . . . drawn between the powers necessary to be conferred by the Constitution to their Delegates, and what ought prudently to remain in their hands.'[11] Yet the English Bill of Rights had delineated the people's rights only against the prerogative or executive power of the crown, not against parliament which presumably represented the people and was the guardian of their rights. Did the American people need to protect their individual rights from the power of their own representative legislatures, that is, from themselves? The loyalists had thought so, but most American patriots had scoffed at the idea. It was illogical, said John Adams in 1775: 'a democratical despotism is a contradiction in terms.'[12] Nevertheless, Americans had witnessed what parliament had done to their rights and some of them, at least, were fearful, as Jefferson put it in his *Summary View* of 1774, 'that bodies of men as well as individuals are susceptible of the spirit of tyranny.'[13]

10. Leonard Levy, 'Bill of Rights,' in Jack P. Greene, ed., *Encyclopedia of American Political History: Studies of the Principal Movements and Ideas* (New York, 1984), I, 122.

11. Albemarle County Instructions concerning the Virginia Constitution (1776), Julian P. Boyd et al., eds., *The Papers of Thomas Jefferson* (Princeton, 1950–), VI, 286.

12. John Adams, 'Novanglus,' in Charles F. Adams, ed., *The Works of John Adams* (Boston, 1850–56), IV, 79.

13. Thomas Jefferson, *A Summary View of the Rights of British America* . . . (Williamsburg, 1774), in Boyd et al., eds. *Papers of Jefferson*, I, 124.

Consequently, five states in 1776—Pennsylvania, Delaware, New Jersey, North Carolina, and Maryland—actually glimpsed that legislative encroachment on the people's rights might be as likely as executive encroachment and tried to erect paper barriers around the people's liberties that even majorities in the popular legislatures could not overleap. But as long as the constitutions and the bills of rights were created by the very legislatures they were supposed to circumscribe, these paper barriers proved to be vulnerable to repeated tampering and violation by the legislatures.

By the 1780s the popular assemblies in all the states were overriding the rights of individuals in a variety of ways, and many Americans despaired of finding mechanisms to control rampaging state legislatures that spoke in the name of the people. In fact, some Americans like James Madison came to perceive that the real problem of American politics was not bodies of men in the legislatures that acted in defiance of the will of the majority of the people, but rather truly representative legislatures that acted in accord with the will of the majority of the people. Democratic despotism, it seemed, was possible after all.

The new federal Constitution drafted in 1787 was designed in part to limit these state legislatures, both by granting new powers to the elevated national government and by forbidding the states from certain actions in Article I, Section 10. Since the members of the Philadelphia Convention that drew up the Constitution were worried about the abusive power of the *states*, not the national government, they had no intention of adding to the Constitution a bill of rights that would restrict the power of the national government. When it was proposed in the Convention every state voted it down. Most of the delegates believed that the national government's powers were of such a general nature that they would touch only upon the rights of the states and not upon the rights of individuals; besides, some thought that the people's rights were already protected by the state constitutions.

But the idea of a bill of rights was too deeply embedded in the Americans' consciousness to be so easily passed over. George

Mason and other opponents of the new Constitution immediately stressed the absence of a bill of rights as a serious deficiency of the new Constitution, and its opponents, or Anti-Federalists, soon came to realize that this deficiency was the best argument they had against the Constitution. Consequently, the Federalists were compelled to justify their omission of a bill of rights; and in doing so they were forced to develop their thoughts about the nature of the government they had created. Indeed, much of the new and original contributions that Americans of 1787–88 made to political theory came out of this need to explain the Constitution's lack of a bill of rights.

Because the Federalists believed that the frenzied advocacy of a bill of rights by the Anti-Federalists masked a basic desire to dilute the power of the national government in favor of the states, they were determined to resist all efforts to add amendments. Over and over again they said that the old-fashioned idea of an English bill of rights had lost its meaning in America. A bill of rights, they said, had been relevant in England where the ruler or king had rights and powers distinct from those of the people; there it had been used, as in the case of Magna Carta of 1215 and the Bill of Rights of 1689, 'to limit the king's prerogative.'[14] But in America rulers now had no pre-existing independent governmental power; all rights and powers belonged to the people, who parcelled out bits and pieces sparingly to their rulers or their representatives (the terms now becoming indistinguishable). 'Why declare that things shall not be done which there is no power to do?' asked Alexander Hamilton in *The Federalist*, No. 84.

It was James Wilson in the Pennsylvania ratifying convention and in an influential speech given at a state house meeting in early October 1787 who most fully set forth what became the central Federalist explanation for the Constitution's lack of a bill of rights; in fact, his speeches, which were printed and widely circulated, rank in importance with any of the *Federalist Papers* in their con-

14. Edmund Randolph, quoted in Wood, *Creation of the American Republic*, p. 539.

tribution to the new political theory underlying the Constitution. Wilson at once focused on what he now saw to be a crucial difference between the revolutionary state constitutions and the new federal Constitution. When the people established their state governments in 1776, he said, 'they invested their representatives with every right and authority which they did not in explicit terms reserve.' These reservations were embodied in their several declarations of rights. In the new federal government, however, the people's delegation of power was clearly limited: 'The congressional power is to be collected . . . from the positive grant expressed in the instrument of the union.' Since the federal Constitution implied that every power not expressly delegated to the general government was reserved in the people's hands, a declaration reserving specific rights belonging to the people was 'superfluous and absurd.'[15]

The Anti-Federalists were puzzled by these arguments. No other country in the world, said Patrick Henry, looked at government as a delegation of express powers. 'All nations have adopted this construction—that all rights not expressly and unequivocally reserved to the people are impliedly and incidentally relinquished to rulers. . . . It is so in Great Britain; for every possible right, which is not reserved to the people by some express provision or compact, is within the king's prerogative. . . . It is so in Spain, Germany, and other parts of the world.'[16] The Anti-Federalists, in other words, continued to presume in traditional terms that governmental powers naturally adhered in rulers with whom the people had to bargain in order to get explicit recognition of their rights.

The Federalists might have eventually been able to carry their case against such old-fashioned thinking about government, if it had not been for the intervention of Thomas Jefferson from his distant post as minister to France. Jefferson was not unsympathetic to the new Constitution and to a stronger national government,

15. Wilson, quoted in McMaster and Stone, eds., *Pennsylvania and the Federal Constitution*, pp. 143–44, 313–16.

16. Henry, quoted in Wood, *Creation of the American Republic*, pp. 540–41.

but he had little or no comprehension of the emerging and quite original political theory of the Federalists that underlay the new federal political system. For Jefferson, sensitive to the politically correct thinking of 'the most enlightened and disinterested characters' of his liberal French friends who still believed that government was something to be bargained with, 'a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference.'[17] No matter that his friend Madison patiently tried to explain to him that attempting to write out the people's rights might actually work to limit them. (Madison was 'sure that the rights of conscience in particular, if submitted to public definition would be narrowed much more than they are likely ever to be by an assumed power.'[18]) Jefferson knew, and that was enough, that 'the enlightened part of Europe have given us the greatest credit for inventing this instrument of security for the rights of the people, and have been not a little surprised to see us so soon give it up.'[19]

Jefferson's belief that the Constitution was basically deficient because of the absence of a bill of rights was picked up by the Anti-Federalists and used with great effectiveness, especially in Virginia and Maryland.[20] The Federalists were defensive over the issue, and in Massachusetts they had to agree to add to the state's ratification a list of recommended amendments, nearly all of which advocated changing the structure of the new government. New York and Virginia ratified the Constitution only with the understanding that some amendments would be subsequently made. Both suggested some amendments, many of them restricting the powers of the new government but others listing the rights of individuals. The Federalists in the ratifying conventions con-

17. Jefferson to John Jay, May 23, 1788, to James Madison, Dec. 20, 1787, in Boyd et al., eds., *Papers of Jefferson*, XIII, 190, XII, 440.
18. Madison to Jefferson, Oct. 17, 1788, *ibid.*, XIV, 18.
19. Jefferson to Francis Hopkinson, Mar. 13, 1789, *ibid.*, XIV, 650–51.
20. Madison to Jefferson, July 24, 1788, *ibid.*, XIII, 412, 414.

cluded that it was better to accept such amendments as recommendations rather than as conditions for ratification. Otherwise they might have seen the Constitution defeated or they might have had to heed calls for a second convention.[21]

With nearly two hundred suggested amendments coming out of the state ratifying conventions, and with his good friend Jefferson remaining obstinate on the issue, Madison reluctantly began changing his opinion on the advisability of a bill of rights. Although he told Jefferson in October 1788 that he had never believed the omission of a bill of rights 'a material defect' of the Constitution, he now declared that he had 'always been in favor of a bill of rights,' and would support its addition, especially since 'it is anxiously desired by others.'[22] In his hard-fought electoral campaign for the House of Representatives in the winter of 1788–89, Madison was compelled to go further, and he made a public pledge, if elected, to work in the Congress for the adoption of a bill of rights.[23]

This promise made all the difference. If the Federalists, who dominated both houses of Congress in 1789, had had their way, there would have been no bill of rights—despite all the recommended amendments from the states. But once Madison's personal honor was involved, he was stubbornly determined to see a bill of rights enacted. At the same time, however, he was determined that this bill of rights would be mainly limited to the protection of personal rights and would not harm 'the structure & stamina of the Government.'[24] He sifted through the nearly two hundred suggested amendments made by the states, most of which suggested altering the powers and structure of the national government, including such matters as taxation, the regulation of elections, judicial authority, and presidential terms. Madison deliberately

21. Robert Allen Rutland, *The Birth of the Bill of Rights, 1776–1791* (Boston, 1983, rev. ed.), pp. 159–89.

22. Madison to Jefferson, Oct. 17, 1788, *ibid.*, XIV, 18.

23. Madison, 'To a Resident of Spotsylvania County,' Jan. 27, 1789, in Robert A. Rutland et al., eds., *The Papers of James Madison* (Charlottesville, 1977), XI, 428–29.

24. Madison to Edmund Randolph, June 15, 1789, *ibid.*, XII, 219.

ignored these proposals and extracted from the lists of amendments mainly those concerned with personal rights that he thought no one could argue with. On June 8, 1789, Madison proposed his nine amendments, most of which he believed could be inserted into Article I, Section 9, as prohibitions on the Congress. He also included one amendment to be inserted into Article I, Section 10, that actually prohibited the states, and not just the federal government, from violating rights of conscience, freedom of the press, and trial by jury in criminal cases.

At first his Federalist colleagues in the House claimed that it was too early to bring up amendments, that the country ought to experience the Constitution a bit before changing it. Discussing amendments would take up too much time, especially since there were other more important issues like collecting revenue that the Congress ought to be considering. They ridiculed him in private, called him 'poor Madison,' who 'got so Cursedly frightened in Virginia, that ... he has dreamed of amendments ever since.'[25] They told him he had done his duty and fulfilled his promise to his constituents by introducing the amendments, and now he ought just to forget about them. But Madison wouldn't forget about them ('as an honest man I *feel* my self bound'), and he hounded his colleagues relentlessly.[26] Madison assured them that the matter would not take too much time, maybe only a day; his proposals were so self-evident that no debate would grow out of them. One of his Virginia allies thought the House could agree on amendments in half an hour![27]

In several elegant and well-crafted speeches Madison laid out the reasons why a bill of rights had now become important and should not be delayed. It would quiet the minds of the people uneasy about the new government, help to bring North Carolina

25. Robert Morris to Francis Hopkinson, Aug. 15, 1789, in Helen E. Veit et al., eds., *Creating the Bill of Rights: The Documentary Record from the First Federal Congress* (Baltimore, 1991), p. 278.

26. Madison to Richard Peters, Aug. 19, 1789, in Charles F. Hobson et al., eds., *Papers of Madison*, XII, 347.

27. Madison and John Page, in Veit et al., eds., *Creating the Bill of Rights*, pp. 77, 75.

and Rhode Island into the union, and further secure the people's rights in public opinion without harming the government. We have something to gain, he said, and nothing to lose. He answered all the doubts and all the arguments against a bill of rights, most of which were the doubts and arguments he himself had earlier voiced.[28] Privately, however, he still jokingly referred to his promotion of amendments as a 'nauseous project.'[29]

There is no question that it was Madison's personal prestige and his dogged persistence that saw the amendments through the Congress. There might have been a federal Constitution without Madison but certainly no Bill of Rights. Madison did not get all he wanted and in the form he wanted. His colleagues in the House eliminated his preamble, revised some of his other amendments, and placed them at the end of the Constitution instead of incorporating them into the body of the Constitution as he had wished. The House then sent over seventeen amendments to the Senate. The upper house not only significantly altered these amendments, but it compressed them into twelve, including eliminating Madison's proposal to protect certain rights from the states, which he had considered 'the most valuable' of all his amendments.[30] Two of the twelve amendments—on apportionment of the House and on congressional salaries—were lost in the ratification process. Still, when all is said and done the remaining ten amendments—the Bill of Rights—were Madison's.

He pushed and prodded and persisted, and somehow the amendments were debated, modified, reduced in number, but finally passed. Sometime in the summer of 1789 sentiment began to shift. Anti-Federalists in the Congress began to realize that Madison's rights-based amendments undercut the desire for a second convention and thus actually worked against their cause of fundamentally altering the Constitution. Anti-Federalist Aedanus

28. Madison, *ibid.*, pp. 66–68, 77–86.
29. Madison to Richard Peters, Aug. 19, 1789, in Hobson et al., eds., *Papers of Madison*, XII, 346.
30. Madison, in Veit et al., eds., *Creating the Bill of Rights*, p. 188.

Burke of South Carolina was among the first to declare openly that Madison's proposals 'are not those solid and substantial amendments which the people expect; they are little better than whip-syllabub, frothy and full of wind, formed only to please the palate.' Or, in an image borrowed from Jonathan Swift, Burke likened Madison's amendments to a tub thrown to the whale to divert it in order to save the ship.[31] The image was a common one for describing a diversionary tactic, and others, both Anti-Federalists and Federalists, found 'a tub to the whale' an appropriate way of describing Madison's bill of rights.[32] Madison's amendments, as opponents of the Constitution angrily came to realize, were 'good for nothing' and were 'calculated merely to amuse, or rather to deceive.'[33] They affected 'personal liberty alone, leaving the great points of the Judiciary & direct taxation &c. to stand as they are.'[34] Before long the Federalists were expressing surprise that the Anti-Federalists had become such vigorous opponents of amendments, since amending the Constitution was originally an Anti-Federalist idea.[35] Under the circumstances the states ratified the first ten amendments slowly and without much enthusiasm; several of the original states, including Massachusetts, did not even bother.

The country then promptly forgot about the Bill of Rights, until the middle decades of the twentieth century. Now all has been reversed. In our own time the Bill of Rights has become even more important judicially than the Constitution itself. Although both Jefferson and Madison pointed out in passing that a bill of rights might place 'a legal check . . . into the hands of the judiciary' that could be used to protect the people's liberties against improper

31. Burke, *ibid.*, p. 175.

32. Kenneth R. Bowling, '"A Tub to the Whale": The Founding Fathers and Adoption of the Federal Bill of Rights,' *Journal of the Early Republic*, 8 (1988), 223–51.

33. William Grayson to Patrick Henry, Sept. 29, 1789, and Thomas Tudor Tucker to St. George Tucker, Oct. 2, 1789, in Veit et al., eds., *Creating the Bill of Rights*, p. 300.

34. Grayson to Henry, June 12, 1789, in William Wirt Henry, *Patrick Henry: Life, Correspondence and Speeches* (New York), III, 391.

35. Thomas Hartley to Jasper Yeates, Aug. 16, 1789, and John Brown to William Irvine, Aug. 17, 1789, in Veit et al., eds., *Creating the Bill of Rights*, p. 279.

acts of the government, neither they nor anyone else at the time could have foreseen just how significant judicial review in relation to the Bill of Rights would become in the last half of the twentieth century.[36] What the Federalists once called Madison's '*milk-and-water*' amendments have now become potent potations indeed.[37] The real question for us in our own time is whether we are drinking so heavily of these potations of rights that we are running the risk of becoming intoxicated.

36. Jefferson to Madison, Mar. 15, 1789, in Boyd et al., eds., *Papers of Jefferson*, XIV, 659; Madison, in Veit et al., eds., *Creating the Bill of Rights*, p. 83.

37. Pierce Butler to James Iredell, Aug. 11, 1789, *ibid.*, p. 274; Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass., 1977).