'What Are The Rights Of The People?'

For more than a decade, Americans have been reliving the birth of the United States through bicentennials: those of the Declaration of Independence, the Constitution, and now, finally, the Bill of Rights. But this past is also kept alive by the almost daily eruption of new disputes over the very things that most agitated our forebears: rights. Does Madonna have a First Amendment right to have her steamy rock video aired on television? Is there a right to life? A right to abortion? Do the homeless have a right to shelter? Here, historian James H. Hutson recalls the equally difficult time Americans had sorting through rights before framing the Bill of Rights; legal scholar Gary McDowell casts a critical eye on the proliferation of rights in 20th-century America.

'A Nauseous Project'

by James H. Hutson

From the beginning," write Philip Kurland and Ralph Lerner in a recent book on the framing of the Constitution, "the language of America has been the language of rights." Although this statement might not apply to 17th-century America, few scholars would deny that it accurately describes the situation during the 18th century, especially the period after the passage of the Stamp Act in 1765.

The eagerness of 18th-century Americans to claim rights exasperated those trying to govern them. As early as 1704, James Logan, an agent of William Penn, the founder of the Pennsylvania colony, ridiculed the colonists' obsession with the "Rattle of Rights and Privileges." Three years later this same functionary assailed "the infatuated people of this province" for their "ridiculous contending for rights unknown to others of the Queen's subjects." That the colonists had inflated ideas of their rights was, in fact, a stock complaint of royal officials for as long as the King's writ ran in America. Reverence for rights was not grounded, however, in widespread intellectual mastery of the subject; there were frequent assertions and admissions that Americans did not fully understand the object of their devotion. But they perceived that they could not afford to wait for perfect enlightenment before claiming rights in opposition to the pretensions of an intrusive British government. Thus, the 18th century was a period (not, perhaps, unlike our own) in which the public's penchant for asserting its rights outran its ability to analyze them and to reach a consensus about their scope and meaning.

As the century progressed, and especially after independence set off searching debates in the states about the formation of

new governments, Americans reached a common understanding about some aspects of the rights question, and this rough consensus informed the drafting of the Bill of Rights in 1789. To understand what the drafters of that document meant requires, therefore, an explanation of the context from which the Bill of Rights emerged, an investigation that must begin in the reign of King George III and pick its way through a complicated clutter of ideas emanating from moral philosophy, jurisprudence, political theory, and theology.

On whose authority can it be said that Americans did not comprehend the rights they claimed? On Thomas Hutchinson's, for one. "I am sensible," the royal governor lectured the Massachusetts legislature on March 6, 1773, "that nice Distinctions of Civil Rights and Legal Constitutions are far above the reach of the Bulk of Mankind to comprehend." Since Hutchinson was a Loyalist who soon retired to London, his statement might be dismissed as so much Tory superciliousness. Modern scholars have agreed with him, however. Assessing the events in 1773 upon which Hutchinson was commenting, one concluded that "the people at large... were too little informed in political theory to have possessed any clear ideas [about rights], and so they voted in ignorance for opinions presented to them by a handful of local leaders."

I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Just how much difficulty the "people at large" had in dealing with the rights question is revealed by a plaintive letter to a Baptist minister from a back-country delegate to the Massachusetts Constitutional Convention of 1780. "I am sensible," wrote Noah Allen to the Reverend Isaac Backus, that "the work is grate and my gifts Small and I am inexperienced in work of this sort. Dear brother I pray you to favor me with your mind on the subject Expesualy what are the Rights of the people and how that Bill of Rights ought to be drawn." That Allen's perplexity was widespread is attested to by pleas from various Massachusetts towns to the draftsmen of the state constitution to describe rights in language "so explicitly as the lowest capacity may fully understand," to use words "leveled as much as may be to the Capacities of the Subjects in common."

Even the well-informed were vexed by the "numerous and various" opinions on rights. "I consider that there are very few who understand the whole of these rights," Philadelphia lawyer James Wilson complained in 1787. "All the political writers, from Grotius and Puffendorf down to Vattel, have treated on this subject, but in no one of these works, nor in the aggregate of them all, can you find a complete enumeration of rights appertaining to the people as men and citizens."

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Formidable though the subject of rights was, John Adams contended in 1765 that many Americans were having trouble coming to grips with it not because they were unable to understand it but because they were unwilling to try to do so. "We have been afraid to think," claimed Adams. "We have felt a reluctance to examine into the grounds of our privileges and the extent to which we have an indisputable right to demand them." Scholars have agreed with Adams, arguing, as one put it, that in the years before 1763 Americans were "noticeably hesitant about spelling out the rights and liberties they claimed." Why was this so? Adams cited "certain prudent reasons" for his countrymen's diffidence. Some Americans, he believed, were opportunists, seekers after political loaves and fishes, who did not want to antagonize potential patrons in the British colonial administration by raising the rights issue. Others, Adams implied, recoiled from a searching investigation of rights when they saw where it might lead. Consequently, when Britain brought on the crisis of 1764–65 by taxing the colonies, Americans were caught intellectually unprepared. They knew they had rights, but they had no coherent, authoritative statement, nothing resembling an intercolonial position paper, on the origin, sum, and scope of those rights. To forge a common understanding on rights became one of the principal challenges confronting American thinkers during the next quarter century.

The Stamp Act, announced in Parliament in 1764 and passed in 1765, taxed legal instruments, business documents, and newspapers in the colonies and subjected violators of the act to trial in the vice-admiralty courts, where judges, applying Roman law, sat without juries. This statute started the rights controversy on the most elementary level because everyone in America believed that Magna Carta and other basic documents of the British Constitution forbade the taking of an Englishman's property without his consent. Since the colonists were Englishmen and since they were not represented in Parliament, the Stamp Act violated their constitutional rights. So plain was this proposition that people in Britain, including the officials who drafted

II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

the Stamp Act, agreed with it, although they countered with the specious argument that American rights had not been violated after all because the colonists were "virtually" represented in Parliament. (The doctrine of virtual representation held that members of Parliament represented the citizenry at large, not just the citizens of the particular districts that happened to elect them.)

As the dispute with America intensified, George III's ministers tried to tighten their controls in the colonies. Refractory Massachusetts required special attention. The colony's legislature paid the salaries of the judges of its Superior Court. To deprive the locals of this lever of financial control over the administration of justice, London proposed in 1772 to pay the judges itself. Massachusetts Whigs believed that royal payment of judges serving during royal pleasure might subvert the rule of law by creating an irresponsible and tyrannical judiciary. The proposal was, in their view, politically and morally wrong. But did it violate their rights? The British Constitution was no help here, for it certainly permitted the king to pay his servants. Massachusetts Whigs, therefore, used another voice in the repertoire of rights. Speaking through the Boston Committee of Correspondence,

they issued on November 20, 1772 a statement listing the "Natural Rights of the Colonists as Men" and protesting that the payment of the judges violated those rights.

In issuing statements in the language of natural rights, Americans, according to legal scholar John Philip Reid of New York University, "went off the constitutional deep end." What Reid apparently means is that since natural rights (and the law of nature from which they were derived) were unwritten and hence undefined, they could be used to dignify any desire, to package any prejudice. Indeed, the citizens of Andover, Massachusetts, announced in 1780 that it was "one of the natural and civil rights of a free People" to limit public office to Protestants, and a writer in the *Boston Gazette* claimed in the same year that Congregational ministers had "a natural and unalienable right" to be paid salaries by the state legislature.

Reid also accuses historians of overemphasizing the "nonsense" of natural rights during the revolutionary controversy. In his opinion the primary authority for rights between 1763 and 1776 was the British Constitution; it followed, therefore, that "the revolutionary controversy was concerned with positive constitutional rights, not abstract natural rights." Not so, argues the political scientist Harry Jaffa: "Natural law always took precedence in the order of importance. The primacy of rights and right, understood in the light of the law of nature, was the argument of the American Revolution from the beginning."

The dispute among contemporary scholars echoes a debate in the First Continental Congress between natural law advocates and proponents of the British Constitution. The First Congress split the difference by agreeing to found American claims on both the "immutable law of nature" and the "principles of the English Constitution." The British paid little attention to these nice distinctions, however, and as they moved toward a military solution to the colonial problem, Americans moved toward a reliance on natural law as the chief source of their rights. Typical of this trend was Alexander Hamilton's assertion in 1775 that "the sacred rights of mankind are not to be rummaged for, among old parchments, or musty records. They are written, as with a sunbeam, in the whole volume of nature, by the hand of divinity itself."

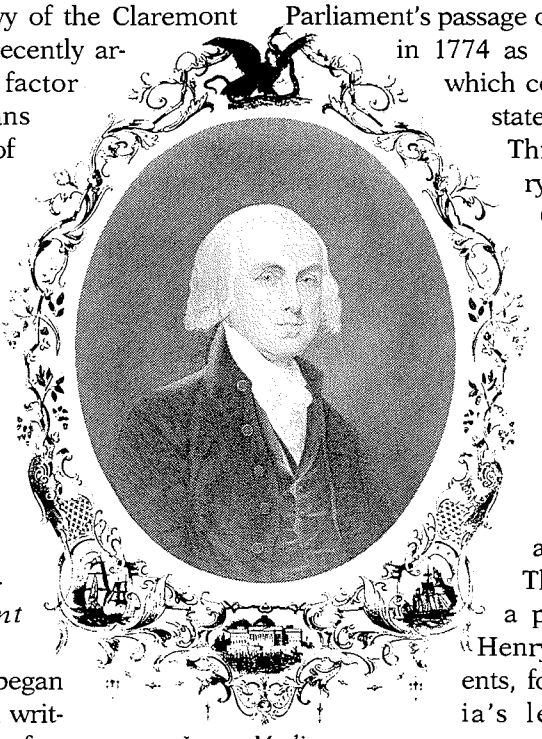
Independence cemented the preference for natural law. "How in the world," Jaffa asks, could Americans be expected "to appeal to their rights under the laws of England at the precise moment that they were telling the world they were no longer Englishmen?" The situation was, in fact, more complicated than this statement suggests, for Americans claimed all through the revolutionary controversy that their quarrel was not with the British Constitution, but with the unprincipled politicians who were defiling it. The mother country's constitution was extolled at the Constitutional Convention in 1787 and for decades thereafter. These tributes, however, were almost always paid to the institutional contrivances of the British Constitution that were designed to control the excesses of democracy. Admiration for the stabilizing properties of Britain's Constitution, mostly voiced by political conservatives, did not translate into a willingness of the citizens of the new republic to concede that they were

III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

beholden to the British for their rights. Rather, they considered, with James Wilson, that "by the Revolution [they] have attained all their natural rights," that, as a Pennsylvania newspaper claimed, they had "nobly resumed those rights which God and nature bestowed on man."

If "the natural rights philosophy seized the minds... of the rebellious patriots of 1776," as Leonard Levy of the Claremont Graduate School has recently argued, a contributing factor was the use Americans made of the theory of the state of nature to explain the events of 1776. Thomas Hobbes employed the state of nature as a major presumption in *Leviathan* (1651), but most Americans absorbed the more benign version of the concept used by John Locke in his *Two Treatises of Government* (1690).



James Madison

The state of nature began appearing in American writing less than 30 years after the publication of Locke's work. By the middle of the 18th century, writes Yale's Edmund S. Morgan, "Locke's political doctrines were assimilated by American clergymen and dispensed in their sermons along with older ideas." In 1764 it was reported that New Englanders believed themselves entitled "to form a new government as full to all intents and purposes as if they had been in a state of nature and were making their first entrance into civil society."

Not every American believed that a state of nature literally existed at some point in the past. James Otis, a leading Boston rebel, labelled the doctrine "a piece of metaphysical jargon and systematic nonsense." Yet Otis conceded that the state of nature was an indispensable fiction. Even if imaginary, it "hinders not but that the natural and original rights of each individual may be illustrated and explained in this way better than in any other."

Many Americans regarded the British Parliament's passage of the Intolerable Acts in 1774 as an act of aggression which converted the fictional state of nature into fact. This was Patrick Henry's view. At the First Continental Congress in September 1774, he declared: "Government is dissolved. Fleets and Armies and the present State of Things show that Government is dissolved.... We are in a State of Nature." The state of nature was a popular topic among Henry's Virginia constituents, for a writer in Virginia's leading newspaper warned in the same month that "if the king violated his sacred faith" with the American colonies, "he dismembers them from the empire and reduces them to a state of nature." From the eye of the storm, Massachusetts Whig leader James Warren wrote John Adams in 1774 that "It can be no longer a question whether any People ever subsisted in a State of Nature. We have been and still remain in that Situation."

The source of the new nation's rights was simple, James Madison said in 1785; they were "the gift of nature." Since Americans believed that the law of nature embod-

ied the will of God, was "dictated by God himself," as Sir William Blackstone described it, many identified God—the more secular-minded substituted the "Creator" of the Declaration of Independence—as the source of American rights. For the Founding generation, rights were grounded in religion.

The constitutions which the new states began adopting in 1776 signaled the states' emergence from the state of nature (whether real or theoretical) to which British oppression had reduced them. Bills of rights were added to most of the new constitutions and they contained all the contradictory and incoherent thinking about rights that existed before 1776. Historian Gordon Wood observes that the new documents combined a "jarring but exciting combination of ringing declarations of universal principles with a motley collection of common law procedures." If they contained too much for Wood's taste, they included too little to suit Leonard Levy. Reproving the drafters of the documents for proceeding "in an haphazard fashion that verged on ineptness," Levy deplored their omissions: "Two states passed over a free press guarantee; four neglected to ban excessive fines, excessive bail, compulsory self-incrimination, and general search warrants. Five ignored protections for the rights of assembly, petition, counsel, and trial by jury in civil cases. Seven omitted a prohibition of *ex post facto* laws. Nine failed to . . . condemn bills of attainder. Ten said nothing about freedom of speech, while 11 were silent on double jeopardy."

People at the time were not satisfied with the first bills of rights either. The citizens of Albemarle County, Virginia, for example, in the fall of 1776 sent instructions to their delegates in the state assembly, complaining that, although the recently adopted Virginia Declaration of Rights "will be an honorable Memorial to the memory of its Compilers . . . we find, that the true sense of it is not understood; for which reason a good many still remain ignorant of their rights."

What were the people of Albemarle unable to comprehend? Perhaps they could not tell how secure their rights were, for by using the verb "ought" to state certain rights—trial by jury "ought to be held sacred," excessive bail "ought not to be required"—the drafters of the Declaration seemed to make the enjoyment of rights optional. There were also doubts in the Old Dominion about the relationship of the bill of rights to the state constitution. "Virginia," said Governor Edmund Randolph, "has a bill of rights, but it is no part of the Constitution. By not saying whether it is paramount to the Constitution or not, it has left us in confusion."

Another confusing aspect of the first state bills of rights was what appeared to be their strong British flavor. Sections from the English Bill of Rights, the Habeas Corpus Act of 1679, and even Magna Carta seemed to have been imported wholesale into the first bills, raising the question of whether the British Constitution was not, after all, the source of rights in independent America.

The eminent continental jurist, Georg Jellinek, dismissed such a conclusion as "superficial," because there was a fundamental

IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

difference in spirit between the English and American bills of rights. The American instruments recognized the individual's "inalienable and indefeasible rights. The English laws know nothing of this. They do not wish to recognize an eternal, natural right, but one inherited from their fathers."

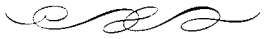
Americans of the revolutionary generation tended to interpret the British Constitution as being, no less than their own fundamental charters, grounded in nature. Most of them did not subscribe to our modern view that rights can be created; rather they believed that in formulating rights, individuals merely declared the presence of what Madison called "pre-existent rights." (Hence the preference of many states for the phrase "declaration" of rights in describing their earliest bills of rights). Since rights were not considered to be created or invented, the British were thought to have appropriated to their use natural, pre-existent rights. Therefore, in the American view, the British Constitution was itself a natural rights document. As the Massachusetts Assembly asserted in 1765, Americans "have a just value for those inestimable rights which are derived to all men from nature, and are happily interwoven in the British Constitution."

The idea that all rights and liberties were natural or naturally derived had by 1787 become the analytical tool Americans used to make sense of the bills of rights they had reflexively written in 1776. Bills of rights, it was widely held by 1787, were in theory repositories of reserved natural rights. How this notion evolved from the confused and conflicting ideas about rights abroad in 1776 is worth noting.

The starting point was the pervasive concept of the state of nature. As noted above, Locke postulated that individuals who left the state of nature surrendered some of their rights to society but retained others. Americans subscribed to this idea.

V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.



George Mason, author of the Virginia Declaration of Rights, America's first bill of rights, believed that individuals who formed societies "entered into compacts to give up some of their natural rights, that by union and mutual assistance they might secure the rest." Civis, as one writer in the *Virginia Gazette* called himself in 1776, asserted that "the use of speech is a natural right, which must have been reserved when men gave up their natural rights for the benefit of society." When the Observer wrote in a Boston paper two years later that "every natural right, not expressly given up, remains," he was merely repeating what had been claimed for years in the state of Massachusetts.

What were the natural rights retained by individuals who had entered society? In theory, there were two kinds: alienable and inalienable. Alienable natural rights were those that individuals could have ceded to society, if they wished; inalienable natural rights were so fundamental to human welfare that they were not considered to be in the power of individuals to surrender. George Mason named three of them in the Virginia Declaration of Rights: life, liberty, and "the means of acquiring and possess-

ing property." He appears to have borrowed this trio from the three "absolute" rights in Sir William Blackstone's famous *Commentaries on the Laws of England* (1765–69). They also appeared in five of the seven remaining state bills of rights, suggesting that from the beginning Americans recognized that, at a minimum, declarations of rights must contain these inalienable natural rights.

Quite soon it became apparent to some Americans that around natural rights they could construct a theory about what the state bills of rights were. Writing as Ludlow in the *Pennsylvania Journal* in 1777, Benjamin Rush complained that his state's "Bill of Rights has confounded the *natural* and *civil* rights in such a manner as to produce endless confusion in society." Presuming to speak as an expert on the subject, the future author of the *Rights of Man* (1791), Thomas Paine, replied over his familiar signature Common Sense that "a Bill of Rights . . . should retain such natural rights as are either consistent with or absolutely necessary toward our happiness in a state of society."

As a result of such writing, something approaching a national consensus emerged by 1787. Whatever else a bill of rights might include, its distinguishing characteristic was that it contained reserved natural rights.

The consensus was evident in the debates over the ratification of the federal Constitution in 1787–88. "A bill of rights may be summed up in a few words," Patrick Henry declared in the Virginia Ratifying Convention. "What do they tell us? That our rights are reserved." Pennsylvania Antifederalist leader Robert Whitehill agreed, describing a bill of rights as "an explicit reservation of those rights with which the people ought not, and mean not to part."

What happened to those rights that *were* surrendered to society? By 1787 a consensus had also emerged about their status.

"The Legislature," asserted Noah Webster in 1787, "has all the power, of all the people," the reason being, Alexander Contee Hanson explained, that "when people entered into a compact of government" they "thereby parted with the whole legislative power." "When general legislative powers are given," James Wilson told the Pennsylvania Ratifying Convention, "the people part with their authority, and . . . retain nothing." Nothing, Wilson should have added, except the natural rights they reserved in their bills of rights.

The Federalists and Antifederalists agreed, then, on the theory of the bills of rights adopted by the American states, a theory that was a marriage of Blackstone and Locke. Both groups held that the American bills of rights reserved certain natural rights; those rights not expressly reserved were considered to be transferred to an omnicompetent legislature.

If Federalists and Antifederalists agreed about the nature of American bills of rights, how can historians claim that the issue divided them during the ratification campaign? Antifederalists, it is true, assailed the new constitution because of the absence of a bill of rights and Federalists aggressively refuted their charges. But what was at issue was not contrasting understandings of the nature of bills of rights, but a disagreement over who the parties to the new constitution were. The Antifederalists claimed that in writing the Constitution the Federalists had flouted their instructions, which called for a mere revision of the Articles of Confederation, and had taken the unprecedented step of dissolving the social compact and throwing the country into a state of nature. Individuals were thus obliged to come together and reconstitute the social and political order. The creation of the Constitution was, in Antifederalist

eyes, nothing more than a replay on a continental scale of the creation of the state governments.

If the federal Constitution was, in theory, the state constitutions writ large, if it was a compact of individuals leaving a state of nature, then the other lessons of the state constitutions followed. If the individuals forming the constitution reserved no rights by adapting a bill of rights, all rights and powers were ceded to the new federal government. But Federalists scorned the Antifederalist premises. "The absurd idea of the federal constitution being a government of individuals," complained a Maryland Federalist, "seems too nugatory to merit a serious reflection."

VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

But if individuals did not create the Constitution, who did? The people did, the Federalists answered, albeit the people in a corporate capacity. As James Madison explained in *Federalist* 39, assent was given to the Constitution "by the people, not as individuals composing one entire nation, but as composing the distinct and independent states to which they respectively belong. It is to be the assent and ratification of the several States, derived from the supreme authority in each state—the authority of the people themselves." The Constitution, therefore, as the product of a collective people, could not, in theory, be a vehicle of individual rights, a fact obvious to common scribblers in the newspapers. "In the proposed Compact among the same thirteen individual sovereignties no Bill of Rights of Individuals has been or could be introduced," asserted a Federalist writer in a Baltimore newspaper. But this commentator recognized that a state government was a different matter, for "in Articles of Agreement among a Number of People forming a Civil Society, a Bill of Rights of Individuals comes in of course, and it is indispensably necessary."

The Federalists' support for state bills of rights gave the lie to Antifederalist accusations that they were enemies to rights in general. The Federalists were, as scholars have recognized, "civil libertarians," who could genuinely claim, as John Marshall did at the Virginia Ratifying Convention, "the title of being firm friends of liberty and the rights of mankind." They accepted with equanimity the possibility that rights might vary from state to state—as former Supreme Court Justice William Brennan, Jr., did when he observed recently that "our federalism permits diversity" in rights from state to state.

Believing that rights were a state responsibility, the Framers said little about them in Philadelphia. According to one authority, the Framers' "immediate business gave them little occasion" to discuss rights. What was their "immediate business"? Power, they would have responded. "Every member who attended the Convention," said Charles Cotesworth Pinckney at the South Carolina Ratifying Convention, "was from the beginning sensible of the necessity of giving greater powers to the federal government." To some Federalists the Constitution was nothing more than a "great power of attorney." In 1789 Madison described it as a "Bill of Powers [that] needs no bill of R[ig]hts."

The Federalist argument was adumbrated during the final days of the Philadelphia Convention by Roger Sherman of Connecticut, who parried a demand that a written guarantee for the freedom of the press be included in the Constitution with the reply that "it is unnecessary. The power of Congress does not extend to the Press."

The Federalist attitude was summed up in a phrase: "There cannot be a more positive and unequivocal declaration of the principle of the adoption," said Madison in the Virginia Ratifying Convention, than that "everything not granted is reserved." This aphorism became the Federalists' principal political weapon to "prove" that a bill of rights was unnecessary. Believing that a bill of rights was unnecessary, Federalists also concluded that it would be dangerous, reasoning that the principle of the state bills of rights—everything not reserved was granted—posed the danger that rights omitted from a bill of rights might be considered to have been surrendered to the government. The case against a bill of rights seemed so clear to the Federalists that they did not conceal their contempt for the counter-arguments in its favor. Bills of rights, Federalists jeered, were "absurd and dangerous," "idle and superfluous," "preposterous and dangerous," not to mention full of "inutility and folly."

But ridicule could not assuage the public's anxiety, and the Federalists were obliged, beginning in the Massachusetts Constitution Convention in February 1788, to promise their opponents that they would consider adding rights amendments after the Constitution was ratified. More than 200 amendments (many duplicating one another) had been suggested in various state conventions, and these were used by James Madison as he guided the Bill of Rights through the First Congress, which convened in New York City in April 1789.

Acclaimed as the "Father of the Bill of Rights," Madison in fact was a reluctant parent. In the Virginia Convention he joined in denouncing proposals for a bill of rights as "unnecessary and dangerous" and he suffered politically at the hands of supporters of bills of rights in Virginia. Patrick Henry prevented the Virginia legislature from electing him to the U.S. Senate and forced him to run for a House seat in a district gerrymandered in favor of the Antifederalists. To win election, Madison was forced to promise the local voters that he would support a bill of rights. This he dutifully did, by introducing rights amendments in the House of Representatives on June 8, 1789.

Madison rejected out of hand the model of the state bills of rights, which were placed as discrete entities at the head of state constitutions. Like a modern Procrustes, he compressed the rights amendments into the frame of the Constitution to make them as indistinguishable as possible, structurally and theoretically, from that document. Madison tucked what became the Bill of Rights' first eight amendments "into article 1st, section 9, between clauses 3 and 4." Article I, section 9, is, of course, the part of the Constitution that limits the powers of Congress, forbidding it to prohibit the slave trade for 20 years, to pass bills of attainder, to tax exports from the states, etc. During the ratification debates, these "express restrictions" on the powers of Congress were considered by some as a truncated bill of rights. What better place, then, Madison appears to have reasoned, to insert rights amendments?

This strategy gave the Bill of Rights the curious shape it finally assumed. To make the amendments consistent with the language already there, Madison was obliged to express rights, not positively and affirmatively, as they were phrased in the state bills of rights, but in language that seemed to link them to restraints on power, that

seemed to make them in some sense dependent on the forbearance of government. For example, Madison wrote, "nor shall the full and equal rights of conscience be in any manner, or on any pretext infringed."

As Madison's rights amendments made their way through Congress in the summer of 1789, they were placed at the end of the Constitution. In the case of religion, the press, and speech, Congress also deleted Madison's assertions that these were rights, but retained his language stating that Congress had no power to infringe them. This is the reason freedom of religion, press, and speech are not explicitly claimed as rights in the First Amendment. That they are rights must be inferred from Congress's obligation to refrain from exercising power.

Madison's June 8 amendments also contained the precursor of what became the Ninth Amendment. Refined by the First Congress, Madison's words became: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Both the embryonic language of June 8 and the Ninth Amendment repudiated the philosophy of the state bills of rights, that what is not reserved is granted. Both documents stated that, in addition to rights reserved (i.e. enumerated), other undefined rights were retained by the people. Some modern scholars contend that these undefined rights must be natural rights or some other species of unwritten rights, but this argument collapses in the face of Madison's resolve, which is reflected in his careful interweaving of rights amendments into Article I, section 9, to preserve the integrity of the Constitution by crafting amendments to be consistent with it.

As we have seen, a fundamental conviction of Madison and the Federalists was that the Constitution was created not by individuals leaving a state of nature but by the people acting collectively through their state governments and that, therefore, the natural rights of individuals had no place in the Constitution. During the deliberations of the Committee of Detail at the Philadelphia Convention, Edmund Randolph stated the Federalist position precisely: "We are not working on the natural rights of men not yet gathered into society, but upon those rights modified by society." Leonard Levy has recently shown how Convention delegates scrupulously observed this distinction by proposing only measures to protect rights incident to civil society, such as freedom of the press and the inviolability of the writ of habeas corpus. "No natural rights were constitutionally protected," Levy asserted, nor were any proposed to be protected in the meetings at Philadelphia.

In 1789, American society was further removed from the state of nature than it had been in 1787, because the adoption of the Constitution had overlaid the existing state governments with a powerful new national government. To conceive, therefore, of a bill of rights or of any other law passed by the federal Congress in 1789 as protecting the rights of individuals emerging from a state of nature was ludicrous.

That Madison deliberately omitted natural rights can be seen from the use he made

VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

of the Virginia Ratifying Convention's proposed amendments. Madison had them at his elbow when he prepared his June 8 amendments, and he incorporated parts of them word for word. What he did not incorporate from the Virginia document was its assertion of "certain natural rights" shared by all men, the familiar trio of life, liberty, and property. In a word, Madison stripped rights of their natural status when drafting the Bill of Rights.

If the "others" mentioned in the Ninth Amendment, those other rights "retained by the people," are not natural rights or collateral unwritten rights, what are they?

One clue is the linkage between rights and power in the embryonic ninth amendment language of Madison's June 8 proposals. Another is the Virginia Convention's amendment from which Madison copied some of his ninth amendment language of June 8: It used the word "power," where we should have expected the term "right." The rights retained in the Ninth Amendment seem, therefore, to have been intimately related, in Madison's mind, to power, although we have been assured by scholars that power and right are utterly incompatible. The two concepts, historian Bernard Bailyn insists, occupied "innately antagonistic spheres . . . the one [power] must be resisted, the other [right] defended, and the two must never be confused." In fact, revolutionary Americans fused the two concepts, and they did so not because they were confused but because they had on their side the authority of the foremost students of rights in the Western intellectual tradition.

For example, Jean Jacques Burlamaqui, whose impact on Jefferson, James Wilson, and others was substantial, wrote simply: "We must define Right a power." Blackstone asserted that the rights of man consist "properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature." Confining rights and power within the bounds of the law of nature (dictated, Blackstone believed, by God) gave rights a moral dimension which every writer back to William of Ockham proclaimed and to which Americans of the revolutionary generation were committed. Emmerich de Vattel spoke their mind when he said that right was "nothing more than the power of doing what is morally possible."

VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The founding generation's equation of rights and power clarifies the meaning of the Ninth Amendment. It was, as I have said, a disclaimer of the philosophy of the state bills of rights, that everything not reserved was granted to the government.

Had there been no Ninth Amendment, Madison and his colleagues feared that it could be assumed that the people retained only the rights contained in the first eight amendments. As soon as people outside Congress saw the Ninth Amendment, they perceived that this was its purpose. It was, said Edmund Randolph in the Virginia General Assembly, a "reservation against constructive power." No one considered it a repository of natural or unwritten rights, as indeed it was not.

What was the extent of those rights/powers declared by the Ninth Amendment to be retained by the people? The answer was supplied by the Tenth Amendment. The curious aspect of the Tenth Amendment was that it was a kind of anti-bill of rights. It repeated the stock Federalist charge used during the ratification campaign to deny

that a bill of rights was needed: Powers not granted to the government were reserved to the people. This being so, it was absurd to list rights to be protected against the abuse of power that did not exist. During the ratification contest partisans on both sides recognized that language similar to the Tenth Amendment would obviate the necessity of a bill of rights. The Articles of Confederation, said Samuel Spencer of North Carolina, stated "that all was not given up to the United States was retained by the respective states. If such a clause had been inserted in the Constitution, it would have superseded the necessity of a bill of rights." Yet the Tenth Amendment was needed as a gloss on the Ninth. Scholars have recognized that the two amendments are complementary, but they have not appreciated that the Tenth Amendment was designed to explain the Ninth. To the question posed by the Ninth Amendment—what other rights/powers are retained by the people—the Tenth Amendment answers: All powers not delegated to the United States.

The Bill of Rights is a strange document indeed. The first eight amendments are a list of rights. The Ninth Amendment is a disclaimer, denying that the federal bill of

IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

rights is similar to any of the other American bills of rights adopted since independence. The Tenth Amendment is an anti-bill of rights, a repetition of the argument used by the Federalists to repudiate a bill of rights during the ratification controversy. No wonder that Roger Sherman, in a House debate that August, criticized the document as a potpourri of "heterogeneous articles." It was a document that could not stand in the esteem of either its sponsors or opponents.

The approval of the Bill of Rights by Congress on September 25, 1789 was a defeat for the Antifederalists, who had criticized the Constitution's alleged failure to protect civil liberties in hopes of forcing a revision of the document to enhance state power.* Once it became apparent that Congress would pass a bill of rights that protected individual rather than states' rights, Antifederalist leaders began depreciating its importance. Speaking for many of his colleagues, Antifederalist Senator William Grayson of Virginia dismissed the amendments sent to the states as "good for nothing and, I believe, as many others do, that they will do more harm than benefit."

Nor did the Federalists consider the passage of the Bill of Rights a famous victory. Madison's colleagues were exasperated with him for pushing it through Congress. They accused him of headline hunting and denounced his proposals as "watergruel amendments," "milk and water amendments," and placebos prescribed for "imaginary ailments." They persisted in considering a bill of rights absurd and dangerous and justified passing it as a means of placating the misguided Antifederalist rank and file, an exercise they cynically described as "tossing a tub to a whale." (When sailing ships of the era ran afoul of whales at sea, crews often diverted them by tossing empty tubs or barrels into the water.) Weary of rowing against the tide of friend and foe, Madison confided to a correspondent that August that the Bill of Rights business was a "nauseous project."

*Two amendments approved by Congress were not ratified by the states. One would have changed the basis of representation in the House of Representatives, the other would have required the approval of two Congresses for congressional pay increases. Because the state legislatures left few records of their deliberations, historians do not know why these amendments failed.

Federalists in Congress were not inclined to take much credit for a measure they passed with so little enthusiasm, and their Antifederalist adversaries wrote the Bill of Rights campaign off as a bad investment of their time. Taking their cue from Congress, the state parties received and ratified the Bill of Rights so unceremoniously that, except in Virginia, which became the 11th and last state to ratify on December 15, 1791, they left scarcely any record of what they had done. The Bill of Rights forthwith fell into a kind of national oblivion, as Cornell's Michael Kammen reminded us in 1987, not to be "discovered" until the beginning of World War II (when the two remaining states ratified). A 1941 census of the 13 copies of the Bill of Rights sent to the states in October 1789 revealed that the document had been literally forgotten. Only four copies could be found, although a diligent search, propelled by patriotic ardor, later uncovered additional copies in Rhode Island, New Jersey, and South Carolina, the latter "crumpled, and torn" and caked with "much dust."

Of course, as a result of momentous Supreme Court decisions since World War II, the Bill of Rights has enjoyed a remarkable resurgence in our national consciousness. What of natural law, considered by Americans in the years after 1776 to be the bedrock of rights in the new nation? One scholar recently has found natural law prospering in American jurisprudence from 1789 to 1820, and another has described it as a principle of considerable, though declining jurisprudential importance up to the Civil War. Today, natural law and natural rights are said to be rejected by spokesmen of every ideological stripe.

X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The result is that natural law, considered indispensable by the Founders' generation, is now dismissed as unnecessary, while the Bill of Rights, considered unnecessary in 1787, is held to be indispensable. Such reversals are not uncommon in the history of ideas, nor are they unknown in the history of law. What they indicate is that the most strongly held convictions often change and that the current reverence for the Bill of Rights cannot be taken for granted in the future.