'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."

James H. Hutson *is Chief of the Manuscript Division at the Library of Congress. Born in Bridgeport, West Virginia, he received a B.A. (1959) and Ph.D. (1964) from Yale University. He is the author of several books, including* John Adams and the Diplomacy of the American Revolution *(1981). This essay is taken from* A Culture of Rights: The Bill of Rights in Philosophy, Politics, and Law—1791 and 1991, *edited by Michael J. Lacey and Knud Haakonssen, to be published this fall in the Woodrow Wilson Center Series by Cambridge University Press.*

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."

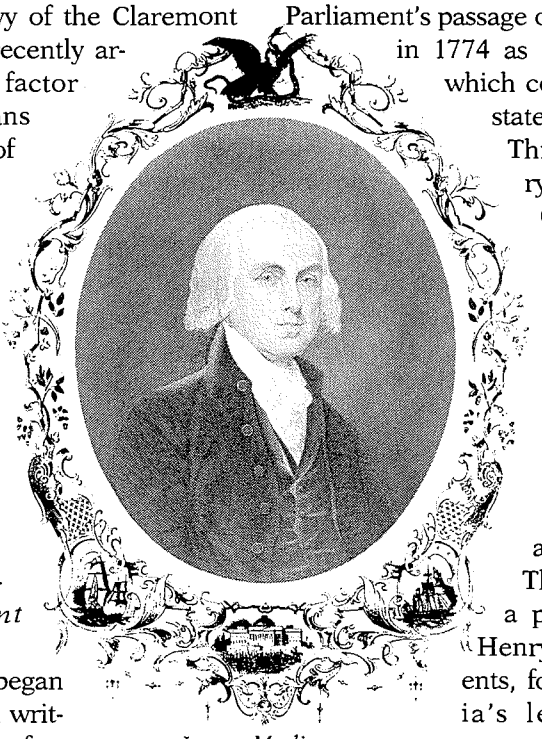
Independence cemented the preference for natural law. "How in the world," Jaffa asks, could Americans be expected "to appeal to their rights under the laws of England at the precise moment that they were telling the world they were no longer Englishmen?" The situation was, in fact, more complicated than 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."

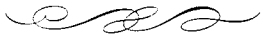
Americans of the revolutionary generation tended to interpret the British Constitution as being, no less than their own fundamental charters, grounded in nature. Most of them did not subscribe to our modern view that rights can be created; rather they believed that in formulating rights, individuals 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.

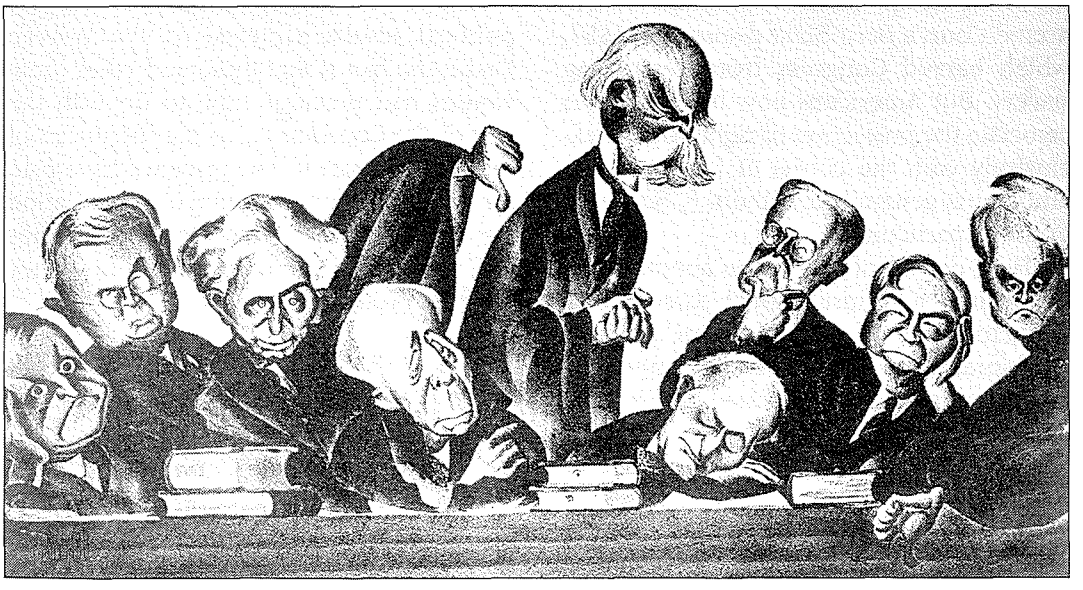
The result is that natural law, considered indispensable by the Founders' generation, is now dismissed as unnecessary, while the Bill of Rights, considered unnecessary in 1787, is held to be indispensable. Such reversals are not uncommon in the history of ideas, nor are they unknown in the history of 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.

RIGHTS WITHOUT ROOTS

by Gary L. McDowell

We are living in the midst of America's second great age of rights—or perhaps its first age of rights rhetoric. Scarcely a question now comes before the American public without some fundamental issue of rights being invoked. There is said to be a right to life and a right to die, and a right governing virtually everything that might occur between the exercise of these two prerogatives. There are said to be women's rights, gay rights, and handicapped rights, a right to work and a right to smoke, to name only a few. To a degree that must astonish even Western Europeans, concern about rights animates many contemporary American public debates—over judicial nominations, congressional legislation, federal grants to "artists," even performances by pop music stars.

There is a sense in which all of this is quite natural. Our nation was founded on the idea that all men are created equal, that they are endowed by their Creator with certain inalienable rights, and that governments are instituted among men to secure the rights nature gives. From the beginning, Americans have believed that if their country was about anything, it was about personal freedom and the rights that helped secure it. During the 20th century, the American devotion to rights was redoubled by the contest with fascism—which erupted into war during the sesquicenten-



The Nine Old Men of the U.S. Supreme Court used spurious economic "rights" to obstruct the New Deal, then dropped them. Can today's "rights" be as easily forgotten?

nial of the Bill of Rights—and then with communism. What more clearly distinguished free societies from totalitarian ones than individual rights? And, finally, there was the civil rights movement of the 1960s, which strengthened Americans' resolve to practice what we have always preached.

Today, the rhetoric of rights occupies center stage in American politics. As a result, there have been subtle changes in the way we think about rights. The very idea of rights has been cheapened by the widespread use of rights rhetoric to morally inflate what are, in reality, only policy preferences—over everything from abortion to affirmative action. And the transformation of ordinary political questions into non-negotiable questions of right has diminished our public life, turning the give-and-take of normal debate into all-or-nothing clashes.

In the process, we have become increasingly confused about what rights are and how they are best preserved. Earlier generations thought rights were to be protected by the constitutional system as a whole. Abraham Lincoln, after all, went to the White House declaiming against the Supreme Court's *Dred Scott* decision of 1857, which barred Congress from restricting slavery. But Americans now have come to associate the protection of rights almost exclusively with the courts of law—the federal courts generally and the U.S. Supreme Court in particular.

How did all of this come about? What intellectual and institutional forces combined to create this state of affairs, in which fundamental rights are looked upon as rootless things to be fashioned and re-fashioned at judicial will?

A major cause was the prominence of the Supreme Court under the leadership of Chief Justice Earl Warren between 1953 and 1969. Under Warren, the Supreme Court began teaching a generation of lawyers and law professors what Judge J. Skelly Wright called the "language of idealism." The lesson was simple: There need be "no theoretical gulf between law and morality." By the time Earl Warren handed over the reins of judicial power to Warren Burger in 1969, he had used the language of rights to transform American society in accordance with his own vision of a just political order. He had undertaken to end segregation beginning with the desegregation of public schools in *Brown* v. *Board of Education* (1954 and 1955); to restructure state criminal justice systems by announcing in *Gideon* v. *Wainwright* (1963) that the Constitution demanded that indigents be afforded legal counsel and in *Miranda* v. *Arizona* (1966) that the police had to inform suspects of their "rights"; and to enforce "one man, one vote" as the rule for apportionment of state legislatures, in *Reynolds* v. *Sims* (1964).

However much one may agree with the political results achieved by the Warren Court, the fact is that these and other innovations had precious little to do with the text of the Constitution or the intentions of those who wrote it. The price we have paid for such departures is a loss of appreciation for rights properly understood: what they are, where they come from, and how they are best protected.

Of all the Warren Court's significant rights cases, none can compare in importance to *Griswold* v. *Connecticut* (1965). In *Griswold*, the Court

Gary L. McDowell, *a former Wilson Center Fellow, is Bradley Visiting Scholar at Harvard Law School. Born in Flat River, Missouri, he received a B.A. from the University of South Florida (1972) and a Ph.D. from the University of Virginia (1979). He is the author of* Equity and the Constitution *(1982) and* Curbing the Courts: The Constitution and the Limits of Judicial Power *(1988). He is completing a book on the philosophic dimension of constitutional interpretation.*

made the startling announcement that there was a realm of unwritten rights and that the job of the Court was to divine and decree these rights.

The *Griswold* case involved a challenge to a Connecticut law that prohibited the use of contraceptives, even by married couples. Few would argue with Justice Potter Stewart's judgment that the law was "uncommonly silly," but many, including Stewart and Justice Hugo Black, did argue with the Court's presumption that silliness was enough to render it unconstitutional. But writing for the majority, Justice William O. Douglas did just that, creating as he did so a "right to privacy" out of the First, Third, Fourth, Fifth, and Ninth amendments. Douglas said that he discerned "penumbras, formed by emanations from these guarantees" that looked to him like "zones of privacy." In short, while nowhere mentioned in the Constitution, there was indeed an unenumerated general "right to privacy."

The lines and limits of this new right? That was simple; the only limit would be the judicial imagination.

"Rights anxiety" might be the title of this cartoon. Critics say that the news media wrap themselves in a First Amendment flag, and invoke a "right to know" not mentioned in the Constitution.

To old-time liberals such as Hugo Black, *Griswold* was as intolerable as what the Court had done long before in such economic liberties cases as *Lochner* v. *New York* (1905). It was, he said in a spirited dissent, nothing more than the old natural rights arguments come back clad in the raiment of due process of law. What had made that approach illegitimate at the turn of the century was precisely what made it illegitimate now. Such constitutional interpretation—if, indeed, interpretation be the right word—would turn the Court into a continuing constitutional convention with the power to transform the Constitution. That, said Black, was antithetical to the very idea of the rule of law. (In 1973, in fact, the Court would discover within the right to privacy a new right to abortion in *Roe* v. *Wade*—or at least a right that existed during the first trimester of pregnancy. But in 1985, the Court would refuse to stretch the "right" to include consensual homosexual sodomy.)

It would be wrong to hold the Warren Court solely responsible for the recent revolution in rights. In many ways, Warren and his colleagues merely took advantage of ambiguities in law and the public understanding of rights that had been growing for a long while. Some of the revolution's seeds were planted long ago in a most unlikely place, that most infamous of Supreme Court cases, *Dred Scott* v. *Sandford* (1857). While most notable for denying Congress the power to restrict slavery in the territories (and thus for helping to push the nation closer to civil war), *Dred Scott* also marks the first suggestion of what

would become the legal doctrine of Substantive Due Process. This doctrine asserted that the constitutional guarantee of due process of law did not only require the just administration of legal *procedures*; it also allowed the courts to scrutinize the *substance* of laws for infringements of, say, the right to own private property—in the case of *Dred Scott*, slaves. Thus, the Court ruled that the Constitution barred Congress from tampering with the noxious institution of slavery.

Of course, the Constitution said no such thing. This was merely what a majority of the Court under Chief Justice Roger B. Taney thought reasonable. As Alexander Hamilton had put it long before, the "words 'due process' have a precise technical import, and are applicable only to the process and proceedings of the courts of justice; they can never be referred to an act of the legislature." Yet that is precisely what the Court's Substantive Due Process doctrine allows. It posits as a general rule that any law that strikes the Court as being unfair, unjust, or against the rules of reason is unconstitutional.

The Fourteenth Amendment, ratified after the Civil War, contains the same Due Process Clause as the Fifth Amendment. Now, both the states under the Fourteenth Amendment and the nation under the Fifth Amendment were bound to guarantee that no citizen would be deprived of "life, liberty, or property without due process of law." These terms "life, liberty, or property" were not natural law abstractions; they had a very definite common law meaning. Life referred to the death penalty; liberty to incarceration; and property to fines. Nothing more than that.

No matter. The belief that due process empowered the courts to review the substance of legislation lay dormant for nearly half a century after *Dred Scott*. Then, toward the end of the century, it was transformed into a full-blown doctrine when the justices bridled at new laws that Congress and the state legislatures began passing to mitigate the ills of rapid industrialization. One after another, laws restricting child labor, mandating safe and sanitary conditions in the workplace, and establishing minimum wages, among others, were overturned by the Court.

The business community, the Court said in a series of rulings, had certain rights protected by the Constitution. While these were not spelled out in the text, they were included in the "liberty" provision of the Due Process clauses of both the Fifth and the Fourteenth Amendments. This provision, the Court declared, included a "liberty of contract." Certain "unreasonable" governmental regulations, the Court asserted, violated the freedom of private property implicit in the already implicit "liberty of contract."

This notion of *laissez faire* constitutionalism reached its clearest expression in *Lochner* v. *New York* (1905), in which the Court struck down a New York State health and safety law regulating the hours bakers could work, declaring that the law violated the fundamental "liberty of contract" between employers and employees. For the next 22 years, the Court stuck more or less steadily to this extra-textual path in constitutional law. It was, as one wry observer put it, "prone to take a decidedly astringent view of all governmental powers except its own."

The beginning of the end came in 1937 in *West Coast Hotel* v. *Parrish*, wherein the Court, as part of its general retreat from confrontation with President Franklin D. Roosevelt and his New Deal policies, finally upheld a state wage law. That year and the next proved to be very important in the history of the rights revolution. Not only was the move away

from Substantive Due Process in economic matters begun, but two other cases were handed down that foreshadowed the next wave of judicial innovation.

The first of these portents was *Palko* v. *Connecticut* (1937), which addressed the question of whether the Due Process Clause of the Fourteenth Amendment "incorporated" the Bill of Rights—that is, whether it required the states to abide by the Bill of Rights.

"Incorporation" may be a worthy goal, but there is nothing in the Fourteenth Amendment to suggest that it was the intention of the authors. Like the Framers of the Bill of Rights, they were quite prepared to contemplate a situation in which primary responsibility for these matters was left in the hands of the states. To arbitrarily "incorporate" provisions from the Bill of Rights reduces those rights to judicial fiat.

But *Palko* was not the first "incorporation" case.* The real heart of the *Palko* decision lies in the idea, advanced by Justice Benjamin Cardozo in the majority opinion, that there is "an honor roll of superior rights." The Court deemed these rights "superior" insofar as they were distinguished from those without which "justice . . . would not perish." Only those rights "implicit in the concept of ordered liberty [and] so rooted in the traditions and conscience of our people as to be ranked fundamental" were to be considered superior. In particular, Cardozo believed that strictly procedural rights (such as protection against being placed twice in jeopardy of one's life) were of a lower order than such rights as "freedom of thought and speech." These were the "matrix, the indispensable condition, of nearly every other form of freedom."

Cardozo thus established two novel ideas. First, not all of the rights spelled out in the Bill of Rights are equal. (Thus, incorporation could be done on a case-by-case basis.) Second, the distinctions between "fundamental" rights and lesser rights are to be drawn by the Court, based on what the justices (or at least a majority of them at any given time) think is reasonable. These two ideas would propel the Court into the next period of Substantive Due Process, a period of judicial activism that continues to this day. A new doctrine was born: Rights depend only upon the Court.

The second major case of that era, *United States* v. *Carolene Products* (1937), was handed down about four months after

*That distinction belongs to *Gitlow* v. *New York* (1925), in which the Court ruled, without so much as an argument, that at least portions of the Bill of Rights affect the states. And between *Gitlow* and *Palko*, a few other provisions of the Bill of Rights found their way into the crevices of the Fourteenth Amendment. But in no case did the Court offer a sustained defense of what it was doing. That was left for *Palko*.

RANKING RIGHTS

Two centuries ago George Mason asserted that citizens must "give up some of their natural rights that . . . they might secure the rest." In 1989, People for the American Way put this 18th-century proposition to a 20th-century test. In an opinion survey, it asked a sample of young adults aged 15–24 which of their fundamental rights they would be willing to give up in order to keep all the others. Below, the question and responses:

If you had to trade off just one of these rights or freedoms in order to keep all the others, which one would you be the most willing to give up?

Freedom of the press	27%
Right to protest	17%
Right to own private property	15%
Freedom of religion	11%
Right to choose own career	11%
Right to vote	8%
Freedom of speech	2%
Refuse to give up any rights	5%
Not sure	4%
	100%

Palko. Its significance lies less in the Court's formal opinion than in a single famous footnote. In footnote four of the majority opinion, Justice Harlan Fiske Stone noted that there was a need for "more searching judicial inquiry" into whether prejudice against "discrete and insular minorities" might raise special constitutional concerns. Together, the new doctrines announced in *Palko* and *Carolene Products* eventually would take the Court down many strange paths. By focusing on the claims of minorities (not just racial minorities, but those defined by ethnicity, gender, and even political ideology and religious belief) and by focusing on rights not always explicitly mentioned in the Constitution, the Court would encourage the belief that majority rule is somehow inherently illegitimate, that the collective sense of the community ought to be easily trumped by a well-tuned minority claim of rights. The Court thus contributed in no small way to the atomization of American society. Substantive Due Process was alive and well; only now it focused on personal liberties rather than property rights.

The Court did not immediately put the new doctrines into practice. Between the demise of the old liberty-of-contract variety of Substantive Due Process in the mid-1930s and the explosion of the new era of Substantive Due Process in the mid-1950s, the Court largely went about its incremental business, stretching a past holding here and adjusting an old doctrine there. Under the stewardship of Chief Justices Charles Evans Hughes (1930–41), Harlan Fiske Stone (1941–46), and Fred M. Vinson (1946–53) there was no inkling of the revolution that was to come. Yet each in his own way presided over a Court that was, however slightly, clearing the way for the Warren Revolution.

Between 1937 and 1947, for example, the Court effected a virtual constitutional revolution in the way federal regulation was considered. The power of Congress to regulate commerce, once radically restricted by the Court, was suddenly endowed with a life beyond anything the Framers of the Constitution could have dreamed. So expansive was the power, the Court held in *Wickard* v. *Filburn* (1942) that a farmer could be prohibited from growing certain crops for his own family's consumption.

The Court also moved ahead on the bit-by-bit "incorporation" of the Bill of Rights. In 1937, in *De Jonge* v. *Oregon*, it invalidated the conviction of a communist under an Oregon statute outlawing criminal syndicalism. In 1943, it struck down as unconstitutional a West Virginia flag salute statute in *West Virginia State Board of Education* v. *Barnette*. Four years later the Court erected its famous "wall of separation" between church and state in *Everson* v. *Board of Education*. And in 1948 Justice Hugo Black, in a famous opinion in *Adamson* v. *California*, urged his brethren to dispense altogether with the ad hoc approach to incorporating the Bill of Rights and to decree the entire catalogue of the first eight amendments absorbed.

Yet none of these rulings was part of an overarching judicial vision. They came from different directions at different times and for different reasons. What Earl Warren was able to supply after he arrived on the Court in 1953 was precisely that unifying vision—not only of rights but of judicial power generally.

As one of his biographers put it, Warren felt he had a "mission to do justice," and he combined "an ethical gloss on the Constitution with an activist theory of judicial review." His was a calling, in Warren's view, that did not demand that he carry along much "theoretical baggage." His feelings and a commitment to do good were all that

he needed.

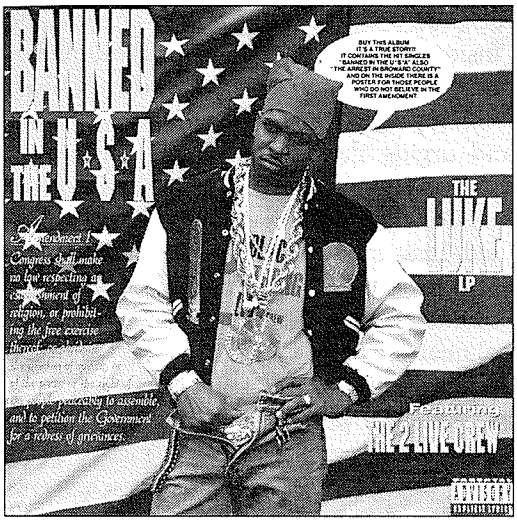
But an activist theory of judging without much "theoretical baggage" is a vacuum waiting to be filled, and the legal academy wasted no time in rushing to Warren's ideological rescue. As Judge J. Skelly Wright pointed out, Warren and his Court had nothing short of a "revolutionary influence" on an entire generation of law students, a generation that has long since passed into the law professoriate and the judiciary itself. That generation did carry a lot of "baggage," including Warren's dedication to act on those "ideals to which America is theoretically and rhetorically dedicated."

Indeed, the real revolution in rights during the last 40 years has occurred in the way constitutional theory is taught in the nation's law schools. Students are now trained to practice a muscular kind of "political jurisprudence," with the ultimate aim of persuading the courts to adopt new theories of rights in the name of doing justice. According to Robert H. Bork, many of today's constitutional theorists "continue to speak of 'constitutional law,' but it is clear that they view the Constitution less as a legal document with a meaning to be ascertained than as a general warrant for judges to implement the policies the professors favor." As the dean of the Stanford Law School, Paul Brest, once confessed, the writings of these thinkers are not so much political theory as "advocacy scholarship . . . designed to persuade the Court to adopt our various notions of the public good."

The theoretical keystone of this new judicial activism was finally laid in place in 1977 by Ronald Dworkin, in a book appropriately titled *Taking Rights Seriously*. Dworkin, an American lawyer who had become the University Professor of Jurisprudence at Oxford, aimed to "define and defend" a new liberal theory of law. That required a concerted effort to achieve the "fusion of constitutional law and moral theory." At a minimum, that fusion required freeing judges from the shackles of history and urging them to exercise their moral imaginations in ways that the Framers of the Constitution never could have imagined. Law, in Dworkin's view, had to be an arena where "political morality" could be put into effect. But where was that vision of political morality to come from? Not from the people, Dworkin argues, but from judges: "The program of judicial activism holds that courts . . . should work out principles of legality, equality, and the rest, revise those principles from time to time in the light of fresh moral insight, and judge the acts of Congress, the states, and the president accordingly." Such a system "involves risks of tyranny," Dworkin concedes, but to his way of thinking that is simply a price worth paying.

While the years since the publication of *Taking Rights Seriously* have seen the emergence of an army of constitutional moralists—Philip Bobbitt of the University of Texas, Michael Perry of Northwestern, and Laurence Tribe of Harvard, to name but three—none departs very significantly from Dworkin's original vision. They all tend to share certain assumptions. First, they believe that the idea of rights is not static but dynamic. Thus, as Tribe argues, it is the Court's job to exploit the Constitution's alleged "necessarily evolutionary design" in order to encourage the "living development of constitutional justice."

Second, they assume that the idea of rights is not rooted in the consent of the governed or in any "archaic" notion of popular sovereignty. As Bobbitt argues, "constitutional decisionmaking has . . . an expressive function . . . and if we accept the expressive function of the Court, then it must sometimes be in advance of and even in contrast to, the largely inchoate notions



Another First Amendment flap: 2 Live Crew hoped for a hit after its first record ran afoul of Florida authorities. It was a commercial flop.

of the people generally."

The third assumption that unites Dworkin and his allies is the dismissal of the written Constitution as binding law. The idea that the intentions of those who wrote and ratified the Constitution can be known, they hold, is naive. And even if these intentions could be discerned, to think them binding on us at this late date is more than naive. It is ludicrous. Another of the activists, Craig Ducat of Northern Illinois University, bluntly declares that the Framers "are dead, and, in the contemporary world, their views are neither relevant nor morally binding." To seek the original meaning of the text, says still another theorist, is to do nothing more than to encourage "judicial autopsies on the Framers' minds."

What unites these shared assumptions into a vision of law is a simple belief that it is legitimate for judges to "define and enforce fundamental human rights without substantial guidance from constitutional text and history." Such a view obviously presupposes judges who are, as Michael Perry puts it, "committed to the notion of moral evolution and are themselves open to the possibility of moral growth." In the name of taking rights seriously, these three fundamental assumptions ultimately lead, as political scientist Walter Berns has noted, to "treat[ing] the Constitution frivolously."

To many of those who founded the American republic, rights were important enough to require a bill of rights to shackle the new national government, just as the state governments were restricted. To keep the government in its place, it was necessary to get the rules in writing, to give concrete expression to those things we call rights. Such rights, or constitutional "fences" as John Locke called them, were to come from the collective judgment of the people, not from the moral imaginations of judges. The Framers recognized that it was not only the Constitution but the very idea of constitutionalism and the rule of law that was at stake. As Justice Benjamin Curtis wrote more than a century ago in his dissent in the infamous *Dred Scott* case, "When a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean."

The idea that there are unenumerated rights waiting to be discovered and decreed by the judiciary is an idea at odds with the premises of constitutional government. Rights divorced from the idea of written protections in the form of a constitution are not "rights" in any meaningful sense. They may be the moral predilections of a judge, or of people who come to bar to press their claims, but they are not rights in the historic sense. Nor are they rights in the sense

that they are permanent "fences" against the pretensions of governmental power. Judicial power is still governmental power, and rights that depend upon governmental power for their definition are not rights at all but only privileges.

Therein lies the lesson for our time. The Warren Court is gone; the Burger Court is no more; and now the so-called Reagan Court under Chief Justice William Rehnquist will have its say about the rights of Americans. There is every reason to believe, of course, that the newly constituted Court will be less than friendly to some of the liberal claims of rights likely to arrive on its docket. Neither a significant limitation of capital punishment nor expansions of abortion rights, the separation of church and state, or affirmative-action policies that embrace racial preferences seem likely.

Since the Warren Court shed virtually all pretense of judicial restraint, the way is now clear for the Reagan Court to do virtually whatever it wishes—and some of what it does do will no doubt horrify the constitutional thinkers who have been so eager to trust in the moral imaginations of judges. There is, for example, a distinct possibility that the Court will revive the economic liberties doctrine of the 19th century, albeit in new dress. There is no reason a creative judge could not stretch *Griswold*'s unenumerated right to privacy to include a right to private property. Rent control, environmental regulations, and other allegedly socially benevolent laws may very well be roughly treated by a Court that includes many justices who are at least as libertarian in their economic beliefs as they are conservative in their politics. And there are important libertarian theorists in the law schools—notably, Richard Epstein of the University of Chicago and Bernard Siegan of the University of San Diego—who have helped lay the theoretical foundations for just such a drastic change of course should the Court choose to build upon them.

Whether the Court strikes out on that path or not, the status of rights in America is certain to remain confused. That is the inevitable result of our contemporary jurisprudence of rights. The rights of Americans will continue to have less to do with what "We the People" have marked off as beyond the reach of government than with what a majority of the Supreme Court may think or feel at any given moment. That is a sad state indeed for our country to be in as it celebrates the bicentennial of its Bill of Rights.

THE BILL OF RIGHTS

Since the American Revolution Bicentennial Commission opened for business in 1966, Americans have been benumbed by celebrations of big historical events. The indifference that one detects toward the bicentennial of the Bill of Rights is also evident in the scholarship on the origins of that document. Until the 1950s, scholars largely ignored the subject, with the result that, according to one expert, there is no good book on it.

What writing there has been on the birth of the Bill of Rights has treated its gestation in a cynical, disparaging manner. Thirty years of research have produced the following picture of its origins: The Bill of Rights was first promoted by politicians whose commitment to civil and religious liberties was suspect and who cynically advocated it to promote their hidden agendas. They were supplanted by another set of politicians who managed to enact the Bill of Rights, but only to achieve their own self-serving political ends.

The scholarly "rediscovery" of the Bill of Rights during the mid-1950s was a reaction to what were perceived to be the excesses of Senator Joseph McCarthy. One result was a monograph that Judge Edward Dumbald identified in 1957 as the "first book devoted specifically to the Bill of Rights," Robert A. Rutland's **The Birth of the Bill of Rights** (1955, reprinted 1983). Rutland credited the Antifederalists, such as Virginia's George Mason, with supplying the impetus for the Bill of Rights. He thus aligned himself with those who hold, in the words of political scientist Herbert Storing, that the "Federalists gave us the Constitution, but the Antifederalists gave us the Bill of Rights."

No sooner had Rutland published, however, than historians, responding not to McCarthyism but to their profession's internal dynamics, made an abrupt course correction. It involved Charles Beard, who in his celebrated **Economic Interpretation of the Constitution of the United States** (1913) had rehabilitated the Antifederalists by picturing them as agrarian democrats struggling against a propertied elite that was conspiring to impose a reactionary constitution on the country. When Beard's thesis suddenly disintegrated in the 1950s, so did his heroic portrait of the Antifederalists.

Among those scholars who shattered Beard's thesis was Cecelia Kenyon. In "Men of Little Faith: The Anti-Federalists on the Nature of Representative Government," an essay in *William and Mary Quarterly* (Jan. 1955), Kenyon attacked Beard's vision of aristocratic Federalists arrayed against democratic Antifederalists. She contended that the political ideas of the antagonists were virtually indistinguishable. The chief reason for the Antifederalists' opposition to the Constitution was their fear, grounded in the best political science of the day, that the republican government that it established could not succeed over a geographical area as large as the United States.

Kenyon also showed that the Antifederalists were hostile to certain First Amendment rights, specifically those involving religion. They were, she wrote, "greatly displeased" with the ban on religious tests for federal officeholders. The absence of such tests, they asserted, would be "dangerous and impolitic" and tantamount to "an invitation for Jews and pagans of every kind to come among us."

Kenyon at least credited the Antifederalists with some regard for civil liberties. Beard's principal critic, Forrest McDonald, would concede them none at all. In **We the People** (1958), he argued that Federalists and Antifederalists were not divided into opposing camps of personality and realty, as Beard postulated, but were composed of coalitions of similar kinds of property holders. There were, McDonald demonstrated, many speculators, investors, and entrepreneurs among the Antifederalists. It was these men, he asserted in an article in the *Wisconsin Magazine of History* (Spring 1963), who shaped their party's attitude toward civil liberties. Through their control of state governments, they participated in a variety of "insider" transactions, many of them dependent on state issues of paper money and state taxes on commerce. By prohibiting these state practices, the Constitution directly threatened their pocketbooks.

How could they defeat the Constitution?

Selfish economic grounds would not do. A "cause" needed to be manufactured for public consumption and that cause was a bill of rights.

Beard still had his defenders, though they conceded that he had made mistakes. Jackson T. Main, for example, in **The Anti-Federalists** (1961), asserted that the principal difference between the Antifederalists and the Federalists was not their positions on the Bill of Rights but the location of the former in the noncommercial, the latter in the commercial, areas of the country. But Main thus joined his scholarly adversaries in de-emphasizing the connection between the Bill of Rights and the Antifederalists.

Another notable revisionist was historian Leonard Levy. In **Freedom of Speech and Press in Early American History: Legacy of Suppression** (1960, revised and reissued by Oxford Univ. as **Emergence of a Free Press**, 1985), he argued that the libertarian thrust of the American Revolution as a whole had been exaggerated. To scholars who claimed that "one object of the Revolution was to get rid of the English common law on liberty of speech and of the press," Levy replied that it was "closer to the truth to say that the Revolution almost got rid of freedom of speech and press instead of the common law on the subject." The state constitutions, Levy observed, contained few protections of those rights.

For that reason, Levy found it impossible to take at face value the Antifederalists' noisy campaign for a bill of rights. One suspects, he wrote, that "Antifederalists callously resorted to alarming the people" with lurid claims of threats to their rights in order to defeat or alter the Constitution to strengthen the states.

Thus, starting from different points, Levy and McDonald reached the same conclusion: The agitation for a bill of rights was, as Levy put it, "propaganda" by Antifederalists with ulterior motives.

The revisionist view of the Antifederalists was strengthened by several important books: Alpheus T. Mason's **The States Rights Debate: Anti-Federalism and the Constitution** (1964); Irving Brant's **The Bill of Rights: Its Origin and Meaning** (1965); and Gordon Wood's **The Creation of the American Republic, 1776-1787** (Univ. of North Carolina, 1969).

As for the Federalists, the scholarly account of their relationship to the Bill of Rights has changed little since the 1950s. That the Federalists initially and resolutely contested the demand for a bill of rights is conceded by every writer on the subject. Scholars have largely reduced the whole story to a chronicle of Madison's choices and activities.

Was Madison, for example, converted by the rhetoric of the ratification campaign from opposition to bills of rights to a belief in their efficacy as shields for civil and religious liberties? In **James Madison: A Biography** (Macmillan, 1971), Ralph Ketcham contends that Madison went "far beyond tactical reasons for supporting a bill of rights," that he was motivated by a "devotion to natural rights." Ketcham's claim has not convinced other scholars. As Leonard Levy put it in his **Essays on American Constitutional History** (Quadrangle, 1972), Madison "seems to have troubled to do no more than was necessary to get something adopted in order to satisfy popular clamor and deflect Anti-Federalist charges."

The Bill of Rights was, then, a phony issue cooked up by one group of politicians and appropriated, reluctantly, by another. Such is the current scholarly view of its origins. The problem with this view is that it obscures the commitment of the Framers, Federalists and Antifederalists alike, to civil liberties. It does so by failing to distinguish between their attitudes toward bills of rights and rights.

The Framers' disillusionment with bills of rights—state legislatures had regularly trampled parchment guarantees—did not indicate indifference to rights. As George Washington wrote to the Marquis de Lafayette in 1788, no Framer was opposed to what was "contended for by Advocates for a Bill of Rights." But no Framer believed that rights could be protected by words on paper. Only concrete checks against arbitrary exertions of power would do the job. The checks favored by Madison and the Federalists are familiar: multiple interest groups in an extended republic; the separation of powers; the "necessary fence" that the Senate embodied against the House; and others.

Antifederalists differed from the Federalists about how those checks could be constructed. They held that the state governments must themselves be the checks to secure the "liber-

ties of the people" and, therefore, their power, particularly their financial power, must be preserved. Thus, there were libertarian, as well as selfish, motives at work among the Antifederalists who advocated state power.

What of the power of judicial review? "The case that could be made for judicial review in 1787 on either the ground of workability or of precedent was a shadowy one at best," observed Edward S. Corwin in **Court Over Constitution: A Study of Judicial Review as an Instrument of Popular Government** (1938). Relatively few participants in the debates over the ratification of the Constitution perceived that the judiciary could transform bills of rights from "parchment barriers" to roadblocks against oppression. But this is what eventually happened. Bills of rights prospered as the judiciary flourished. Their credibility in American society depended, in short, on the establishment of judicial review.

Another question: If the Framers believed that bills of rights were dangerous and unnecessary and yet aspired to protect rights by constructing various kinds of checks, how were these rights to be ascertained? Was the common law, adopted by 12 states after 1776, to be consulted? Was natural law?

More attention also needs to be devoted to the status of rights in 1776. According to Gordon Wood, "in the mind of most Whigs in 1776 individual rights, even the basic civil liberties that we consider so crucial, possessed little of their modern theoretical relevance when set against the will of the people." In **Popular Consent and Popular Control** (Louisiana State Univ., 1990), Donald S. Lutz agrees, adding that "emphasis on individual rights could only come with the decline of the radical Whigs." But these same radical Whigs have been described by generations of historians as being obsessed with individual rights, obsessed to the point of fighting a war with the mother country to protect them!

Overnight, apparently, the Founders became indifferent to their rights as they sat down to write their new state constitutions. So abrupt a change on so fundamental a matter is remarkable. It suggests that the account of rights in revolutionary America as we now have it is seriously flawed. The strange reality driven home by the bicentennial of the Bill of Rights is that we know surprisingly little about the origins of the rights that so proudly we hail.

—James H. Hutson

EDITOR'S NOTE: This essay is adapted from a longer piece that appeared in Prologue *(Fall 1988).*