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## BACKGROUND BOOKS

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### 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 the-

sis 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 reality, 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 Framers was opposed to what was "contended for by Advocates for a Bill of Rights." But no Framers 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

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

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