Jefferson and Civil Liberties: The Darker Side

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Jefferson and Civil Liberties: The Darker Side. By Leonard W. Levy. Cambridge: Harvard University Press. 1963. xv+225 pages. $4.50.

In *The Legacy of Suppression,* the book to which the one under review is a sequel, Leonard Levy wrote,

> This has been a difficult book to write. . . . [T]he facts have dictated conclusions that violate my predilections and clash with the accepted version of history. But . . . my views as a scholar do not depend on my civic convictions nor [*sic*] on historical convention. . . . [T]he past must be taken on its own terms.[1]

"I would be delighted," he added, "if this book were proved to be wrong"[2]—as, we may safely add for him, would a great many other people who share Professor Levy's "predilections" and are in the habit of resolving certain great issues of our time by appealing mainly to the "historical convention" he has in mind.

Those predilections are, roughly speaking, those that we have, with gross historical inaccuracy, come to associate with the name of Mr. Justice Hugo Black, to whose line of dissents in first amendment cases we are indeed indebted for their most recent and most vigorous articulation. They are predilections as to the policy a self-governing people ought to adopt concerning the so-called "basic" individual "freedoms" or "rights"—freedom of speech, press, petition and assembly, conscience, and above all perhaps, though seldom mentioned, freedom of thought. To use Popper's phrase, they are

[1]Levy, The Legacy of Suppression viii (1960).
[2]*Id.* at xi.

predilections in favor of an "open society"—a society in which there is no legal or governmental interference with the "free market" in ideas, no legal or governmental barrier to unrestricted liberty of choice by the citizens among all conceivable alternatives in religion, politics, morals, and indeed all areas of possible controversy. They are predilections that our generation should, in strict justice, associate with Alexander Meikeljohn who, in their specific application to constitutional problems in the United States, was the first writer to urge them upon us and who, more I think than any other writer including Zechariah Chafee, Jr., is responsible for their current regnancy among American intellectuals. They are, finally, predilections with which we are sufficiently familiar to be able to say with some confidence that the major types of argument by which they can be supported intellectually are the following:

First, the argument that there is an unanswerable "pure" case for these predilections to be found in the literature of political philosophy, especially in the writings of John Stuart Mill—the appeal to the authority of what Professor Levy calls "libertarian theory" from Milton to the present day.[3] Secondly, the argument that the constitutional rules appropriate to these predilections are presupposed in the very idea of self-government—the appeal to the "necessity" of the logic of democracy (which, for convenience, I distinguish from the appeal to philosophical authority in order to set it apart from the argument to be found in Mill). Thirdly, the argument that all questions as to these predilections are settled for us by the "plain language" of the first amendment: "Congress shall make no law. . . ." that abridges the freedoms in question—the appeal to the authority of the Constitution. Fourthly, the argument that the plain language of the first amendment reflects the settled convictions and thus the intention of the "Framers" and, beyond that, of the generation of Americans who ratified the Constitution—the appeal to the authoritative wisdom of the founding fathers.

These four types of argument constitute the American brief for the open society. It is well that we should have all four in mind before we consider those "conclusions" that made the first of Professor Levy's two books so "difficult" to write because they "violated" his

[3]As Levy says, "the case for civil liberties is so powerfully grounded in political philosophy's wisest principles, as well as the wisest policies drawn from experience, that it need not be anchored to the past." *Id.* at 4.

predilections and the conclusions, for him equally unpalatable, to which he has been driven in his new book. For once the two books are digested by the scholarly community, the relative status of the four arguments can never again be what it was when Professor Levy took pen in hand. Levy completely, definitely explodes the fourth argument (appeal to the Framers) and gives to the third argument (appeal to the plain meaning of the first amendment) a wholly new cast that will cause it to figure less prominently in future than in past discussions. Thus he places in the forefront of the debate the arguments (the appeal to the logic of democracy and the appeal to political philosophy) of which in the past we have, to our misfortune I think, heard least. Defenders of the open society and of policies that will move the United States in the direction of becoming an open society will find themselves obliged in the future to argue these questions on their merits, that is, on the level of political philosophy. One can, I think, imagine no more wholesome development in our public debate.

We must, therefore, attend carefully to at least the major conclusions to which Professor Levy found himself driven in *The Legacy of Suppression.*

Levy states that the question as to the intention of the Framers and of the generation that ratified the constitutional rule that "Congress shall make no law . . . abridging the freedom of speech, or of the press" boils down to whether they intended to abolish the common law of seditious libel.[4] There is no evidence of any such intention on the part of any member of the Constitutional Convention or of the First Congress, which drafted the Bill of Rights.[5] At least freedom of speech had in America "prior to the First Amendment or even later" little or no history either *"as a concept or a practice."*[6] It was a "concept without basis in everyday experience and nearly unknown to legal and constitutional history or [even] to libertarian thought";[7] and to the extent it was known, it referred to the immunity of the *legislator* for utterances made in his official capacity, not to immunity of private individuals.[8] Nor was the situation notably different in

[4]See *id.* at 1, where Levy initially states the accepted proposition that the Framers intended to abolish seditious libel but then challenges its validity.
[5]See *id.* at 4-5.
[6]*Id.* at 5. (Emphasis added.)
[7]*Ibid.*
[8]*Id.* at 5-6.

regard to freedom of the press, which meant at most freedom from "prior restraints" on publication. "One might publish without a license, but he did so at the peril of being punished for libel";[9] "any comment about the government which could be construed to have the bad tendency of lowering it in the public's esteem or of disturbing the peace was seditious libel, subjecting the speaker or writer to public prosecution."[10] Nor is there any doubt that "the presence of punishment afterwards, for 'bad sentiments,' oral or published, had an effect similar to a law authorizing previous restraints."[11] So it had been in England, and so it was, despite historical convention, in colonial America: "The persistent image of colonial America as a society in which freedom of expression was cherished is an hallucination of sentiment. . . ."[12] "The American people simply did not understand that freedom of thought and expression means equal freedom for the other fellow, especially the one with hated ideas."[13] The most "dreaded and active instrument of suppression," moreover, was "that acclaimed bastion of the people's liberties, the popularly-elected Assembly";[14] "the law of seditious libel . . . was enforced . . . chiefly by the provincial legislatures . . ., secondly by the executive officers in concert with the upper houses, and lastly, a poor third, by the common law courts."[15]

> Any words, written, printed, or spoken, which were imagined to have a tendency of impeaching an Assembly's behavior, questioning its authority, derogating from its honor, affronting its dignity, or defaming its members, individually or together, were regarded as a seditious scandal against the government, punishable as a breach of privilege.[16]

"None of the available evidence . . . [for any of the colonies] suggests that freedom of speech or press existed before the revolutionary controversy,"[17] as witness the treatment meted out to the American

[9]*Id.* at 9.
[10]*Id.* at 10.
[11]*Id.* at 15.
[12]*Id.* at 18.
[13]*Ibid.*
[14]*Id.* at 20.
[15]*Ibid.*
[16]*Id.* at 21.
[17]*Id.* at 63.

Tories[18]—"Yankee Doodle's Liberty Boys vociferously claimed for themselves . . . [a] right of free expression which they denied their opponents."[19] In the words of one writer of the pre-Revolutionary period, "Political liberty consists in freedom of speech, so far as the laws of a community will permit, and no farther: all beyond is criminal, and tends to the destruction of Liberty itself."[20] Nor is there any "known evidence proving that any American prior to 1798—that late —thought otherwise."[21]

> Animadversion was regarded as subversion. Any verbal attack on government officials or policies which might be deemed an affront to the authority or honor of the legislature was subject to a power of repression from which not all the writs precious to the liberty of the subject could effect a rescue.[22]

In short, the "people" whose representatives wrote and who themselves ratified the first amendment, with its apparent guarantees of freedom of expression, had no tradition of free speech or a free press, no statesmen who were urging the need for these guarantees, and no political philosophers who had made out a case for them.

The first amendment "happened" where and when it could not possibly have happened, except to the extent we repeal the axiom that nothing is ever created out of nothing. How we are to explain the first amendment brings us to a second, and still more breathtaking, set of Professor Levy's conclusions. Levy notes that the remote source of the first amendment freedom of expression clauses appears to be a provision of Pennsylvania's first constitution, adopted in 1776, "that *the people* have a right to freedom of speech, and of writing, and of publishing their sentiments; therefore freedom of the press ought not to be restrained."[23] But it is not true, as historical convention would have us believe, that the first amendment merely bumped up to the federal level speech and press guarantees that were already familiar features in the state constitutions—twelve states had left speech entirely unprotected and four had provided no

[18]See *ibid.*
[19]*Id.* at 64.
[20]*Id.* at 68-69.
[21]*Id.* at 68.
[22]*Id.* at 86.
[23]*Id.* at 183. (Emphasis added.)

constitutional protection for freedom of the press.[24] Worse still, "The history of Pennsylvania . . . shows that the only one of the original states to protect constitutionally both speech and press *did not intend to abandon the common law of seditious libel.*"[25] The same thing appears to be true of the eight states that protected the press:

> There is no evidence to show that . . . [the term "freedom of press"] was not used in its prevailing common-law or Blackstonian sense to mean a guarantee against previous restraints *and a subjection to subsequent restraints for licentious or seditious abuse.*[26]

The guarantees probably meant, to those who wrote them, "the right of unrestricted discussion of public affairs," but it was clearly understood "that discussion *was* unrestricted if there was a guarantee against previous restraint."[27] The "freedom" toward which the Constitution-makers were groping was a "freedom to write, print, or utter anything that was *temperate, accurate, well-intentioned, and that fell short of what a court or the community might deem seditious or libelous.*"[28] Benjamin Franklin put the idea very well when he wrote that, if freedom of the press meant " 'the Liberty of discussing the Propriety of Public Measures and Political opinions, let us have as much of it as you please'. . . . [but] as to writers who affront the government's reputation 'we should, in moderation, content ourselves with tarring and feathering and tossing them in a blanket.' "[29] He further felt that verbal criticisms of the government must be "guided by moderation, truth, and good motives."[30] As for the political theory of the pre-first amendment period, such as that reflected in the famed Cushing-Adams correspondence,[31] the only break one finds in the direction of Professor Levy's "predilections" is the twofold insistence that "truth should be a defense against a charge of criminal utterance" and that juries "should decide whether the

[24]*Id.* at 184-85.
[25]*Id.* at 185. (Emphasis added.)
[26]*Ibid.* (Emphasis added.)
[27]*Id.* at 186. (Emphasis added.)
[28]*Ibid.* (Emphasis added.)
[29]*Id.* at 186-87.
[30]*Id.* at 187-88.
[31]See *id.* at 192-96.

defendant's words were criminal."[32] Neither Cushing nor Adams had broken with the idea that falsehoods and scandals against the government should be punished, as Cushing put it, "with becoming rigour."[33] In due course, Adams as President was to sign the Sedition Act of 1798 and "eagerly" urge its enforcement; Cushing as Associate Justice of the Supreme Court was to preside over some of the trials and to charge juries on the statute's constitutionality.[34] Moreover, Cushing and Adams wrote as *reformers,* far ahead of the constitutional law of the period.[35] We need not be surprised, then, when we find nobody challenging James Wilson's contention at the Pennsylvania ratifying convention that the Constitution would leave the common law of seditious libel in force.[36] There are thus no grounds for Zechariah Chafee's often quoted statement that the authors of the first amendment "intended to wipe out the common law of sedition, and make further prosecutions for criticism of the government, without any incitement to law-breaking, forever impossible in the United States of America."[37] With one very minor exception, "from the time of the revolutionary controversy through the ratification of the first amendment," one finds no statement to the effect that the doctrine of seditious libel is incompatible with liberty.[38] What one does find "indicates the contrary proposition."[39] Finally, as some persons will learn to their surprise, no book or pamphlet was available to the authors of the first amendment that urged any such novel doctrine.[40] Nor can it be argued, as we often hear, that the first amendment guarantees were rendered necessary by the famous "recommendations" with which the ratifying states accompanied their respective acts of ratification: none of the first nine states to ratify recommended guarantees of freedom of speech or press,[41] and while three other states did make recommendations along these lines, there is no rea-

[32] *Id.* at 196.
[33] *Id.* at 198.
[34] *Ibid.* The weakness of the protection derived from the Cushing-Adams concept of freedom of the press is demonstrated by the fact that "only one Sedition Act jury returned a verdict of acquittal." *Id.* at 199.
[35] *Id.* at 200.
[36] *Id.* at 202.
[37] CHAFEE, FREE SPEECH IN THE UNITED STATES 21 (1948) (quoted in LEVY, THE LEGACY OF SUPPRESSION 213-14 (1960)).
[38] LEVY, THE LEGACY OF SUPPRESSION 214 (1960).
[39] *Ibid.*
[40] See *id.* at 88-125.
[41] *Id.* at 217-18.

son to attribute to them an intention to supersede the law of seditious libel.[42] We begin to see the answer to the question, "How did the first amendment guarantees of free speech and free press happen when and where they did?" If what we are talking about are *guarantees* of *free* expression to the individual citizen, they did not happen at all. *Pace* Mr. Justice Black, the first-amendment support for Professor Levy's "predilections" has been brought off by mirrors. Both terms, as used in the first amendment, were understood as having their common-law meaning and *only* that meaning, because there is no other meaning they could have had for the persons concerned. Moreover, even had they had another meaning, one tending in an "open society" direction, the fact would remain that the first amendment "offered against *state* violation no protection whatever to speech and press, or to religion."[43] As I like to put it in classroom lectures, what the first amendment in fact does is to declare suppression a monopoly of the state governments. Nor can there be any question of making the amendment look better in these respects by appeal to the relevant congressional debate. It was "unclear and apathetic; ambiguity, brevity, and imprecision of thought characterize the comments of the few members who spoke. It is doubtful that the House understood the debate, or cared deeply about its outcome. . . ."[44] "To assume the existence of a general, latitudinarian understanding [of the speech and press guarantees] that veered substantially from the common-law definition is incredible. . . ."[45] "Not even the Anti-Federalists offered the argument that the clause on speech and press was unsatisfactory because insufficiently protective."[46] The Anti-Federalists, the primitive source of the demand for "amendments guaranteeing individual rights,"[47] disliked Madison's Bill of Rights, including the guarantees here in question, the moment they saw it and switched sides on the Bill of Rights issue.[48] We can now understand why they disliked it—why, for instance, Burke of South Carolina denounced the guarantees as "little better than whip-syllabub, frothy and full of wind, formed only to please the palate; . . . we have done nothing but lose our

[42] See *id.* at 218-21.
[43] *Id.* at 223. (Emphasis added.)
[44] *Id.* at 224.
[45] *Id.* at 225.
[46] *Ibid.*
[47] *Id.* at 226.
[48] See *id.* at 227-28.

time. . . ."[49] The events surrounding ratification of the amendment leave matters unchanged: their history "indicates no passion on the part of anyone to grind underfoot the common law. . . . Indeed, the history of the framing and ratification of the First Amendment scarcely manifests a passion on the part of anyone connected with the process."[50]

Professor Levy's conclusions should, as they become known to scholars in the field of constitutional law, put an end to appeals to the intention of the Framers of the first amendment by proponents of open-society doctrines. And Professor Levy's book should also end appeals to the "plain meaning" of the language of the first amendment, save on the part of those who are prepared to wrest it unabashedly out of its historical context; its plain meaning for the men who wrote it and the men who ratified it was precisely *not* the meaning it now seems to have because history has played strange tricks with the *usage* of the terms "freedom of speech" and "freedom of the press." The best Professor Levy can do to salvage it is to say that its Framers "formulated its language in words of such breadth . . . that *we* have been able to breathe a liberality of meaning *into* it in keeping with the ideals of our expanding democracy,"[51] which gives the show away as regards "plain meaning" as a libertarian edict. The "rights" vouchsafed by the plain meaning of the first amendment were the very reverse of "absolute," to use Mr. Justice Black's phrase, and belong rather in the same category with the right to swim guaranteed in the celebrated rule of jurisprudence: "Yes, yes, my darling daughter; hang your clothes on a hickory limb, but don't go near the water." Mr. Justice Black therefore must, on pain of being declared either an ideologist or a careless scholar, change his line of argument in first-amendment cases.[52]

[49] *Id.* at 228.
[50] *Id.* at 233.
[51] *Id.* at xii. (Emphasis added.)
[52] There are, let me add, three further difficulties about the whole matter to which Professor Levy's leanings in political philosophy blind him—difficulties that the present writer will deal with in a book now in progress. There is—as witness the word "people" in the above reference to Pennsylvania's 1776 Constitution, where the "right" to freedom of speech would seem to inhere not in individuals but in the *populus*—grave doubt whether the men responsible for the "plain language" were yet thinking at all in terms of "rights," automatically extensible to all individuals. There is also grave doubt that anyone except Madison and Jefferson was yet thinking of rights as enforceable by the courts against Congress. Finally, the Supreme Court has yet to attempt to enforce the first amendment against Congress, which *might* mean that it does not think it can.

In dispelling one mystery, how the first amendment could have happened when and where it did, Professor Levy raises another: where and when and how then *did* his predilections, the predilections in favor of a legally open society, originate in America? Still another mystery is when and where the first attempt occurred in America to defend the libertarian position philosophically. To the first of these two questions his answer, on the "where" and "when," is: with Jefferson and the "Jeffersonians," in the course of the controversy over the Sedition Act of 1798; and on the "how": in a manner that is highly "suspect" (from, one supposes, the standpoint of political philosophy). "Had any of . . . [the Jeffersonians] declared at any time before 1791 . . . some of the opinions they formed in *the party battle* of 1798-1800," their later statements might be accepted at face value; but none of them meets this test.[53] "Not a single Federalist in the United States is known to have opposed the constitutionality of the Sedition Act. . . . Every Democratic-Republican with the exception of James Sullivan believed it to be unconstitutional."[54] The predilections were born in the ardors of a struggle for power by some "outs," in the form of promising arguments to be used against some "ins," and should be taken *cum grano salis.* This is especially true since "many of the Jeffersonians, *most notably Jefferson himself,* behaved when in power in ways that belied their fine libertarian sentiments of 1798."[55]

Jefferson and Civil Liberties: The Darker Side, which is to all intents and purposes a lengthy appendix to *The Legacy of Suppression,* is a detailed account of the fall from libertarian grace that accompanied the Jeffersonians' rise to power. It, too, must have been a "difficult book to write"; indeed Professor Levy's mood is not unlike that of a devoted husband reading aloud a private investigator's report on how his errant wife spends her afternoons. Unlike *Legacy,* therefore, *Jefferson* tends to be iterative and tiresome; few readers will—or ought to—wish to stay the course, the more since Levy early establishes the overall point his data are capable of supporting. Jefferson did, from the standpoint of Professor Levy's predilections, have a "darker" side. He went into office with heavy commitments to maintain civil liberties; one could piece together, out of the quotes strewn through the book, a veritable libertarian credo. However, he

[53] *Id.* at 247. (Emphasis added.)
[54] *Id.* at 246.
[55] *Id.* at 247. (Emphasis added.)

did, while in office, appear to act on the principle that no government should permit qualms about individual rights to get in the way of its policies. He *did,* although he was in part responsible for the adoption of a Bill of Rights that would presumably limit the power of the federal government by, for example, forbidding unreasonable searches and seizures, make constant use of such searches and seizures in enforcing his embargo legislation and even persuaded his Democratic Congress to authorize them, "the most repressive and unconstitutional legislation ever enacted by Congress in time of peace."[56] He had, on countless occasions, testified to his belief in freedom of the press, yet in power "he experimented with censorship and condoned the prosecution of his critics."[57] In 1783 he had wished to forbid the Virginia Legislature the power "to pass any bill of attainder,"[58] but he lived to argue that "legislative outlawry and attainder was justifiable . . . when a person charged with a crime withdrew from justice or resisted it."[59] So on down through all the articles of the credo: "Practices once reprehended by Jefferson as shocking betrayals of natural and constitutional rights suddenly seemed innocent, even necessary and salutary, when the government was in his hands."[60] He "tended to stretch his political powers as he stretched his mind in intellectual matters, leaving his conscience behind. . . ."[61] "In Jefferson's case power produced a myopia that permitted bills of rights to be seen only dimly."[62]

How, Professor Levy asks all along the way, are we to judge "the foremost [libertarian] spokesman of his generation" when we find him behaving in this manner? And his answer is that we are to pronounce a verdict of "culpable."[63] I agree, as I agree also with Professor Levy's contention that "Jefferson's experience . . . has particular relevance to the problems of the 1960's, a decade in which expediency seems often to demand a sacrifice of rights."[64] Culpable, yes—but of which of the two possible charges: (1) Knowing the right yet doing the wrong—that is, failing to "live up," while in the office

[56]P. 139.
[57]P. 19.
[58]P. 41.
[59]P. 39.
[60]Pp. 162-63.
[61]P. 166.
[62]P. x.
[63]P. xi.
[64]P. viii.

of President, to the pronouncements previously handed down from his study; or (2) having handed down pronouncements from his study that turned out, when put to the test, to have been ill-considered—pronouncements, if you like, that were insufficiently grounded in political philosophy and especially that chapter of political philosophy that teaches us to leave room when we make pronouncements for the possible future claims of prudential considerations? For Professor Levy, who though he chides Jefferson with overconfidence in his "rightness" is "certain that he is absolutely right"[65] on all questions concerning civil liberties, the choice between the two charges is easy: he will take the first every time and will unhesitatingly sweep aside Jefferson's now tacit, now explicit, insistence that the conduct Levy retrospectively demands of him would involve constant betrayal of the responsibilities of his office. For me the choice is not easy[66]—it is, indeed, possible only because I look behind Jefferson's commitments to the *assertions* involved and find them bad political philosophy because they violate Madison's wise injunction against "absolute restrictions in cases that are doubtful, or where emergencies may overrule them." But since bad political philosophy is a greater crime than "talking one way and acting another,"[67] I must in the end find Jefferson even more "culpable" than Levy thinks him to be; and by the same token I must find Professor Levy "culpable" too—for approaching all these questions with a dogmatism, an apodictic certainty, that cuts him off from the very possibility of political philosophy. This he does, moreover, at the moment, when having deprived his fellow-libertarians of the appeal to the Framers and the appeal to the plain text of the first amendment, both they and he have no place to go *except* to political philosophy. Were he ever to develop one iota of doubt about the correctness of the libertarian "position" or even a little familiarity with the writings of its critics,[68] a whole new world would be opened to him and, because of his great intellectual gifts, to us all.

In conclusion, as to the second of Professor Levy's mysteries and his "solution" to it, it *is* possible to say when and where a case for the libertarian position first emerges in America, and one of the

[65]P. 163.
[66]I do recognize that something is to be said for a statesman's acting in office as he has led people to expect.
[67]P. x.
[68]Even James Fitzjames Stephen is not mentioned in his survey of the literature.

virtues of *Legacy,* indeed a major "breakthrough" for which we shall remain forever in debt to that book, is that it settles the question once and for all. Louis Wortman, a New York lawyer, published in 1800 a book entitled *A Treatise Concerning Political Inquiry, and the Liberty of the Press* that establishes itself, even in Levy's brief exegesis of its argument,[69] as the great neglected American masterpiece on freedom of expression and as, therefore, *the* book to which the libertarians will be well advised to go for ammunition when they begin to argue questions concerning civil liberties on their merits. "It is . . . ," says Professor Levy, "the book Jefferson did not write but should have."[70] I would pay it even higher praise: it is a book Jefferson could not have written even if he had tried and the book John Stuart Mill later tried to write but did not write as well.[71] Stephen would have had with Wortman's *Treatise* no Roman holiday of the kind he indulged in with Mill's *Essay;* the *Treatise,* indeed, would present a real challenge to any nonlibertarian critic. If Levy deprives his coreligionaries of a couple of old and jaded lines of argument, he gives them a new hero. And they have everything to gain and nothing to lose from this redistribution of assets.

[69]See LEVY, THE LEGACY OF SUPPRESSION 283-90 (1960).
[70]*Id.* at 283.
[71]Wortman, it may be noted, preceded Mill by several decades.

The Bill of Rights & American Freedom

Let me begin by setting down a few easily confirmable but perhaps not very well-known facts:

I

1. The Convention that drew up the Constitution of the United States voted down unanimously a proposal (by Colonel Mason) that the Constitution be made to include a declaration or bill of the natural rights of man.

2. Proposals for such a declaration or bill of rights became, in short order, the major rallying points in the several States for opponents of ratification of the Philadelphia Constitution.

3. In the controversy over ratification, as it went forward in the so-called ratifying conventions, no clear distinction was drawn by the opponents of ratification between the two issues: (a) Will the new Federal government be "too powerful" in the sense that it will threaten the integrity and sovereignty of the *States?* and (b) Will it be "too powerful" in the sense that it will threaten the natural rights of the *individual citizens of the States?*

To put it otherwise: We know that a very considerable percentage of the opponents of ratification were primarily concerned about what was going to happen to the States in the new Federal union. This is the objection to ratification that is uppermost in the minds of the authors of the *Federalist,* so that Hamilton's attack on the very idea of a bill of rights appears at a relatively late date in the series; too late to affect the controversy. But *this* animus, which would have produced a demand not for a bill of individual rights but for something roughly equivalent to the Tenth Amendment—some barrier to the expansion of Federal power at the expense of State power—never expresses itself very clearly in the course of the controversy, somehow gets absorbed into the demand for guarantees of individual rights.