clearly urge a cooperation among the branches. So much is clear from Publius' repudiation of the doctrine that the branches should be completely separated from one another or, as Publius puts it, the doctrine of separation of powers does not mean that the "departments ought to have no *partial agency* in, or no control over, the acts of each other." [14] Yet there is another side to this interdependence which involves a healthy sense of self-restraint on the part of the departments. Lacking self-restraint (something which is actually imposed upon the Congress through express consitutional provision), the very cooperation necessary for the operation of government is endangered. In a war of "all against all" among our branches, the Senate, for example, might refuse to cooperate with a President who has shown lack of self-restraint in his dealings with the legislative branch. The Congress might well decide to take drastic action against a Supreme Court that overtly challenges the authority of Congress. We can well imagine any number of conflicts that might occur to bring our system to the very brink of a total breakdown.

The self-restraint and cooperation of which we speak is in a very real sense much akin to the consensual politics to which we have referred. And we should not be surprised that until the time of the Civil War the morality urged upon us by Publius was adhered to, judging from the number of times the President and the Court used their ultimate weapons with respect to the will of the people as interpreted by Congress. Since that time, however, we seem, as even the official literature informs us, to have run into great difficulties. The reasons for our difficulties can also be traced to a derailment in our tradition, the causes of which we will explore further.

14 From Federalist 47.

CHAPTER VII

The Tradition and the Bill of Rights

We can now analyze the so-called Bill of Rights, usually defined as the first ten amendments to our Constitution. The official literature, as we might well expect, has already taken great care to supply us with answers to most of those questions that arise concerning the Bill of Rights and its place in our tradition. Its teachings come down to something like this: The Declaration of Independence and the Bill of Rights, theoretically speaking, fit "hand in glove." More exactly, the Bill of Rights follows in the "spirit" of the Declaration by asserting individual rights that limit arbitrary and abusive action by government. It is worth our while to examine some of the contentions found in the official literature upon which such an estimate of the Bill of Rights seems to be based.

Contention One: The Bill of Rights was intended to correct an oversight of the Constitutional Convention. The fifty-five at Philadelphia somehow did not appreciate the extent to which the people wanted their basic rights enumerated in the Constitution. On this score, at least, they certainly were not attuned to the times or to the spirit of either the people or the revolution.

Whether the Framers were out-of-step with their times—which is one of the stock charges of those who claim the Declaration marks the origins of tradition this side of the Atlantic—is a question we shall leave open save to point out that this

seems not to be the case given the speed with which the Constitution was drafted and adopted. The "oversight" theory, however, falls flat on its face because of certain obvious facts. First, the matter of whether to include a Bill of Rights in the Constitution was brought up before the Philadelphia Convention and was rejected unanimously, each state voting as a unit. Second, we find the subject of a Bill of Rights discussed in Federalist 84, wherein the charge is made that the addition of a Bill of Rights would not only be unnecessary but dangerous —a matter we will go into at some length later. But we are hardly entitled off of the plain record to say that the omission of a Bill of Rights was an oversight. On the contrary, it was by all outward evidences deliberate.

Contention Two: The Constitution would not have been adopted unless the pro-Constitution forces promised that a Bill of Rights would be written into or added onto the Constitution.

Of all the fictions that have grown up around the Bill of Rights and the adoption of the Constitution, this is quite probably the most unbelievable. Who, we might ask, could make any such commitment? How could promises of such a nature be extracted from the pro-Constitution forces when the participants in the state ratifying conventions (all thirteen of them) had only to look at the document before them to see precisely what the amendment process entailed. Certainly no group in the ratification conventions was in any position to do more than say: "Yes, if we, or one of our members, is elected to the Congress, we pledge ourselves to bring the matter up. Moreover, we will, insofar as possible, try to secure passage of the desired amendment." But given the amendment process which calls for a two-thirds vote of both houses of Congress and a three-fourths approval of the states, they could not have *promised* anything beyond this. And the plain undisputed fact is that the Constitution was ratified without a Bill of Rights.

Contention Three: The Bill of Rights is closely linked to the Declaration of Independence because the Bill of Rights is couched in terms very much akin to the Declaration's. At least both documents speak of "rights" in the sense that there are things which no duly constituted government should do.

This is *at best* only partially true. The word "right" or "rights" appears six times in the Bill of Rights. Three times it is employed with respect to matters that relate principally to the administrative and judicial branches. "In all criminal prosecutions, the accused shall enjoy the right of a speedy and public trial . . . ." Or, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures, shall not be violated." The Ninth Amendment (which we will discuss later in a different context) contains the word "rights," and the Second Amendment speaks of "the right of the people to keep and bear Arms," [1] a right which, as we have recently been reminded by some of our intellectual leaders, is best forgotten if for no other reason than certain reasonable regulations are necessary to promote domestic tranquility. None of these rights is at all exceptional in the sense that they represent a departure from our tradition to the time of the Constitution. None of them (save possibly the Second Amendment) can impinge upon our basic commitment as a people since they are not directed as limitations on the people operating through their representative institutions to enact the deliberate will of the community. On the contrary, the administrative and judicial arms of government are, with the enactment of these amendments, bound by rules or modes of procedure which seem to be the product of a slow and deliberate evolution within our tradition. Most of the rights in the Bill of Rights—and we want to make this clear—bear no resemblance to the "unalienable rights" of the Decla-

1 Poore, I.

ration but rather to the "rights" that "We the People" have devolved upon for our better ordering—rights, that is to say, which are part and parcel of a tradition that has its origins well before the Declaration.

On top of this, the Bill of Rights does not mention "equality," much less even reaffirm in any fashion whatsoever that which the official literature claims to be our supreme commitment off of the Declaration. Nor can the rights set forth in the Bill of Rights be regarded as *unalienable*: they are rights that can be modified or even repudiated through the very same process by which they were adopted.

But let us leave the matter of contentions aside, for, as the reader will soon see, most of the claims of the official literature with respect to the Bill of Rights have no foundation in fact. In this regard, we can go so far as to say that contemporary libertarians, who comprise a pretty healthy majority of those who interpret and explain the American political tradition out across the nation in our institutions of higher learning, are guilty of attributing their values to those who were responsible for the adoption of the Bill of Rights.

To this point we have purposely ignored the First Amendment. We have done so because the First Amendment presents us with a very special problem that requires some intensive analysis (Amendments Two through Ten, so far as we can tell, do not).[2] The First Amendment provisions do apply to Congress and hence, indirectly, to the people, so that we are entitled to read the amendment as a limitation on the deliberate sense of the community. We can put the matter this way: If "We the People" are truly upset about what certain individuals and groups in society are saying or writing publicly, whether the speeches or writings urge revolution, simple

[2] They do not because our tradition as far back as the Massachusetts Body of Liberties always placed great stress on preventing abuses by the executive and judicial arms of government.

disobedience to the laws, contain obscenities, or whatever, "We the People"—or so the amendment can be interpreted—have no legitimate authority to regulate or meddle with such writings or publications through national laws.[3] More precisely, any regulation through normal political channels (*i.e.*, through the law-making process as defined by the Constitution) would at least require the "repeal" of the First Amendment. It is a short step from this view to the proposition that the drafters of the First Amendment intended to commit us as a people irrevocably to what is now fashionably termed an "open society" which places an extremely high premium on the toleration of dissent. And from here it is even a shorter step to the proposition that the First Amendment, particularly the speech and press provisions, embodies the essence of the revolutionary ideals expressed in the Declaration.

Bearing this in mind let us turn to Federalist 84, wherein Publius does argue against a Bill of Rights in the sense it was contended for during the ratification struggle. The first thing we must note is that the word "right" in the common law tradition—and this tradition was still dominant at the time the Bill of Rights was drafted—confers a very special status upon that which is specified as a right. To label something, either of substantive or procedural nature, a right is tantamount to establishing a limitation on the powers of *governors against* the *people* or *individuals*. So much was true with respect to the Magna Carta, the Petition of Rights, and the Declaration of Rights in the English tradition. And this is precisely why Publius could argue when speaking of rights: "According to their primitive signification, they have no application to constitutions professedly founded upon the power

[3] Of course, with the broad interpretation given the Fourteenth Amendment by the Supreme Court, the same prohibitions now apply against the states. The Court's interpretation, we hasten to add, just "happens" to correspond with the philosophy of the official literature on these and like matters.

of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing, and as they retain everything, they have no need of particular reservations. 'WE, THE PEOPLE of the United States, to secure the blessings of liberty to ourselves and our posterity, do *ordain* and *establish* this Constitution for the United States of America.' " [4]

Publius' point is well taken. If—and this happens to be the case—we have been regarding rights in the context of limitations on the authority, then what sense does it make for the sovereign people to limit themselves? Surely, the security for any such rights of the people against the people must ultimately depend, as Publius tells us, "on the general spirit of the people and of the government." [5]

But Publius does talk about certain rights in a very favorable manner. He even goes so far as to declare that those rights contained in the Constitution (*i.e.,* prohibition against bills of attainder, ex post facto laws, guarantee of writ of habeas corpus and prohibition against titles of nobility) are "in every rational sense, and to every useful purpose, A BILL OF RIGHTS." Now we must ask, isn't Publius guilty of a gross inconsistency? He hails those rights already in the body of the Constitution but rather strongly opposes the addition of other rights—specifically "liberty of the press." If the specification of some rights is worthwhile and efficacious, why shouldn't a further elaboration of rights also serve a useful purpose? Publius' answer we briefly may put as follows:

(*a*) The national government is not intended to regulate "every species of personal and private concerns." Rather it is established with the intent "to regulate the general political interests of the nation." Thus, there is little need for detailed specification of personal liberties and rights. Moreover, Publius intimates, the states should be charged with the task of any such detailed specification because the scope of their authority does involve personal and private concerns.[6]

(*b*) ". . . that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous." Why? They are unnecessary because the national government is a government of delegated powers and possesses no authority to infringe upon the rights which the opponents of the Constitution want to protect through amendments. "For why declare," Publius asks, "that things shall not be done which there is no power to do?" And, he declares, they would be dangerous for at least two reasons. First, "They would contain various exceptions to powers which are not granted; and, on this very account, would afford a colourable pretext to claim more than were granted." Second, to declare that government should not abuse a given right or liberty carries with it a presumption that the national government was originally vested with powers to regulate the rights and liberties in question. This affords those who are "disposed to usurp, a plausible pretence for claiming" that the national government still possesses, despite the bill of rights, the power to *properly* regulate the specified rights and liberties.

(*c*) There will be, Publius warns us, problems involved with the differentiation of rights such as liberty of the press. "What signifies," he asks, "a declaration that 'liberty of the press shall be inviolably preserved?' What is liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion?"

With this in mind we are in a position now to see why Publius supported the rights contained in the Constitution but rather vigorously opposed the inclusion or addition of other

4 Cooke (ed), *The Federalist.* Emphasis his.
5 Robert Dahl reminds us of this in his *Preface to Democratic Theory.*
6 All of this represents a differentiation between society and government, a differentiation that is certainly not unexpected in light of our tradition.

rights "in the sense and to the extent in which they are contended for" such as liberty of the press. The rights which he does support, *i.e.*, those contained in the body of the Constitution, are (*a*) common-law rights as distinct from rights which are merely asserted by an individual or a group, (*b*) easily defined, in part because they are traditional and do not touch in any significant way upon the basic design of the Philadelphia Constitution. The "rights" he opposes (if we abstract from the one example he does offer, "liberty of the press") are susceptible of such a variety of definitions that they could subsequently be construed in such a fashion as to limit the legitimate exercise of delegated powers by the national government, to expand national powers at the expense of the states, or to limit severely the deliberate sense of the community operating through prescribed constitutional channels to handle those contingencies and conflicts that might in the future arise concerning the meaning and intent of the rights in question without having recourse to the amendment process. This latter point, often overlooked, surely must have been on his mind, for even the most important of the rights contained in the body of the Constitution, at least in Publius' estimation, the establishment of the writ of habeas corpus, can be suspended, presumably by Congress, "when in cases of rebellion or invasion the public safety requires it." We can understand, then, his reluctance, and even animus, towards the incorporation of less well-defined rights which could be construed so as to prevent resolution of future contingencies consonant with the purposes of the Preamble.

We see still another reason why, granting Publius' view of this matter, a wedge can be driven between the First Amendment of the Constitution and the other nine that comprise the Bill of Rights; why it is, as we have contended, that the First Amendment does deserve special attention. The "guts" of Amendments Two through Eight reassert well-established

common-law rights about which there could scarcely be any controversy. The Ninth Amendment, of course, is an umbrella of sorts intended to answer counter-argument (*a*) above on Publius' part. And the Tenth is, as the Court aptly put it, nothing but a "truism" which simply reasserts Publius' view of the Constitution as expressed in Federalist 84 and elsewhere. Clearly, however, the First Amendment touches upon matters which Publius felt have no place in a bill of rights. From what we have said we can see reasons why he would be vigorously opposed to this amendment as it now stands, while still remaining rather indifferent about the other amendments which now constitute our Bill of Rights.

We can, without doing any injustice to Publius' arguments and the general thrust of his contentions, cast something of a different light on his arguments by asking: What is to prevent some individuals who subsequently become a majority in this nation from looking upon the First Amendment freedoms as providing us with a new commitment as a people organized for action in history? Would not a First Amendment containing these freedoms lead us to believe that we are committed to the precepts of an "open society"? Would not such contentions, in light of the Declaration and the interpretation given it in the official literature, make such good sense that subsequent generations might be disposed to believe our basic commitments are something other than those embodied in the Philadelphia Constitution and our prior tradition?

Publius, to be sure, does not provide us with direct answers to these questions. He was in a very poor position to envision the linkage that would be established in the minds of some between the Declaration and the freedoms which now constitute our First Amendment. Most surely he would have great difficulty in following the reasoning of those who contend in our day and age that the First Amendment embodies our supreme symbols. However, much to his credit, he did seem to

sense that the specification of these and like freedoms could create very severe problems within our system.

Let us turn now to another episode regarding our Bill of Rights, the debates and proceedings of the first Congress which drafted and proposed them. In this we will see very few intimations that the Bill of Rights, and, in particular, the First Amendment freedoms of speech and press, represent any break with our tradition over the underlying principles of the Constitution.

Madison is frequently dubbed the "Father" of the Bill of Rights, as well he might be, given the seeming unflagging persistence he exhibited in the first Congress on behalf of their adoption. The House of Representatives, of which Madison was a member, was apparently very reluctant to take up the matter of a Bill of Rights. At least this much can be said, contrary to what is more or less accepted myth: The addition of a Bill of Rights was far from being the first concern of those who first met under the authority of the Constitution.[7]

Madison's speech of June 8, 1789, urging the adoption of a Bill of Rights, the longest and most detailed justification for the Bill of Rights we have in the official literature, hardly would lead one to believe that the Bill of Rights is the cornerstone of our republic. Nor, by all available evidence, did the first Congress which proposed it. To show this we need only point out the following which is a matter of official record:

(*a*) Madison's speech on behalf of the Bill of Rights is throughout conciliatory and moderate. The proposed amendments, he tells his audience, will not "endanger the beauty of Government [*i.e.*, The Philadelphia Constitution] in any one important feature, even in the eyes of its most sanguine ad-

[7] Madison, as the record plainly shows, was rebuffed twice in his efforts to force this issue before the House. Even when he does gain the attention of the House there are those who still complain that there is more important business to attend to.

mirers." He is fully aware that some feel "paper barriers against the power of the community are too weak to be worthy of attention." But he counters: "As they have a tendency to impress some degree of respect for them, to establish the public opinion in their favor and rouse the attention of the whole community," they may still be of some merit. The argument he has heard to the effect that "by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration," he deems "the most plausible" objection to a Bill of Rights. But this he has "attempted" (and history, we add, has shown his attempt a dismal failure) to guard against by means of what subsequently turned out to be the Ninth Amendment.[8] The final sentence of his address is probably the most revealing of his attitude toward the question of a Bill of Rights: "I have proposed nothing that does not appear to me as proper in itself, or eligible as patronized by a respectable number of our fellow-citizens; and if we can make the Constitution better in the opinion of those who opposed to it, without weakening its frame or abridging its usefulness in the judgment of those who are attached to it, we act the part of wise and liberal men to make such alterations as shall produce that effect." This "something to gain but nothing to lose" argument permeates most of his speech on behalf of the Bill of Rights, a fact which hardly supports the extravagant claims made for the Bill of Rights today. Moreover, we do not find, no matter how hard we search, that the House is under obligation to adopt a Bill of Rights because of promises made to the people. Nor do we

[8] The fact is that probably 99 percent of the American people cannot name a right provided by the Ninth Amendment. This, we can say, is an intriguing matter. It certainly tends to bear out a belief we have long held: You confer a very special status upon that which you formally declare as a right and, in so doing, tend to disparage those which, for one reason or another, are omitted. In any event, our contemporary "dialogue" illustrates this point, for we focus, when we do speak of rights, on those specified.

find the argument that the House is obliged to adopt the Bill of Rights in response to overwhelming popular demand.

(*b*) The House of Representatives scarcely debates the amendments submitted to it. Only eight individuals speak to the proposal that "no religion shall be established by law, nor shall the equal rights of conscience be infringed." The House members spend even less time debating the proposed amendment, "the Freedom of speech and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the Government for redress of grievances, shall not be infringed." The fact is that those proposals which subsequently were incorporated into what is now the First Amendment, were not the subjects of any extended or penetrating discussion. Those who lead us to believe differently, and that would include certain members of our Supreme Court who seem to speak with apodictic certainty about the intentions of the drafters of the First Amendment and other provisions of the Bill of Rights, can justly be accused of not having done their homework. The debates in the House tell us practically nothing about the matter of intent.

But this is significant in itself. The proposed amendments were adopted by the House, some to be sure with modifications, in such a short period of time and with so little opposition that we have every reason to believe that they were taken in the very spirit in which Madison first proposed them; namely, they would not in any way alter the basic structural or procedural design of the Philadelphia Constitution. In other words, every available bit of evidence would suggest that the participants did not envision that the adoption of the amendments represented any departure from the basic principles embodied in the Constitution. Yet this seems strange no matter how one looks at it. On the one hand, from the vantage point of our contemporary intellectuals, duly echoed in numerous Supreme Court decisions, the drafters certainly must have meant to significantly modify, if not entirely change, the course of our tradition as expressed in the Constitution, at least to the extent of bringing it back into line with the "spirit" of the Declaration—at least as they interpret that "spirit." On the other, we should expect debate concerning the proposed amendments, principally those provisions which now constitute the First, because they are couched in such terms that we can easily envision their being interpreted in a fashion so as to significantly alter the fundamental nature of our Constitution and the government created by it. Indeed, we have today the benefit of hindsight but still we should expect that Madison's arguments might well have been challenged on the following grounds: "If we adopt these amendments we are severely circumscribing rule by 'We the People.' The 'listing' of rights in the manner you suggest is a highly presumptuous undertaking because such rights may very well be interpreted to deny future generations the flexibility and discretion to handle matters involving these very rights in a prudential manner consonant with the purposes of the Preamble." [9]

Two likely explanations for the behavior of the House suggest themselves. (*a*) The members of the House could have regarded the admonitions and prohibitions contained in the proposed Bill of Rights as nothing more than, to use John Marshall's words, "merely recommendatory." [10] Such a view, no matter how much at odds with our contemporary conception of the matter, is nevertheless quite plausible. We see this view expressed in Federalist 84, wherein we are so much as told that the rights contended for (and this certainly would

[9] Some indeed were prescient enough to see this. *Cf.* Charles Hyneman and George W. Carey (eds.), *A Second Federalist* (New York: Appleton, Century and Crofts, 1967), Chap. 2.

[10] Jonathan Elliot (ed.), *The Debates in the Several State Conventions on the Adoption of the Constitution* (Philadelphia, 1941, 2nd ed., rev.), III, 561.

include liberty of speech and press) "would sound much better in a treatise of ethics than in a constitution of government." And the salient parts of Madison's address suggest so much. For instance, the specification of rights he calls for in the form of amendments would "have a tendency to impress [upon the public or people] some degree of respect for them" and this "may be one means to control the majority from those acts to which they might be otherwise inclined."

We can say with certainty, off of the state constitutions including even the Virginia Declaration of Rights, that those rights relating to our First Amendment freedoms were put in such terms as to be nothing more than prudent guides for public and legislative behavior.[11] The same is true with respect to the "recommendatory amendments" submitted by the state constitutional ratifying conventions. For example, New York, one of four of the states which submitted the longest and most detailed amendment recommendations, proposed the following. "That the enjoyment of Life, Liberty, and pursuit of Happiness are essential rights which every Government *ought* to respect and preserve. . . ." [12] But note that the three other states (Rhode Island, North Carolina, and Virginia), by all evidences intent upon securing adoption of a bill of rights, employed the following language with respect to what is now part of our First Amendment "freedoms": "That the people have a right to freedom of speech, and of writing and publishing their sentiments; but the freedom of the press is one of the greatest bulwarks of liberty and *ought* not to be violated." [13]

Now note that the word "ought" is used with respect to the more sacred or fundamental "rights," whereas "shall," the

11 The following is taken from Charles Tansill (ed.), *Documents Illustrative of the Formation of the Union of the American States* (Washington: Government Printing Office, 1927).

12 Emphasis added.

13 *Ibid.*

mandatory form of expression, is employed with respect to lesser "rights." Much can be said about this rather curious wording (we say "curious" only in light of our contemporary interpretations of the meaning and intent of the Bill of Rights) but so much is clear: We can reasonably infer that the proposed amendments relating to speech and press were generally considered to be recommendatory—that is, of no legal binding or effect. This could well account for the absence of debate in the House, for it could well be that the proposed amendments, particularly as they relate to speech and press, were held to be something akin to New Year's resolutions.

(*b*) Considerable evidence can be mustered to show that those provisions relating to freedom of speech and press were to be understood and interpreted in the context of the existing common law of seditious libel which, for all intents and purposes, would serve to place regulation of these freedoms in the hands of the legislative assembly through the deliberative processes established by the Constitution. Harrison Gray Otis, speaking in the debates on the Alien and Sedition Acts, presents us with the accepted understanding of what the common law entailed: "This freedom [referring here to freedom of speech and press as contained in the First Amendment] is nothing more than the liberty of writing, publishing, and speaking one's thoughts, under the condition of being answerable to the injured party, whether it be the Government or an individual, for false, malicious, and seditious expressions, whether spoken or written; and the liberty of the press is merely an exemption from all previous restraints." [14] Clearly, then, if these freedoms were understood in the context of the common law of seditious libel, the Congress would still possess a considerable discretionary authority over their exercise—too much, at any rate, for our modern libertarians.

All available evidence, some of it admittedly indirect, leads

14 See Hyneman and Carey, *A Second Federalist*, for our source.

us to believe that the provisions of the First Amendment relating to speech and press are best understood in the context of the common law. One important piece of indirect evidence is this: The select committee charged with winnowing through the proposals from the state ratifying conventions and drawing up amendment proposals for consideration by the House recommended that protection against infringement of speech and press also apply against state governments. The wording of their proposal is as follows: "No State shall infringe . . . the freedom of speech or of the press." We do know that in the vast majority of the states (probably ten of the eleven represented in the House) the common law of seditious libel was both accepted and in force. For this reason it is virtually impossible to believe that if this proposal were intended to eliminate the common law of seditious libel we would not find resistance and heated debate, particularly on the part of those who were a strong and vocal contingent in the House bent upon preserving the powers and autonomy of the states.[15]

Equally startling is this: There is virtually no debate about what freedom of speech and press would mean in the absence of the common law. Surely we should again expect extended debate if the traditional common-law standards were to be superseded. To assume that the members of the House knew precisely what these freedoms entailed in the absence of the common law would seem preposterous in light of the subsequent controversies surrounding these freedoms.

A relevant question with respect to the First Amendment as adopted, since it applies only to Congress, is this: Did the participants assume a federal or national law of seditious libel to exist? The bulk of the evidence would suggest that this was the case. Indeed, one sees off of Federalist 84 this very presumption. Moreover, as we have indicated, the fact that the

15 Leonard W. Levy, *Legacy of Suppression* (Cambridge: Harvard University Press, 1960).

prohibitions against the state and national governments were lumped together in the original proposal would clearly suggest that any intended restrictions were to apply equally to both levels of government. But again the absence of debate is revealing, for the participants certainly acted *as if* the provisions against the national government were no more severe than those against the state governments. This behavior is best explained on the assumption that prohibitions against the state and national governments were felt to be of the same order and to be interpreted in the same context, namely, that of the common law, Otherwise, if the prohibitions were not intended to apply equally in the same context—or if there were the slightest doubt about the matter—we should expect to find extensive and intensive debate about the proposal.

To this we may add the following. The participants certainly lacked any great corpus of literature on behalf of the libertarian ethic. To say that the members of the first Congress were captivated by those thoughts which charm our contemporary intellectuals concerning freedom is a proposition that will not withstand the most superficial critical examination. More: Madison, the "Father" of the Bill of Rights, tells us more than once in his public utterances on this question that the basic design of our system will not be altered by their adoption. Yet today we know that these Amendments, particularly the First, are interpreted to embody within them very drastic changes for the central symbol of our tradition, rule by the deliberate sense of the community. And we must ask, Could not the framers of these amendments see the potentialities inherent within them for altering the course of the American tradition? We must answer, Apparently not. As Aedanus Burke, a representative who very much wanted to change our direction as a nation, put the matter: "I am very well satisfied that those amendments that are reported and likely to be adopted by this House are very far from giving sat-

isfaction to our constituents; they are not those solid and substantial amendments which the people expect; they are little better than whip-syllabub, frothy and full of wind, formed only to please the palate; or they are like a tub thrown out to a whale, to secure the freight of the ship and its peaceable voyage." This, off of the available records, was the view of those of a substantial majority who voted for the proposed amendments.[16]

We can only conclude as follows concerning the Bill of Rights and the First Amendment: Their adoption did not alter the mainstream of the American tradition which, as the Preamble and *The Federalist* would have it, comes down to rule by the deliberate sense of the community. The Bill of Rights, contrary to what we have over the years been led to believe, did not constitute any departure from the tradition. Yes, indeed, our tradition was derailed and, to be sure, the Bill of Rights plays a critical role (because of deliberate distortion) in justifying the theories of those who support that derailment. But the real source of the derailment is not to be found in the Bill of Rights. It occurs, as best we can tell, at a point somewhat later in our history.

16 Paradoxically—paradoxical because it does conflict with the myth handed down to us by the official literature—the Antifederalists were not the champions of "civil liberties" (as we currently understand that term). They wanted to preserve the sovereignty of states vis-á-vis the national government. The record is abundantly clear on this point.

CHAPTER VIII

Derailment and the Modern Crisis

We have in the foregoing pages talked about a "derailment" in our tradition. The derailment, as we have further remarked, has understandably caused a certain schizophrenia among us, We the People, so that we do not really know who we are and where we are going. To detail when all this came to pass is far beyond our purpose here. We can, however, say this much: The philosophical plants of derailment were seeded and began to grow full force sometime between the very early years of the Republic and the Civil War. This is precisely why Lincoln could speak in the manner he did at Gettysburg and get away with it. These plants were lavishly fed and nourished, sometimes unwittingly, after the Civil War, so that by the turn of the century the so-called progressivist historians and political scientists could burst forth with their notions about the central symbols of the American tradition. In the intellectual world their interpretations have subsequently enjoyed remarkable and frightening success. Today, by and large, in the average college classrooms across the nation, it is their recounting of the American tradition and symbols (the Declaration of Independence and the Bill of Rights being their major sources) that is accepted pretty much as gospel truth, if we judge only by the texts that are most commonly used. Why two or more generations of presumed scholars fell under the spell of the "progressivists" is an intriguing matter.