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.

Here is one of the curiosities of the whole business; one might have expected, for example, a concerted attack by the States'-rights men on the "necessary and proper" clause, which was—one is tempted to say "obviously"—*the* threat in the Constitution to the powers of the States. But the major rallying point of opponents of ratification becomes, I repeat, and becomes at an early date, the demand for guarantees of personal liberty; they apparently do not see that a bill of individual rights will in no way, or at least no direct way, protect the "sovereignty" of the States. I leave to one side, as unresearchable, the "cynical" explanation, namely: that those who opposed ratification out of concern for the States embraced the bill of individual rights in the fond hope of saving the States by defeating the Constitution altogether. The Federalists often made this charge, which we may call the "phony issue" charge. But I do not see how, even if it were true, it could possibly be substantiated; that is, I see no scholarly alternative to taking the participants in the controversy at their word and assuming that the bill-of-rights men wanted what they are reputed to have got, namely, a bill of rights.

4. The controversy was in many respects a curious one; properly speaking, perhaps, we should not speak of *a* controversy but of the *several* controversies in the several States: neither the Federalists nor the anti-Federalists ever threw up anything much in the way of a union-wide organization; the Federalists in each state merely took on their local anti-Federalists. (Let me stress the point, because it will assume considerable importance in a few minutes.) Letters and documents were exchanged; strategies were no doubt affected, within a given State, by influences coming from outside; but that was about it. Another curiosity is that the controversies were not (to some extent no doubt for the reason just mentioned) over *the* Bill of Rights, but rather over *a* bill of rights, which nobody ever took the trouble to draw up, so that what the controversies were in fact over was Bill of Rights X, where X, as in algebra, was an unknown. This, too, will assume importance below, so let me stress it: Madison, when he finally came up tails on the issue, had an extremely free hand in preparing the first draft.

5. It is *not true,* though many historians would like us to think so, that nobody bothered to draw up a draft because "everybody knew" what provisions the future bill of rights, if incorporated in or added to the Constitution, would "have" to contain; this remained a great

uncertainty right down to the moment when *the* Bill of Rights was finally voted in the First Congress. Or rather let me respond to the stirrings of scholarly caution and say: Everybody perhaps knew certain things it would contain, namely, the common-law rights that do in fact make up the bulk of *the* Bill of Rights. Indeed I have come to the conclusion that if a draft *had* been prepared and adopted by a nation-wide anti-Federalist organization, and *if* that draft had limited itself to the common-law rights, there need have been no controversies. The Federalists would have said, would have *had* to say, "Ah! If *that* is all you mean, let us by all means have your bill of rights." They were not going to take the public position that they wished the new government to have the power to make unreasonable searches and seizures, or to force witnesses to testify against themselves, or to try accused persons a second time for one and the same offense.

To put it still otherwise: *if* a draft had been prepared, and *if* it had confined itself to the substance of Amendments II through X, the only point on which the Federalists might have felt tempted to take exception was that of jury trials in civil cases. The Framers had had their reasons, rather honorable ones in point of fact, for excluding civil cases from the guarantee of jury trial in the Constitution, and their animus on that matter might well have perpetuated itself, in the hearts of the Federalists, into the hypothetical situation I envisage.

But *that* solution was out of the question, we can see in retrospect, for two reasons: First, the anti-Federalists, as we learn from the so-called "recommendatory" amendments that went forward to the First Congress from the ratifying conventions, were not of one mind even as to which of the II-X rights were "essential"; such rights appear in the most remarkably spotty fashion in the recommendatory amendments. But, second, and this brings us closer to the heart of the matter, there was the grave and potentially divisive matter—potentially divisive as between the two sides *and* potentially divisive on each side—of what rights (apart perhaps from freedom of petition and of peaceable assembly) should "go in" relating to the area we today identify with the First Amendment.

Even if *arguendo* we were to concede the point, Yes, there was consensus concerning the substance of Amendments II-X, no one could possibly argue, for reasons to which I shall give due attention a little later, that there was consensus or potential consensus about the provisions of Amendment I. To put this otherwise: I now feel

sure, after careful study of the documents and long meditation, that (a) the anxieties that led the Federalists to oppose a bill of rights must have related *mainly* to what the framers of the future Bill of Rights might do in what we may now begin to call the Hugo Black area and (b) the fervor of the anti-Federalists for a bill of rights can be explained only in terms of their determination that it must say this or that in the Hugo Black area. But I stress again: one must not think of the anti-Federalists as agreed about what a bill of rights should say in that area. (Many were concerned exclusively with what it should say about *religious* freedom, but even these meant different things by religious freedom. Many were concerned mainly about freedom of the press.) To which I must now add: This is above all the area in which debate was never joined between the Federalists and anti-Federalists; nearly everyone, as one reads the records, seems to be avoiding the problem, precisely, perhaps, because it *is* so controversial. For the Federalists it is easier just to oppose a bill of rights, and so postpone the problem. For the anti-Federalists it is easier, if I may put it so, just to raise hell in favor of this or that provision that *must* "go in." The "fight" is analogous to one between two men, each convinced that the other threatens something sacred in his existence, groping blindly for one another in a pitch-dark cellar, but each avoiding contact when he senses the other's approach.

At the risk of stating it over-graphically, I offer the following thesis: The First Amendment had already become, long before it was ever written, *the* potentially—I am tempted to say unavoidably—explosive problem of the American Republic. With only minor exceptions (such as whether wire tapping is an unreasonable search or seizure or whether the self-incrimination provision of Amendment V extends to the House Un-American Activities Committee), the problem of the Bill of Rights and American freedom is and has been, ever since Mason made his motion at Philadelphia, the problem of the First Amendment and American freedom. Perhaps someone will say I should have entitled this essay "The First Amendment and American Freedom." But I couldn't: the controversies, articulately, were over a bill of rights, and we must start out from there.

6. There is some little talk in the literature on the Bill of Rights about the First Congress having "had" to enact such a bill because, variously, it was under what amounted to a "mandate" from the state ratifying conventions to do so; or the Federalists had in those conventions "committed themselves," that is, promised, to go along on the bill-of-rights issue; or (those considerations apart) there was overwhelming popular pressure, too insistent for the Congress to ignore, in favor of such a bill. None of the three notions, however, will hold water. The sentiment in favor of a bill of rights in the ratifying conventions was, in each case, a *minority* sentiment; in no case were the bill-of-rights men able (though they tried) to make the ratification voted conditional on subsequent adoption of a bill of rights; they just plain got licked all the way along the line. The Federalists, in case after case, "conceded" on the matter of "recommendatory amendments"—that is, they agreed that ratification should go forward with proposals for amendments that the First Congress might take under advisement; but one gets the strong impression that the Federalists in each convention are "conceding" not because they have to, but in the hope that the majority in the final vote shall be as large as possible, thus giving the new Constitution a broader basis of support than it would otherwise have had.

The main points to grasp are (a) that no one was in position to speak for the Federalists union-wide and (b) that, in any case, the ratifying conventions, even assuming the concessions in question to be properly speaking additive, were not in position to lay down a "mandate" to the First Congress, which would evidently be responsible to its constituents not to the conventions. The most that the conventions could do was what they did, namely, make recommendations. The majority in each case, having won on ratification *and* against conditionality (ratification to be conditional on the holding of a second convention, on the subsequent adoption of such and such amendments, on the adoption of a bill of rights), simply agreed to send along to the First Congress recommendations reflecting the views of the minority.

As for the third point, alleged popular pressure on the First Congress, the proofs are even less convincing; the anti-bill-of-rights men won the elections hands down, and so completely dominated the First Congress. Apart from the elections there existed, of course, no avenue through which such pressure could make itself felt effectively and convincingly. And, finally, nothing could be clearer to us, as we read the history of the First Congress, than this: if such pressure existed, only Madison seems to have been much aware of it or anything properly describable as sensitive to it.

Madison's problem, from the beginning, is to get attention—even a modicum of attention—from his fellow legislators to the bill-of-rights matter; *they* think there is vastly more important business to transact; in the parlance of a later era, they "stall," "drag their feet." But let me not overstate the point; there *is* satisfactory evidence of widespread minority sentiment in favor of some sort of step to assure "separation" of "church" and "state," to assure "freedom of conscience." And Madison had *promised* his own constituents in Virginia that he would try to get them a bill of rights. But that is all you can get out of the account of the matter by Rutland, who is not uneager to make the adoption of the Bill look as "democratic" as possible. I conclude: no Federalist commitment, no mandate, no overwhelming popular pressure. We cannot hope to understand what happened until we get these false notions out of our heads. The problem narrows down, in an astonishing manner, to Madison. He is indeed the "father" of the Bill of Rights, and doubly so because he begat it on the body of so reluctant a mother.

7. Back now to the "controversies" in the ratifying conventions. Astonishingly little attention has been paid to the Federalist case against a bill of rights, though the arguments they used—now on the floor of the conventions, now in the public print, above all of course in the *Federalist*—are perhaps not unworthy of attention. Permit me, in the briefest possible manner, to summarize them, and then, also briefly, to attempt the rather unorthodox exercise of listing a few arguments they *might* have used if (to repeat my earlier language) the issue had ever got joined and they had seen themselves obliged to pull out all the stops. The overt arguments were:

a. A bill of rights is unnecessary; the new government is a government of merely delegated powers, could not possibly do the things a bill of rights would forbid it to do.

b. A bill of rights would be ineffective, unenforceable; so, the Federalists argued, bills of rights had proven themselves to be in the States, even in that great primitive mother of American bills of rights, the State of Virginia. The barriers a bill of rights imposes are, in Madison's classic phrase, "parchment barriers"; the legislature will, in a given situation, go ahead and do, *pace* the bill of rights, what seems to be called for. Only Madison and Jefferson were sufficiently prescient to envisage possible enforcement by the courts, and they did not press the point. Hamilton's discussion of unenforceability in

the *Federalist* shows clearly that, whatever dreams he may have dreamed about judicial review, *he* was not thinking of future clashes between the Supreme Court and Congress over the rights to be embalmed in a bill of rights; there is not a whiff of such a suggestion in No. 84.

c. As a limitation on the powers of the new Federal government, a bill of rights would be self-defeating; it would have the effect of expanding not diminishing them. As Hamilton puts it, in effect, in No. 84, to tell the new Federal government that it must not impair freedom of the press is to create a presumption, not present in the Constitution as it came from Philadelphia, that its power somehow does extend to such matters; erect the dam, so to speak, and the water of Federal power will flow right up to it, where otherwise it would remain right back where the fifty-five at Philadelphia had left it.

This time, however, I cannot proceed without a word or two of comment: That argument, even in Hamilton's hands, would be on the face of it disingenuous without the "necessary and proper" clause, with which Hamilton was presumably familiar. The new government was, notoriously, to act directly on the citizens; it would in due course, to go no further, be called upon to wage war; Hamilton and his fellow citizens had just had some experience of the impossibility of waging war, even under a constitution without a "necessary and proper" clause, without curbing freedom of the press. Did he really believe that in some future war the sort of dam he was opposing would *pull* Federal power harder than the "necessary and proper" clause would *push* it? It is one of the misfortunes of the whole matter that the anti-Federalists were not sufficiently adroit to smoke Hamilton out, force him to face the real problem.

On the other hand, viewing the argument from the point of vantage of 1963, what a piece of prediction! I say prediction, not prophecy, because it proceeds in terms of *analysis,* and the shrewdness of the analysis is surely validated by the accuracy of the prediction. For have things not fallen out *just* as Hamilton said they would? As Hugo Black never wearies of pointing out, and Alexander Meiklejohn before him, Federal power has indeed flowed down to the dam of the First Amendment freedoms. Owing largely perhaps to the kind and capable ministrations of the United States Supreme Court, the question long ago ceased to be "Can the Federal government abridge freedom of speech, press, association, assembly, petition, etc.?", since

everybody knows the answer to that question is, "Yes, it can, and does, and in the opinion apparently of most of us *must.*" Rather the question is: "In what circumstances? Clear and present danger? The existence of a proper governmental interest that must be 'balanced' against our interest in enforcing the First Amendment?" I don't say it wouldn't have happened that way anyhow under the "necessary and proper" clause (though it might, mercifully, have done so without the verbal and logical saltimbankery of the decisions that make Mr. Justice Black so furious); I do say that Hamilton had himself quite a point and that we should be proud of him for it.

d. No bill of rights should be adopted because natural rights are as safe as you can make them in the hands of the people acting through their elected representatives; you can trust the people and—this overlaps, of course, the "parchment barriers" argument—in point of fact have no alernative *but* to do so. As Rousseau had put it a while before, if the people wills to do itself harm, who is to say it nay? But let us speak only of an overlap; the two points are distinct, and those who have been brought up on J. Allen Smith and his epigones may find it difficult to grasp at first that it was the Federalists not the anti-Federalists who used the "democratic" argument, the put-your-confidence-in-the-people argument, in the controversies over a bill of rights. And the argument is already prefigured in the way the *habeas corpus* provision of the Philadelphia Constitution is worded. No attempt is made to place *habeas corpus* once and for all beyond the power of Congress; rather circumstances are frankly envisaged when the "public safety" may require suspension of the right.

A pretty convincing case, in the opinion of this writer, and, insofar as convincing, let me add, as convincing a case for repealing the First Amendment as ever it was against adopting it. Yet one suspects, as one canvasses it, that it does not reveal very fully the Federalist state of mind on the bill-of-rights issue. So I now ask, how then, without injustice to Federalist political thought as we know it across the decades, can we round it out? What arguments can we add? At the risk of appearing impudent, I am going to attempt to add a few as the Federalist spokesmen *might* have put them:

a. The anti-Federalists, beginning with Colonel Mason and his statement on the floor at Philadelphia that a committee could draw up a list of the natural rights of men in "three hours," show a "temper" that is inappropriate to the genius of the Constitution drawn up

at Philadelphia (and defended in the *Federalist*). That Constitution envisages the *self*-government of America by the "deliberate sense of the community," which must extend, *inter alia,* to the making of decisions from situation to situation and moment to moment as to what is called for by the purposes set forth in the Preamble. No, no, no; the issue is *not* whether men have natural rights or whether those rights should be respected by government; the issue is whether our generation, by contrast with scores of preceding generations that were also deeply committed to the idea of natural rights, has any particular reason for claiming that it can now make a "list" of them and, having done so, seek to impose them, forever and a day, on future generations. The issue is not whether men have natural rights, but whether those rights can at any moment be specified once and for all.

We might make an exception here of the common-law rights—which, however, precisely do not, in detail, have their origin in a list that some person or persons sat down and "drew up"; they have been hammered out in the courts of law over long centuries and reflect the accumulated experience of the English-speaking peoples with the vexed question of how to prevent miscarriages of justice. Probably we confuse matters by calling them "natural rights" at all. In any case, we suspect you, having seen these recommendatory amendments of yours, of wishing to go far beyond—how far, nobody knows—a mere statement of the common-law rights. We suspect you of wishing to venture where the wisest of our ancestors (none of whom ever attempted to draw up a "list") have feared to tread; there is even talk among you—not much, but enough to give us pause—of writing into your bill of rights something new and unheard-of called "freedom of speech," of writing it in as a right which government must in *no* circumstances abridge. Well, we do not think such a right is ultimately compatible with orderly government, much less with *free* orderly government. Gentlemen, let us be sensible!

b. We are not clear as to the status your bill of rights would enjoy if we did adopt it. You speak of "amendments," to be accomplished under the procedures laid down in Article V. But the Article V procedures envisage amendments that, once ratified, will enjoy *equal* status with the main body of the Constitution, and it may be that is what you seriously intend. That, however, is going to raise some very serious problems to which, honestly, you do not seem to have given

much thought. There's the whole question of how and by whom your bill of rights is to be enforced the day Congress, or Congress and the President, or Congress and the President and the Federal Courts wish to set aside this provision or that one. It is hardly too much to say that if you are going to expect equal status for your bill of rights, equal with the main body of the Constitution, you are going to have to do more than just tack on a bill of rights; you are going to have to get back into the main body of the Constitution and reword it so as to take care of the enforcement problem. Otherwise you are going to create a great confusion of responsibilities; over here the Constitution will seem to say that the deliberate sense of the community, as expressed through the republican principle of majority rule, is to prevail; over there the Constitution will seem to say, No, there are these and these absolutes that the deliberate sense of the community must stay inside of, must deem itself bound by, and let the chips fall where they may. The system looks to us, with all candor, downright unworkable; either your bill of rights will, as a barrier on the power of Congress, become a dead letter, unenforceable on the face of it, or machinery is going to have to be developed *for* enforcing it. And we cannot imagine what shape that machinery might take.

c. We have still another anxiety about all this. It now seems likely that the main body of the Constitution will go into effect backed up by a very high degree of consensus. That, we believe, is good; we as a nation made it clear as long ago as the Declaration of Independence that we believe in government by the consent of the people. Now, let us concede, *arguendo,* that you could embody the common-law rights in a series of amendments, perhaps even embody in such an amendment the provision some of you speak of about reserving to the States all powers not expressly delegated, and still hope for a high degree of consensus. Such provisions might well be *self*-enforcing, and so get you around the enforcement problem we mentioned a moment ago; because all Americans believe in these guarantees, there is good reason to suppose they would be respected. But once you go beyond that—to freedom of speech, or freedom of press, or freedom of conscience—we doubt whether forms of words could be devised that would command any general agreement. Look at the wide variation in the State bills of rights in this area. To put it otherwise: once, in your listing of rights, you go beyond the common-law

rights, you kiss good-bye to the sanction of tradition; as a people we *have* no tradition of free speech, or free press, or freedom of conscience—not even a tradition of having no established church. Gentlemen, you wish to launch us on uncharted seas, and we will have none of it!

d. To go back to the status of your future bill of rights, perhaps you do not, if only because of the apparently insoluble enforcement problem, intend it to have equal status with the main body of the Constitution. It is well-known, for instance, that the Virginia Declaration of Rights is not regarded as part of the constitution of that State but rather as—how shall we put it—a statement of ideals that the citizens are understood to entertain in common but know not to be immediately applicable. Well, if that is the sort of thing you have in mind, we shrink from the idea of your using amendments to the Constitution as your vehicle. The Constitution is intended to be a *law,* the supreme law of the land; it is not a proper locus for high principles that we might get around to applying, if all goes well, at some moment in the indefinite future. If Congress, when the "public safety" requires, or in the interests of justice or liberty, is to set the Constitution, or any one of its provisions, aside as it sees fit, that is to undermine the very notion of law, to encourage disrespect for law, And that, Gentlemen, as you surely know, no nation can do with impunity. Or, failing that, it is to encourage verbal games, with which you persuade yourselves that you are not really violating the law although it is obvious that you are, not really setting aside the principle when you clearly are setting it aside. And no nation can do that with impunity, either.

8. One thing is certain and cannot be overemphasized: At no point in the struggle over a bill of rights, and so far as I have been able to learn at no point in that First Congress which enacted the Bill of Rights, was the question "up" whether the American society of the future was to be, should be an "open society." The rights the future bill of rights would embody, the guarantees it would vouchsafe, were to be rights and guarantees against merely the new Federal government. Paradoxically, the anti-Federalists would have been the last to wish for them any broader scope than that. The anti-Federalists were States'-rights men, not prepared to put the new Federal government into the business of enforcing such rights and guarantees against the

State governments, or to alter in any significant way a state of affairs which we may define roughly as follows: the quality and intimate detail of the ordinary citizen's freedom would be determined, through an indefinite future, by the laws and policies and actions of the governments of the several States. The anti-Federalist talk of a bill of rights that would embody those natural rights that man "holds back" from "government"—and there was a great deal of such talk—represents, from this point of view, an unfortunate confusion. It suggests that the anti-Federalists were somewhat confused themselves, and it is an inexhaustible source of quotes by which our own contemporaries confuse the meaning which, at its problematical maximum, the Bill of Rights and, most especially, of course, the First Amendment, could have had for *anybody,* Federalist or anti-Federalist, at the time of its enactment. But of that, more in a moment.

9. Finally, the procedures that brought the First Congress into existence were, from first to last, in accordance with the "republican principle"—were, that is to say, "majoritarian," and not characterized by majority submission to minority dictation or blackmail. That is true not merely of the elections that actually produced the First Congress, which involved no sort of flirtation with the so-called unanimity principle; and not merely of the post-electoral situation, in which apparently it was clearly understood on all hands that the Federalists—or as John Roche prefers to call them, the Constitutionalists—having won their majority, would rightfully dominate the scene in the new "national" legislature. It is true also of the State ratifying conventions, where the final decision went by majority vote (one State, I believe, did require an extraordinary majority, but that is still not the unanimity principle). It is true, finally, of the Philadelphia Convention, where, apart from "withdrawees" like Yates and Lansing, the minority, once it saw that further talk was futile and that it was outvoted, "went along" with the majority—the one exception here being the Great Compromise between the large and small States, where, according to Roche, Madison had the votes but decided not to press his advantage lest the Convention go to pieces. There the minority was able to prevent a majority decision that it disliked, but not—even Roche does not claim that—to "dictate," merely to force an accommodation. (Even within the State delegations—witness poor Alexander Hamilton—decisions as to how to cast delegation votes went by the majority principle.)

II

So much, I say, is not very well-known but easily confirmable fact, all of it, I believe, sorely necessary for any approach to my central topic, which is:

Justice Black assures us, with three Justices already concurring, that the Founders of the American Republic intended the First Amendment freedoms to be "absolute"; that is, intended that they should not be set aside in any circumstances whatever; that, therefore, any infringement of those freedoms, on this ground or that, militates towards a drastic change in the basic character of the American Republic. Is he or is he not talking "good" history?

Put otherwise: Did the First Amendment, as passed by Congress and ratified by the States, declare the American Republic an "open society" and put in motion machinery that would make it an "open society"? Put still otherwise: Can we properly argue, as Justice Black does, from the "plain language" of the First Amendment to the "intentions" of the majority that voted it in the First Congress and the majorities that ratified it?

These are questions, I believe that can only be answered by recurring to facts that are even less well-known than those I have been canvassing and that are, in the nature of the case, far more difficult to confirm, partly because we do not by any means have at our disposal the data we should like to have and partly because the data we do have are, many of them, open perhaps to different interpretations. For the key questions become, in my view: First, what are we to make of Madison's course in the matter? And second, what significance are we to attach to the favorable vote he finally midwifed for his Bill of Rights out of his fellow M.C.'s?

I do not, obviously, pretend to "settle" either of these questions in this essay. But I do hope to show that there are great difficulties about Black's position in the matter. (He himself, for the most part at least, contents himself with consulting, apart from the "plain language" of the First Amendment, secondary sources.) And I hope to show that these difficulties are sufficiently great to suggest that the whole Black and Co. interpretation of the intention of the Founders is, quite simply, a *myth,* rooted ultimately in the airy fancies of J. S. Mill (who somewhat postdates the Founders). The two questions are, let me say by way of further preliminary, simultaneous, and I shall not take them

up *seriatim,* but shall proceed rather by pointing to certain considerations that would, I have concluded from my researches, have to be taken into account in order for them to be answered fully and definitively.

Item. The story, as I have already intimated, narrows down in an astonishing manner to Madison (just as the Bill of Rights problem, again as I have already intimated, almost narrows down to the First Amendment, or if you like the First and the Tenth Amendments; almost but not quite, because of a little-noticed dimension that I shall speak of below). Madison is the *sine qua non,* the necessary, though not of course sufficient, condition of the Bill of Rights as we have it. The accounts, whose authors are *not* eager to convey that impression, leave one convinced that (a) if Madison, over against the indifference and delaying tactics of his fellow Congressmen, had given up on a bill of rights, the First Congress would not have sent one forward to the States, and (b) those constituents of his in Virginia, to whom he had made his famous promise to work for a bill of rights (in order to defeat James Monroe for his House seat), would at an early moment have had to agree that he had done on its behalf all that could in good conscience be demanded of him. Yet he persevered and in the end —Rutland's chronological account of the relevant legislative events is punctuated by the word "finally"—won.

The question arises: Why? Not, one gathers, because he had changed his mind with respect to the major Federalist arguments against a bill of rights. Not only is the *Federalist* to be handed down to posterity, with his signature, as an *anti*-bill-of-rights book, but also Madison is to take steps later to make sure that his role in writing it is not underestimated (he remains, to go no further, the source of the contemptuous term "parchment barriers"). The most he is willing to commit himself to, even off at the end, is in effect: A bill of rights will (as I have put it earlier) do no harm—or, to use now his exact phrase, would not "endanger the beauty of the Government in any one important feature, even in the eyes of its most sanguine admirers." It is characteristic of the "debate" to which we owe our Bill of Rights that no one effectively calls upon him to say why, to square his new position on the matter with his old one, to meet the Federalist arguments against.

Yet an answer to our "Why?" does emerge, even from relatively stingy accounts of the matter, and, as far as it takes us (which is *not*

all the way), we can be fairly sure of it, namely: somewhere along the line Madison changes the *état de la question,* ceases, if I may put it so, to be interested in the merits of a bill of rights and becomes interested primarily in the merits of *passing* a bill of rights. A single sentence of his seems to put that much in the clear: the proposed Amendments will make *"the Constitution better in the eyes of those who are 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 who make such alterations as will produce that effect." Madison, in other words, takes it into his head that the new Constitution must have behind it, to all intents and purposes, a 100 per cent consensus; that the last opponent and objector must be silenced; and that he is prepared to pay, and persuade others to pay (as he proceeds to do), whatever price be necessary for accomplishing that objective. And that is the argument with which he appears to have fetched the necessary majorities in House and Senate—that plus the tacit inducement: pass my Bill of Rights and I'll leave you in peace.

He calls on his Federalist friends (never mind that he is already in the process of crossing the floor of the House; they are still his friends, else he would never have got those majorities) to change the rules of the constitutional game, at the very moment when they have won a clear victory under them. He calls on them to set aside that "republican principle" of majority rule that has, from first to last, governed the proceedings up to now, and to move suddenly for unanimity *on the terms of the defeated minority*—that is, by giving the minority its way not merely on the first of the two big issues that have been at stake (a bill of rights) but on the second as well (whether something further should be done to "nail down" State "sovereignty").

The question of the *merits* of a bill of rights promptly goes under water and has not, so far as I have been able to learn, surfaced until today. The Federalist M.C.'s, though they must have been well-schooled in the Federalist arguments, seem to have dismissed them overnight, so to speak, from their minds. Unlike the King of France, they had *fought* their troops up the hill, not merely marched them; but like the King of France, they were content to march them down again. Why? —which plunges us (pending a great deal of research on just that point, which does *not* seem to have engaged the fancy of our historians), into the realm of the truly speculative. I shall content

myself with saying merely this: Concede everything you like to Madison's "prestige," which was undoubtedly great. Concede everything you like, too, to the point that Madison's fellow-M.C.'s could get him off their backs only by going along with him on the bill-of-rights issue (the brevity, peremptoriness even, of the sessions devoted to the Bill of Rights does suggest that the Congressmen and Senators were eager to get on with other things). But the mind does not rest satisfied with these answers and is, therefore, driven to seek another.

The two possibilities that seem to cry up at you are (a) Madison's fellow Congressmen themselves suddenly changed their minds on the merits of a bill of rights, which seems improbable, or (b) Madison must have been mighty convincing in the cloakrooms, not only on the consensus point but also on the point that the Bill of Rights would not "endanger the beauty of the Government," would not "weaken its frame or abridge its usefulness." Now, we find ourselves wondering, *did* he argue these points? What did he mean by them? And once again, I think, the possibilities are confined to a fairly narrow range. Either he argued (a) that the Bill of Rights, in the absence in the Constitution of any effective means of enforcement, would remain a dead letter save to the extent that the representatives of the people —ultimately, of course, Congress—chose *to enforce it upon themselves;* or (b) that the Federal judiciary would in due course put forward a claim to "guardianship" of the Bill of Rights *and make it good* (that is, that the other two branches would in fact acquiesce in that claim, and permit the judiciary to have the "last say" as to what the Bill of Rights forbids and what the Bill of Rights allows); or (c) that the Bill of Rights was of such a character that—the people over the decades, the future congressmen, presidents, and judges being all, or in their generality, of one and the same mind about such matters—no troublesome problems would ever arise.

No fourth possibility, it seems to me, presents itself. Of the three before us I offer it as my opinion that (b) the judiciary, with Congress and the Executive acquiescing, will enforce the guarantees, can safely be eliminated, just plain on the grounds that had this been Madison's rationale it would have kicked up enough fuss for us to have heard about it. As for (c), that, after all, these are matters on which we all agree and are sure to keep on agreeing, one can imagine Madison's having used it with great effect as regards the Second, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Amendments as we

now know them; also as regards the Ninth; conceivably, even, if we may suppose both him and his listeners to have forgotten all about the "necessary and proper" clause, as regards the Tenth; but not as regards the First.

Returning now to our distinction between *a* bill of rights and *the* Bill of Rights, it seems safe to say that Madison had a remarkably "free hand" as to what "went in," and what didn't, what sources to draw on, and what "status" the bill he introduced would, so to speak, seem to claim for itself. At one point, we are told, he receives congratulations from a friend for the excellent choice he has made among the myriad proposals that had come in from the several ratifying conventions for guarantees of rights over against the new government. He drew heavily, we are told further and more frequently, on the original Virginia Declaration of Rights. But the first of these notions must be sacrificed to Occam's razor; except for the one nearly incredible "surprise" in his original draft, it seems to be a culling from a single document and, to come to the second notion, *not* from the original Virginia Declaration of Rights but from the recommendatory amendments sent forward by the ratifying convention in Virginia (though it might well be argued that *its* authors drew heavily on the original Virginia Declaration). Those recommendations, or rather the document in which they are embodied, is from the standpoint of modern constitutional theory a very curious affair, and for two reasons that are of considerable interest for our purposes.

First, it urges numerous guarantees for the future bill of rights that are, on the face of them, already taken care of in the *main body* of the Constitution (the guarantees, for example, that the military shall be subordinate to the civil, that legislative and executive officers shall from time to time return to their private stations); one keeps asking oneself as one reads it: "Have the authors not taken the trouble to read the Constitution they propose to amend?" and asks oneself, at the margin, "Do they or do they not take this business seriously?" (Madison, in any case, eliminates all that sort of thing out of hand; if there are objections from Virginia he can make the obvious, and unanswerable, answer.) But secondly, the document is made up, like the original Virginia Declaration, of statements of "principle," statements as to what "ought" to be done and "ought" not to be done, as contrasted with "rules of law." Both points seem to me to have an important bearing upon our topic, because they suggest that the

people Madison was putatively trying hardest to please, the opponents of the Constitution in his own State of Virginia, got in Madison's draft, on one side at least, rather *more* than less than their thinking on the matter to date prompted them to ask for.

Madison does two things out of hand that have, perhaps, been insufficiently noticed. First, he confines his draft (apart from Amendments IX and X) to matters appropriate to a bill of rights as, say, Mr. Justice Black understands a bill of rights, thus *already* setting his draft apart from any "mere" statement of principles analogous to the original Virginia Declaration. But second, he transforms each provision that he adopts into a rule of law; that is, into unambiguously mandatory (as Austin would put it) *commands.* Both, evidently, were things that would have *had* to be done in order for subsequent claims as to the status of the Bill of Rights, as a series of genuine and enforceable limitations on the power of Congress, to make any sense; yet neither change seems to have been hauled out into the open for discussion, or even mentioned. No one, that is to say, seems to have noticed that the bill was so stated as to be enforce*able* and as, therefore, to invite some thought about *how* it was to be enforced. Indeed, the complaints from Virginia, when they come in, are complaints to the effect that Madison's bill did not go far enough towards guaranteeing natural rights! Add to that what I have just called Madison's Big Surprise, namely, inclusion in his draft of a provision that would have forbidden the *States* to infringe trial by jury in criminal cases, or the rights of conscience, or freedom of speech or of the press, and we begin to see the complexity of the question. What *was* Madison up to? (Of course that provision was, as Madison must have known it would be, duly struck out in the Senate; on Madison's own showing, the idea of a bill was to please the objecting minority, who were above all anti-consolidators, anti-centralizers, States' righters.)

But it is the *First* Amendment that really wants looking at from the standpoint of the Virginia recommendations. Here the Virginian text had read: (a) "That the people have a right to freedom of speech, and of writing and publishing their sentiments, *but* [my italics] the freedom of the press [the very "freedom" on which Hamilton sets his sights in Number 84] is one of the great bulwarks of liberty and ought not to be violated"; (b) "That the people have a right peaceably to assemble together, or to instruct their Representatives; and that every freeman has a right to petition or apply to the legislative for the

redress of grievances"; and, finally, (c) "That religion" [promptly defined, if you please, as the "duty we owe to our Creator"] and "the manner of discharging it can be directed only by reason and conviction, not by force or violence, and therefore all men have an equal, natural, and unalienable right to the free exercise of religion according to dictates of conscience, and that no particular religious sect ought to be favored or established by Law in preference to others."

The evolution under these topics is indeed interesting to watch. The draft that goes to the Senate moves from the verbose principle on religious freedom that I have just quoted to virtually the form of guarantee we presumably live under: "Congress"—but note the shift, characteristic only and for no obvious reason of the First as contrasted with the remaining Amendments—"Congress shall make no law establishing Religion [not "a religion" but "Religion"] or prohibiting the free exercise thereof, nor shall the free rights of Conscience be infringed." "Free rights of Conscience" disappears before the final draft, never to be heard of again (though some such guarantee had been recommended by *several* States); "no law establishing Religion" becomes "no law respecting an establishment of religion," and "the equal, natural and unalienable right to the free exercise of religion" becomes a prohibition against "prohibiting the free exercise [of religion]...." The Virginia provision "That the people have a right to freedom of speech, and of writing and publishing their sentiments, etc." becomes first "The freedom of speech, and of the press ... shall not be infringed" and then, in the Bill of Rights itself, "Congress shall make no law ... abridging freedom of speech, or of the press"—again with the new emphasis on Congress, and the small shift from "infringe" to "abridge." As for the right of assembly, it moves from "the people have a right to peaceably assemble together" to, first, "the right of the people peaceably to assemble, and consult for their common good, shall not be infringed," to "Congress shall make no law ... abridging ... the right of the people peaceably to assemble." And, finally, we move from "That every freeman has a right to petition or apply to the legislative for redress of grievances" to, in the House draft, "Congress shall make no law ... abridging ... the right of the people ... to petition the Government for a redress of grievances."

Madison, except for narrowing it down to what *Congress* "shall not" do, merely pares and gives the "sound of law" to the Virginia text. The qualifying phrases disappear. The effect achieved is one of

austere simplicity, but by the time he has done—remember, we are concerned primarily with how he could have persuaded the Federalists to vote for it—we are, so to speak, a long way from Virginia, yet not so far from Virginia that the men of Virginia can take much exception. And, *pace* Mr. Justice Black, what has suffered most, as far as the "plain language" of the First Amendment is concerned, is precisely what all the argument was about, namely, "rights," of which, indeed, according to the "plain language," we are left with only two, the right of peaceable assembly and the right to petition for redress of grievances. The "right to freedom of speech, and of writing and publishing their sentiments," is gone, and we have only that Congress shall make no law abridging *the* freedom of speech; the idea that "the freedom of the press is one of the great bulwarks of liberty" is gone, for we have only that "Congress shall make no law abridging *the* freedom of the press." The "equal, natural and unalienable right to the free exercise of religion" is gone (along with, we might notice, the notion that the "Religion" whose "free exercise" the Congress must not "prohibit" is a "duty" we "owe to our Creator"), and we have only "Congress shall make no law prohibiting the free exercise of religion"; most particularly, the "according to the dictates of conscience" is gone ("freedom of conscience," incidentally, had turned up in several of the sets of recommendations from the State ratifying conventions, and the House draft speaks specifically of "the rights of Conscience" as one of the things that are not to be "infringed"). Finally, the most curious change of all, the Virginia pronouncement that "no particular religious sect or society ought to be favored or established by law in preference to others" becomes simply "Congress shall make no law *respecting* an establishment of religion." [My emphasis]

All very minor changes, you say, and why all the fuss? I answer, Yes, minor in the sense that Madison, final draft in hand, can reasonably say to his constituents in Virginia: "I got you what you asked for." Or, if you like, minor in the sense that the Virginians, if they look hard enough, can "see" in the First Amendment what they had been demanding. But not minor at all from the standpoint of Justice Black's question, which is whether the First Amendment embodies a decision to make the United States an open society, and not, we may I think be fairly sure, as regards picking up Federalist votes in Congress and out in the future process of ratification. For to begin with,

we see that, translated into the language and concepts of the time, what the First Amendment in effect does (through the emphasis on Congress) is to recognize laws respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, or abridging the right of the people to assemble peaceably and petition for redress of grievances as a *monopoly of the State governments;* that is, what it precisely does *not* do is to "take a stand" on the matters Mr. Justice Black now sees as being at stake in it. Not only is no "right" to freedom of speech asserted, rather it is also expressly avoided; no right to freedom of the press is asserted, rather it is expressly avoided; no right to the free exercise of religion, no "rights of conscience" are asserted, rather they are expressly avoided; no right to live in a land where no religious sect or society is favored or established by law in preference to another is asserted, but rather expressly avoided.

All that is left in the way of "rights," I repeat, are peaceable assembly and petition for the redress of grievances, both of which, we may note in passing, were traditional, both to a greater or less extent recognized by the common law, *unlike* any supposed right to free speech or nonestablishment or free exercise of religion. Read in the context of the times and of the document from which they were midwifed, in fine, the major provisions of the First Amendment are conspicuous precisely for the *absence* of overtones to the effect that the "freedoms" involved are "rights" and so, in Black's favorite phrase, "absolute." They are merely the Tenth Amendment (and the basic theory of the Constitution) restated in terms of speech, press, and religion, and Madison can indeed say, by the time he has done, that they will not mar the beauty of the frame of government devised at Philadelphia, that, in the language I have imagined his using, they are so worded that they are certain, as limitations on the power of Congress, to remain dead letters. Why, in view of their "plain language" after Madison has done, should any Federalist vote against them? Do they not leave the content of the freedom of speech and press and exercise of religion to be determined as, according to the *Federalist,* they ought and must be determined, namely, by the deliberate sense of the community, which must be expressed through that very Congress which the Amendment forbids to abridge them? And Madison drives the point home, one might say, by simultaneously forcing his fellow Congressmen through the (surely predictable) sym-

bolic step of eliminating a provision that would have forbidden the States to infringe trial by jury, the rights of conscience, the freedom of speech, or the freedom of the press.

Two further points, and *I* shall have done.

First, unpleasant as it may be for some of us to contemplate, Madison has turned out, *operatively speaking,* to be quite right (though only because, as we have seen, the First Amendment does *not* say what it might have said) about the Bill of Rights not doing any "injury" to the "beauty" of the Philadelphia frame of government—as, incidentally, all those Federalist arguments against a bill of rights may be seen, in retrospect, to have been pretty good political theory. Nearly two centuries have passed since the ink dried on Madison's Bill of Rights, but the showdown that he and Jefferson expected and that his recasting of the Virginia document seemed to invite—the showdown between a Congress bent on invading a natural right and a Federal court system, armed with a declaration of rights elevated to the status of enforceable law, saying (as what else can it do given the "plain language") "No" to it—has yet to occur in the area that, as all Americans know and seem always to have known, is the dangerous one, namely, that of the First Amendment. *To this day, the Supreme Court has never declared an enactment of the Congress of the United States unconstitutional on grounds of the First Admentment.*

Opinions may, to be sure, differ as to whether "natural rights" have thrived or suffered in consequence; that is, as to whether "natural rights" would, as the Federalists insisted, be safer with the people, which is where the Philadelphia Constitution left them, than they could be made by any alternative scheme the bill-of-rights men might end up devising. But Madison's Bill of Rights, correctly read (as I believe myself to have read it here) and read as we as a people have in fact ended up reading it, also leaves the natural rights, in the areas that Justice Black correctly regards as crucial, subject to the general Federalist principles that the deliberate sense of the American community is to be trusted, and that any attempt to put parchment barriers in its way will as a matter of course be ineffective. That is perhaps not the American political system as we describe it in our civics textbooks or our Fourth of July orations; it is certainly not the American system as, for example, Jellinek describes it and has taught other Europeans to describe it; but it is the American political system as it has worked to date, and it is high time we begin to recognize

it as that. Again as Rousseau put it long before the Federalists put forward their arguments: If the people wills to do itself hurt—or, we may safely add, good either—who is to say it nay? And the answer, for the American system, would appear to be: in the crucial area, nobody.