Origins of the Bill of Rights

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Dedicated to

Elyse

My wonderful wife of fifty-four years

Preface

This is my thirty-sixth book, and at the age of seventy-five I am beginning to think of retiring as an author, although I have at least one more book to do—on the origins of trial by jury. And, if I know myself, when that one is done, another will come to mind. In the past forty-plus years, I have written on a considerable variety of subjects, including Chief Justice Lemuel Shaw, Jim Crow, Thomas Jefferson, blasphemy, the right against self-incrimination, the forfeiture of property, and criminal justice. I may now be getting to the point where repeating myself becomes inevitable, especially on the subject of the beginnings of the history of our rights. Parts of this book draw heavily on previous ones. The subject of the origins of the Bill of Rights has long absorbed me. I have written several volumes on aspects of the Bill of Rights, as the list opposite the title page of this book indicates. In addition to my books on the First Amendment, I devoted several chapters on provisions of the Bill of Rights in *Original Intent and the Framers' Constitution,* but this is my first attempt to be systematic and comprehensive concerning the origins of the Bill of Rights. I have included coverage of the provisions of the unamended Constitution that also protect rights (writ of habeas corpus, ex post facto laws, and bills of attainder).

I wrote this book alone, contracting no debts to anyone, especially not to my grandchildren: Natalie, Elon, and Avishai Glucklich and Aaron, Adam, Jacob, and Nathan Harris. But I do want them to see their names in print. I should also acknowledge that several useful suggestions for improving the manuscript derived from an unknown reader employed by Yale University Press and from my editors John Covell and Laura Jones Dooley.

Chronology

1164–1179 Henry II's innovations leading to grand and petty juries

1215 Magna Carta

1354 Reenactment of Magna Carta and first use of "by due process of law"

1444 Bail Act

1606 Virginia Charter protects English liberties

1627 Darnell's case

1628 Petition of Right

1639 Maryland Act for English Liberties

1641 Massachusetts Body of Liberties

1642 Sir Edward Coke's *Institutes*

1644 John Milton's *Areopagitica*

1649 The Levellers' *Agreement of the People*

1649 Maryland Toleration Act

1659 Massachusetts hangs four Quakers

1670 Bushell's case

1676 Fundamental Laws of West New Jersey

1679 Habeas Corpus Act

1682 William Penn's Frame of Government for Pennsylvania

1683 New York Charter of Liberties and Privileges

1683 Pennsylvania Frame of Government

1687 Case of John Wise

1689 English Toleration Act

1690 John Locke's *Treatise of Civil Government*
1691 New York Declaration of Rights
1692 Massachusetts Habeas Corpus Act
1693 Case of Sir Thomas Lawrence
1698 Henry Care's *English Liberties, or, The Free-Born Subject's Inheritance*
1701 Pennsylvania Charter of Privileges
1734–1735 Case of John Peter Zenger
1763 Case of John Wilkes
1765–1769 Sir William Blackstone's *Commentaries on the Laws of England*
1765 Declaration of Rights and Grievances of Stamp Act Congress
1770 Case of Alexander McDougall
1772 Sommersett's case
1772 Boston's Rights of the Colonies and A List of Infringements and Violations of Rights
1774 Address to Inhabitants of Quebec
1774 Declaration and Resolves of First Continental Congress
1775 Declaration of Continental Congress
1776 Declaration of Independence
1776 Virginia Declaration of Rights
1776 Bills of Rights in Pennsylvania, Delaware, Maryland, and Vermont
1780 Massachusetts Declaration of Rights
1787 Northwest Ordinance
1787 United States Constitution
1787 George Mason's Objections to proposed Constitution
1787 Reasons of Dissent by Minority of Pennsylvania Convention
1788 Alexander Hamilton's *The Federalist,* Nos. 84, 85
1787–1789 Thomas Jefferson–James Madison correspondence on bills of rights
1788 Amendments proposed by state ratifying conventions
1789 Madison proposes amendments to Constitution
1789 Congress proposes amendments to Constitution
1791 Bill of Rights ratified by states
1798 Alien and Sedition Acts
1798 Virginia and Kentucky Resolutions

Contents

CHAPTER ONE

Why We Have the Bill of Rights

THE BILL OF RIGHTS consists of the first ten amendments to the Constitution. The traditions that gave shape and substance to the Bill of Rights had English roots, but a unique American experience colored that shape and substance. "We began with freedom," as Ralph Waldo Emerson wrote in "The Fortune of the Republic." The first charter of Virginia (1606) contained a provision that the colonists and their descendants "shall have and enjoy all Liberties, Franchises, and Immunities . . . as if they had been abiding and born, within this our Realm of England." Later charters of Virginia contained similar clauses, which extended to legal rights of land tenure and inheritance, trial by jury, and little else. But the vague language was repeated in numerous other charters for colonies from New England to the South, and Americans construed it handsomely. As the Continental Congress declared, Americans believed that they were entitled to all the rights of Englishmen, their constitutional system, and their common law. American experience with and interpretations of charters eased the way to written constitutions of fundamental law that contained bills of rights.

Freedom was mainly the product of New World conditions, the English legal inheritance, and skipping a feudal stage. Because of American's postfeudal beginnings, it was unencumbered by oppressions associated with an ancien régime—a rigid class system dominated by a reactionary and hereditary aristocracy, arbitrary government by despotic kings, and a single established church extirpating dissent. "America was opened," Emerson wrote, "after the feudal mischief was spent, and so the people made a good start. We began well. No inquisitions here, no kings, no nobles, no dominant church. Here heresy has lost its terrors." Americans were the freest people, therefore the first colonials to rebel. A free people, as Edmund Burke said, can sniff tyranny in a far-off breeze—even if nonexistent. American "radicals" actually believed that the Stamp Act reduced Americans to slavery. They resorted to arms in 1775, the Continental Congress believed, not to establish new liberties but to defend old ones. In fact, they did establish many new liberties but convinced themselves that those liberties were old. That was an English custom: marching forward into the future facing backward to the past, while adapting old law to changing values. Thus, Magna Carta had come to mean indictment by grand jury, trial by jury, and a cluster of related rights of the criminally accused, and Englishmen believed, or made believe, that it was ever so. The habit crossed the Atlantic.

So did the hyperbolic style of expression by a free people outraged by injustice. Thus, James Madison exclaimed that the "diabolical Hell conceived principle of persecution rages" because some Baptist ministers were jailed briefly for unlicensed preaching. By European standards, however, persecution hardly existed in America, not even in the seventeenth century, except on a local and sporadic basis. America never experienced anything like the Inquisition, the fires of Smithfield, the Saint Bartholomew's Day Massacre, or the deaths of more than five thousand nonconformist ministers in the jails of Restoration England. Draconian colonial

statutes existed but were rarely enforced. Broad libertarian practices were the rule, not the exception.

On any comparative basis, civil liberty flourished in America, a fact that intensified the notoriety of exceptional abridgments, such as the hanging of four Quakers in Massachusetts in 1659 or the 1735 prosecution of John Peter Zenger for seditious libel. Although a stunted concept of the meaning and scope of freedom of the press existed in America until the Jeffersonian reaction to the Sedition Act of 1798, an extraordinary degree of freedom of the press existed in America, as it did in England. And nowhere did freedom of religion prosper as in America.

The predominance of the social compact theory in American thought reflected a condition of freedom and, like the experience with charters, contributed to the belief in written bills of rights. The social compact theory hypothesized a prepolitical state of nature in which people were governed only by laws of nature, free of human restraints. From the premise that man was born free, the deduction followed that he came into the world with God-given or natural rights. Born without the restraint of human laws, he had a right to possess liberty and to work for his own property. Born naked and stationless, he had a right to equality. Born with certain instincts and needs, he had a right to satisfy them—a right to the pursuit of happiness. These natural rights, as John Dickinson declared in 1766, "are created in us by the decrees of Providence, which establish the laws of our nature. They are born with us; exist with us; and cannot be taken from us by any human power without taking our lives." When people left the state of nature and compacted for government, the need to secure their rights motivated them. A half-century before John Locke's *Second Treatise on Government*, Thomas Hooker of Connecticut expounded the social compact theory. Over a period of a century and a half, America became accustomed to the idea that government existed by consent of the governed, that the people created the government,

that they did so by a written compact, that the compact reserved their natural rights, and that it constituted a fundamental law to which the government was subordinate. Constitutionalism, or the theory of limited government, was in part an outgrowth of the social compact.

In America, political theory and law, as well as religion, taught that government was limited. But Americans took their views on such matters from a highly selective and romanticized image of seventeenth-century England, and they perpetuated it in America even as that England changed. Seventeenth-century England was the England of the great struggle for constitutional liberty by the common law courts and Puritan parliaments against Stuart kings. Seventeenth-century England was the England of Edward Coke, John Lilburne, and John Locke. It was an England in which religion, law, and politics converged to produce limited monarchy and, ironically, parliamentary supremacy. To Americans, however, Parliament had irrevocably limited itself by reaffirmations of the Magna Carta and passage of the Petition of Right of 1628, the Habeas Corpus Act of 1679, the Bill of Rights of 1689, and the Toleration Act of 1689. Americans learned that a free people are those who live under a government so constitutionally checked and controlled that its powers must be reasonably exercised without abridging individual rights.

In fact, Americans had progressed far beyond the English in securing their rights. The English constitutional documents limited only the crown and protected few rights. The Petition of Right reconfirmed Magna Carta's provision that no freeman could be imprisoned but by lawful judgment of his peers or "by the law of the land"; it also reconfirmed a 1354 version of the great charter that first used the phrase "by due process of law" instead of "by the law of the land." The Petition of Right invigorated the liberty of the subject by condemning the military trial of civilians as well as imprisonment without cause or on mere executive authority.

Other sections provided that no one could be taxed without Parliament's consent or be imprisoned or forced to incriminate himself by having to answer for refusing an exaction not authorized by Parliament. The Habeas Corpus Act safeguarded personal liberty, without which other liberties cannot be exercised. The act secured an old right for the first time by making the writ of habeas corpus an effective remedy for illegal imprisonment. The only loophole in the act, the possibility of excessive bail, was plugged by the Bill of Rights ten years later. That enactment, its exalted name notwithstanding, had a narrow range of protections, including the freedom of petition, free speech for members of Parliament, and, in language closely followed by the American Eighth Amendment, bans on excessive bail, excessive fines, and cruel and unusual punishments. As an antecedent of the American Bill of Rights, the English one was a skimpy affair, though important as a symbol of the rule of law and of fundamental law. The Toleration Act was actually "A Bill of Indulgence," exempting most nonconformists from the penalties of persecutory laws of the Restoration, leaving those laws in force but inapplicable to persons qualifying for indulgence. England maintained an establishment of the Anglican Church, merely tolerating the existence of non-Anglican trinitarians, who were still obligated to pay tithes and endure many civil disabilities.

In America, England promoted Anglicanism in New York and in the southern colonies but wisely prevented its establishments in America from obstructing religious peace because immigrants were an economic asset, regardless of religion. England granted charters to colonial proprietors on a nondiscriminatory basis—to Cecil Calvert, a Catholic, for Maryland; to Roger Williams, a Baptist, for Rhode Island; and to William Penn, a Quaker, for Pennsylvania and Delaware. The promise of life in America drew people from all of Western Christendom and exposed them to a greater degree of liberty and religious differences than previously known.

James Madison, whose practical achievements in the cause of freedom of religion were unsurpassed, said that it arose from "that multiplicity of sects which pervades America."

But a principled commitment to religious liberty came first in some colonies. Maryland's Toleration Act of 1649 was far more liberal than England's Toleration Act of forty years later. Until 1776 only Rhode Island, Pennsylvania, Delaware, and New Jersey guaranteed fuller freedom than Maryland by its act of 1649, which was the first to use the phrase "the free exercise of religion," later embodied in the First Amendment. The act also symbolized the extraordinary fact that for most of the seventeenth century in Maryland, Catholics and Protestants openly worshiped as they chose and lived in peace, if not amity. The act applied to all trinitarian Christians but punished others; it also penalized the reproachful use of such divisive terms as heretic, puritan, papist, anabaptist, or antinomian. The Maryland act was a statute, but the Charter of Rhode Island, which remained its constitution until 1842, made the guarantee of religious liberty a part of the fundamental law. It secured for all inhabitants "the free exercise and enjoyment of their civil and religious rights" by providing that every peaceable person might "freely and fullye hav and enjoye his and theire owne judgements and consciences, in matters of religious concernments." Thus, the principle that the state has no legitimate authority over religion was institutionalized in some American colonies, including those under Quaker influence.

Massachusetts, the colony that least respected private judgment in religious matters, was the first to safeguard many other rights. Its Body of Liberties, adopted in 1641, was meant to limit the magistrates in whom all power had been concentrated. As John Winthrop observed, the objective was to frame limitations "in remarkable resemblance to Magna Charta, which . . . should be received for fundamental laws." The Body of Liberties was, in effect, a comprehensive bill of rights. In comparison, the later