The Rights of Man *vs.* The Bill of Rights

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Two centuries ago, the United States settled into a permanent political order, after fourteen years of violence and heated debate. Two centuries ago, France fell into a ruinous disorder that would run its course for twenty-four years. In both countries there resounded much ardent talk of rights—rights natural, rights prescriptive. (The tricky phrase "human rights" seems to have first entered political discourse by its appearance in the first paragraph of the French Declaration of the Rights of Man and of the Citizen.)

Yet the rights proclaimed by the National Assembly in France never took on flesh during a quarter of a century of ferocious social disruption; while the rights expressed in the American Bill of Rights, the first eight amendments to the Constitution, never have been seriously threatened. It may be found worthwhile to inquire why the French rights turned out to be such stuff as dreams are made of; and why the civil rights appended to the Constitution of the United States have been so peacefully maintained.

On August 26, 1789, at Versailles, the Constituent Assembly adopted the Declaration of the Rights of Man and of the Citizen. The King, on October 5, would be compelled to assent to this Declaration.

On September 25, 1789, at New York, the first Congress of the United States approved and sent to the several states for ratification the first ten amendments to the Constitution, along with two other proposed amendments which, rejected by some states, would fail of incorporation into the Constitution. These ten ratified amendments—of which, strictly speaking, the first eight constitute the Federal Bill of Rights—would take effect on December, 1791.

Long before the middle of December, 1791, fanatic ideology had begun to rage within France, so that not one of the liberties guaranteed by the Declaration of the Rights of Man could be enjoyed by France's citizens. One thinks of the words of Solzhenitsyn: "To begin with unlimited freedom is to end with unlimited despotism." Declarations on parchment do not implement themselves: if they conflict with harsh reality, they still may work mischief, but they cannot then achieve their intended ends.

To almost anyone glancing for the first time at this French prologue or preamble to an intended new written constitution, and at this American appendix to a newly-framed constitution, it may seem that the two documents are similar. Also some resemblances between the Declaration of Independence and the Declaration of the Rights of Man are noted readily. Among the seventeen articles of the French Declaration

are prohibitions of arbitrary arrest and unusual punishments; other articles provide for freedom of religious opinions, protection of rights of speech and publication, and a guarantee of respect for private property. Parallels with provisions of the American Bill of Rights are obvious. Moreover, article XVI of the French Declaration exalts the doctrine of the separation of powers in a government—a cardinal principle of the United States Constitution. So can there exist major differences between these American and French documents intended to secure the liberties of the citizen?

Yes, there can exist major differences, and there do. Since the year 1789, France has suffered from successive revolutions and has swept aside constitution after constitution. Since that year 1789, the United States of America has experienced only one fierce period of disunity, from 1861 to 1865; and America's Constitution of 1787 remains the Union's fundamental law. From the Left Bank of the Seine, revolutionary doctrines still are exported to Cambodia, to Ethiopia, to Latin America; from the City of Washington, conservative preachments issue and are disseminated throughout the world. French political theories and American political practices, during the last quarter of the eighteenth century, produced opposed consequences and those consequences still ferment around the globe.

So it may be profitable to examine the expectations, the intellectual sources, and the conflicting theories that shaped the judgments of most deputies to the Constituent Assembly, on the one hand, and of the senators and representatives in the first Congress, on the other. But first, some remarks concerning the conduct of those two very different assemblies which argued constitutional questions during that summer two centuries ago.

The Constituent Assembly, or National Assembly, was a tumultuous gathering of some 1,700 persons of widely different origins and backgrounds, shouting at one another. They were painfully aware of the menace of the mob, the Bastille having fallen only a month before their debates on the Declaration. Nevertheless, most of the deputies entertained extravagant notions of social perfectibility, being quite unacquainted with representative government and contemptuous of "the lamp of experience." Intellectually, they deferred to speculative philosophers, among them Condorcet—who would fall victim to the Revolution—and the Abbé Sieyès, who edited the Declaration of the Rights of Man. The most earnest advocate of such a Declaration was Lafayette, then commanding the new National Guard, a nobleman of high courage but no great prudence. He sought advice from Thomas Jefferson, then minister to France—another seeming connection between the Declaration and the Bill of Rights—who, among other recommendations, believed that the French constitution should contain a provision for amending conventions periodically. In the Constituent Assembly were a number of deputies conservative in their views, who inclined toward establishing in France an English form of government; but they were overwhelmed by what Edmund Burke was to call "a parcel of hack attorneys."

In striking contrast, the twenty-two senators and fifty-nine representatives, who during the summer of 1789 debated the proposed seventeen amendments to the Constitution of the United States, were men of much experience in representative govern-

ment, acquired within the governments of their several states or, before 1776, in colonial assemblies and in practice of the law. Many had served in the army during the Revolution. They decidedly were political realists, aware of how difficult it is to govern men's passions and self-interest. Their debates at Federal Hall, in New York City, were earnest but civil; and they stood in no danger of being intimidated by urban mobs, although disbanded soldiery had to be kept in mind, and agrarian dissidents of the sort who had made up Daniel Shays' following. The French Enlightenment had made little progress among them; all but a few of these American politicians professed the Apostles' Creed. Where amendments to the Constitution were in question, the dominant mind among them was that of James Madison—temperate, learned, prudent. Among most of them, the term "democracy" was suspect; the War of Independence had sufficed them by way of revolution.

The contrast of the expectations entertained at Versailles with the expectations in the Congress at New York is striking. Most of the deputies to the National Assembly were bent upon creating a Brave New World, from which rank and pomp, oppression, the remnants of feudalism, Christian orthodoxy, and a multitude of miseries would have been cleared away. Such Enlightenment notions had seduced the minds of even the highest classes in France—or perhaps especially the highest classes. I need not labor this point, which has been made repeatedly by such eminent historians as Tocqueville and Taine, and most recently by Simon Schama, in his notable and popular book *Citizens: a Chronicle of the French Revolution*. The French reformers of 1789, with some honorable exceptions, demanded the establishing of an earthly paradise; many of them soon perished in an earthly hell. Mirabeau and a few others were bold enough to declare that a Declaration of the Duties of Man was more needed than a Declaration of Rights. So, as in Hawthorne's tale "Earth's Holocaust", the revolutionary politicians flung into the fire every vestige of the old order, but for one thing: the human proclivity to sin. Thus the sentimentality and the fantastic aspirations of 1789 brought on the Terror of 1793.

Across the Atlantic, the sober and practical gentlemen who had been elected to the First Congress of the United States knew politics to be the art of the possible. The purpose of law, they knew, is to keep the peace. To that end, compromises must be made among interests and among states. Both Federalists and Anti- Federalists ranked historical experience higher than novel theory; they suffered from no itch to alter American society radically; they went for sound security. The amendments constituting what is called the Bill of Rights were not innovations, but rather restatements of principles at law long observed in Britain and in the Thirteen Colonies. Freedom of worship, of speech, of the press, and of assembly already prevailed in British North America; the men of all the thirteen states were accustomed to bearing arms in a militia; and so might one run through the third, fourth, fifth, sixth, seventh, and eighth amendments, pointing out that these, too, were merely protections of rights and usages that already existed in the several states. In short, the framers of the Constitution, and the Congress that approved the first ten amendments, were concerned more with the preservation of an existing order than with marching to Zion. So amended, the Constitution of the United States kept the peace for seven decades.

We turn to the ideas or assumptions that lay behind the proceedings at Versailles and the ideas or assumptions behind the proceedings at New York. Obviously the Declaration of the Rights of Man is a document of the Enlightenment—that is, contemptuous of the Christian and medieval past, though often adulatory of things Roman or Hellenic; fascinated by scientific discoveries, proud of modernity. But in the National Assembly, the Enlightenment's rationalism and skepticism, derived from Voltaire, D'Alembert, Diderot, and other Enlighteners, were curiously intertwined with Jean Jacques Rousseau's sentimental egalitarianism and primitivism. As Friedrich Heer writes of this in his *Intellectual History of Europe*, "Rousseau's importance was, perhaps, greater than Voltaire's. Virtually all the various streams of mystical and sectarian stamp came to expression in his capacious ego. There is hardly a false tone of feeling, joy in nature, self-intoxication, intuition, gush or enthusiasm in the nineteenth century which cannot be found somewhere in Rousseau. . . . He was revered as a prophet and a saint."[1]

The cynical Voltaire, enemy of absolutism and of religion; the sentimental Rousseau, who would sweep away state, church, property, and moral convention—these two, so different in mentality, were the ghosts haunting but inspiring the National Assembly, and later the Convention. Man, naturally virtuous and great-souled, had been corrupted by institutions, especially by private property: so Rousseau had preached. Wipe away the old order of things; set man free—nay, set woman free, too, as in *Paul and Virginia*—to follow their impulses, preferably on some tropic isle; follow nature. This vision is what Irving Babbitt called the idyllic imagination, as opposed to the moral imagination. As applied by enthusiastic revolutionaries, this idyllic imagination soon would be transformed into what T. S. Eliot called the diabolic imagination, with the Marquis de Sade, Terrorist, as its notorious champion in letters.

The perfection of human nature and society: that was the aspiration of the men who, amidst great confusion, patched together the Declaration of the Rights of Man and of the Citizen. To accomplish this, they fancied, the shackles of the past must be struck off. In that cause, Rousseau's "General Will" became, in the words of De Maistre, "a battering ram with twenty million men behind it." And the doctrine of the General Will crushed the liberty so ardently sought by the French enthusiasts.

Out of the Napoleonic era would come the word "ideologue", previously unknown to the French and English languages. The Americans who approved the first ten Amendments to their Constitution were no ideologues. Neither Voltaire nor Rousseau had any substantial following among them; even Jefferson had not read Rousseau until after the American Revolution. Their political ideas, with few exceptions, were those of English Whigs. Abstract doctrine and theoretic dogma had made no headway among them.

The typical textbook in American history used to inform us that Americans of the colonial years and the Revolutionary and Constitutional eras were ardent disciples of John Locke. This notion was the work of Charles A. Beard and Vernon L. Parrington, chiefly; it fitted well enough their liberal convictions, but it has the disadvantage of being erroneous.

Besides, as I suggested earlier, the American politicians of the country's formative years did not shape their policies according to books. As Patrick Henry had declared at the beginning of the Revolution, "I have but one lamp by which my feet are guided, and that is the lamp of experience." Their political inheritance from Britain, and their social development during the colonial era: these were the principal sources of their political ideas. They had no set of coffee-house *philosophes* inflicted upon them. Their morals they took, most of them, from the King James Bible and the Book of Common Prayer. Their Bill of Rights made no reference whatever to political abstractions; for that matter, the Constitution itself is perfectly innocent of speculative or theoretical political arguments, so far as its text is concerned. (Of course John Dickinson, James Madison, James Wilson, Alexander Hamilton, George Mason, and other thoughtful delegates to the Convention in 1787 knew something of political theory; but they did not put political abstractions into the text of the Constitution.)

The mentality of the American leaders, in short, differed greatly from the mentality of most deputies to the National Assembly. An historical consciousness was possessed by the Americans; but political and moral speculation obsessed the French of 1789. This becomes clear when one examines the text of the Declaration of the Rights of Man.

"Men are born and always continue free and equal in respect of their rights," the Declaration's first article proclaims. "Civil distinctions, therefore, can only be founded on utility." Those phrases seem to have the ring of the Declaration of Independence. But Carl Becker, in his witty study of that document, remarks that "it does not appear that the Declaration of Independence suggested to the French the idea of a declaration of rights, or that it served as a model for the Declaration of Rights which they in fact adopted. It was the event itself, the American Revolution rather than the symbol of the event, which exerted a profound influence upon the course of French history."[2]

How is it, then, that the two Declarations employ similar phrases? Because, as Becker pointed out, it was necessary for the Continental Congress to obtain French aid. Jefferson, Franklin, and Adams knew that such phrases as "the Laws of Nature and of Nature's God" and "unalienable rights" would ring pleasantly in the ears of Enlightened Frenchmen; such expressions were much employed in French discourse in those years.

The second article of the Declaration of the Rights of Man specifies the "natural and imprescriptible" rights of liberty, property, security, and resistance to oppression; but these expressions seem to have been drawn from French and English political writers earlier in the century—not from the Declaration of Independence. Among reformers in Europe, such terms were the common currency of the age.

So we ought not to assume that the Declaration of the Rights of Man was derived from American ideas and institutions. The American Constitution, written only two years earlier, makes no reference to natural and imprescriptible rights, nor indeed to any body of political thought: it is not a philosophical discourse. It would be erroneous to analyze the Declaration of the Rights of Man as if Frenchmen had fancied

ex America lux, for French philosophers, then as today, held an inordinately high regard for French culture. Rather, the French Declaration reflects the politics and morals of Rousseau, who at that time had no American following; also it has elements derived from Voltaire and from the Physiocrats. We glance here at certain articles of that Declaration.

Articles IV and V are concerned with the liberty of the individual, as Rousseau perceived it. That sort of liberty would become the creed of nineteenth-century liberals, most notably of John Stuart Mill. "The exercise of the natural rights of every man has no other limits than those which are necessary to secure to every *other* man the free exercise of the same rights; and those limits are determinable only by the law."

And Article V instructs French citizens, "The law ought to prohibit only actions hurtful to society. What is not prohibited by the law, should not be hindered; nor should anyone be compelled to that which the law does not require."

Probably most members of the first Congress, being Christian communicants of one persuasion or another, would have been dubious about the doctrine that every man should freely indulge himself in whatever is not specifically prohibited by positive law, and that the state should restrain only those actions patently "hurtful to society". Nor did Congress then find it necessary or desirable to justify civil liberties by an appeal to a rather vague concept of natural law—this for a reason I will touch upon presently.

Article VI of the Declaration is an enactment of Rousseau's General Will. "The law is an expression of the will of the community. All citizens have a right to concur, either personally, or by their representatives, in its formation. It should be the same to all, whether it protects or punishes; and all being equal in its sight, are equally eligible to all honors, places, and employments, according to their different abilities, without any other distinction than that created by their virtues and talents."

A "right to concur" is guaranteed here; but no right to dissent from the General Will. (One thinks of the old Jewish doctrine of "compulsory consent".) "Natural law" abruptly vanishes from sight in this article, supplanted by the "will of the community". The Declaration of Independence's phrases notwithstanding, the assertion of egalitarianism here would not have been relished by many of the delegates to the Philadelphia Convention in 1787; nor would President Washington have embraced this Article VI. (Incidentally, Washington did not reply to Lafayette's request for fatherly advice concerning the new frame of government in France.)

The final article in the Declaration of the Rights of Man, nevertheless, is not derived from Rousseau: "XVII. The right to property being inviolable and sacred, no one ought to be deprived of it, except in cases of evident public necessity legally ascertained, and on condition of a previous just indemnity." The Americans had not thought it necessary to insert in their Constitution a protection for property so emphatic: Article I, Section 10, forbade states to impair the obligation of contracts, and Amendment VI would forbid the taking of property without due process of law, or the taking of private property for public use without just compensation; but there was no solemn pronouncement of inviolability.

Nor did the Americans declare that property is sacred. As Christians, most of them would have said that only the things of God are sacred. This emphasis on the sacred, occurring repeatedly through the Declaration, seems somewhat amusing, when one recalls that the leaders of the successive revolutionary movements in France between 1789 and 1795 commonly were Deists, skeptics, or atheists. Yet the power of the dead Rousseau compelled the insertion into the nascent Declaration, on August 20, 1789, by amendment, of a reluctant acknowlegement of the existence of the Supreme Being.

That formidable and eccentric orator Mirabeau thought that this Declaration, unveiled so soon by the Constituent Assembly, would tempt the common people to abuse their new powers; he regarded the Rights of Man as "a secret which should be concealed until a good Constitution had placed the people in a position to hear it without danger." But few other deputies supported him in this argument. Indeed the Declaration of the Rights of Man and of the Citizen was to the people of France an intoxicating novelty, its provisions to be realized immediately; while the American Bill of Rights was no surprise at all to American citizens, well accustomed to such provisions in their several state constitutions.

Several other points might be made about the general and the particular differences between the principles of the Declaration of the Rights of Man and the American Bill of Rights; but time runs on, runs on. So I proceed to inquire now concerning the chief line of demarcation between the primary assumptions of the French reformers and the primary assumptions of the framers of the first eight amendments to the Constitution of the United States.

The French deputies in 1789, seeking some sanction for the "sacred" Rights of Man, turned to natural-right doctrines (although not really the tradition of natural law that runs from Cicero through the Schoolmen to Richard Hooker and others). This natural-right argument not always sufficing them, also they turned to the abstractions and the visions of such speculative minds as Rousseau's.

Why did they not turn to precedent, prescription, custom, as did the British? Because the French reformers of 1789 held precedent, prescription, and custom in contempt, as if such influences were the dead hand of the past. (Mounier, Lally-Tollendal, and some others did contend for the British understanding of social continuity, true; but they were a small minority.) Moreover, France had lost long before any vestige of genuine representative government that might have been emulated in 1789.

Therefore the French "Rights of Man" were amorphous, and lacked legal precedents. From the moment of their declaration, they were flouted—and often by the very neophyte politicians who had promulgated them so vociferously as "a Declaration for all men, for all times, for every country, that will be an example to the whole world!" on August 26 and 27, 1789. To apprehend how a professed zealot for the Rights of Man might condemn thousands of men and women to the guillotine, after trials in which the accused had been denied legal counsel or witnesses on their behalf—why, one need merely recollect the rhetoric of various "Third World" despots in recent years, and recollect also the frightfulness of their rule. The Universal Declaration

of Human Rights promulgated by the United Nations was inspired by the Declaration of the Rights of Man—and has been no more efficacious.

The Bill of Rights drawn up by the Congress in 1789, to the contrary, did not refer at all to natural rights or to utopian speculations. Its sanctions were ancient statute and charter, the common law, precedent, British usage, colonial custom. Freedom of religious belief and practice had been more fully experienced in British North America than anywhere else in the world. From the planting of British colonies in Virginia and Massachusetts onward, every American settlement had drilled its own "well regulated militia". The colonial governments never had quartered troops in private houses in time of peace, except "in a manner to be prescribed by law." Unreasonable searches and seizures had been prohibited by British statutes since the middle of the seventeenth century. Due process in criminal cases was another inheritance from English law; so was trial by jury. Excessive bail, excessive fines, and cruel and unusual punishments already were forbidden in English law and in the laws of the several states. In effect, the guarantees and protections of the first eight Amendments were principally reaffirmations, binding the federal government, of rights and immunities already established and accepted as a matter of course in the thirteen states. Those rights were what Edmund Burke, in 1790, would call the "chartered rights" of Englishmen—and of Americans. Unlike the French reformers, such American statesmen as James Madison and Fisher Ames did not proclaim the Bill of Rights they had written as applicable throughout the world, at all times. The first eight Amendments were an inheritance, not a novel creation: their genealogy might be traced back by Americans to the Bill of Rights, in England, of 1689; to the Petition of Right of 1628; all the way back, indeed, to Magna Carta, in 1215.

It was otherwise among the French of 1789, with their relish for grandiose abstraction. The judgment of Lord Acton upon the Declaration of the Rights of Man and of the Citizen summarizes the matter. Acton said, in 1896:

"The Declaration passed, by August 26, after a hurried debate, and with no further resistance. The Assembly, which had abolished the past at the beginning of the month, attempted, at its end, to institute and regulate the future. These are its abiding works, and the perpetual heritage of the Revolution. With them a new era dawned upon mankind."

"And yet this single page of print, which outweighs libraries, and is stronger than all the armies of Napoleon, is not the work of superior minds, and bears no mark of the lion's claw. The stamp of Cartesian clearness is upon it, but without the logic, the precision, the thoroughness of French thought. There is no indication in it that Liberty is the goal, and not the starting-point, that it is a faculty to be acquired, not a capital to invest, or that it depends on the union of innumerable conditions, which embrace the entire life of man. Therefore it is justly arraigned by those who say that it is defective, and that its defects have been a peril and a snare."[3]

Two centuries later, the provisions of the American Bill of Rights endure—if sometimes strangely interpreted. The lobbyists of the National Rifle Association may contend that the authorizing of the several states to maintain troops (nowadays the National Guard) also guarantees to a Detroit mugger his inviolable right to purchase

a Saturday-night-special pistol, or an assault rifle; while certain federal judges appear to reason that the First Amendment clause sheltering the free exercise of religion really is intended to protect the public from religious instruction and public ceremony.

Yet despite such odd notions, we have known liberty under law, ordered liberty, for more than two centuries; while great or petty states that have embraced the Declaration of the Rights of Man and of the Citizen, with its pompous abstractions, have paid the penalty in blood.

Notes

1. Friedrich Heer, *The Intellectual History of Europe*, Volume II, *The Counter-Reformation to 1945*, translated by Jonathan Steinberg (Garden City, New York: Anchor Books, 1968), p. 209.
2. Carl Becker, *The Declaration of Independence* (New York: Knopf, 1922), pp. 231–232.
3. Lord Acton, *Lectures on the French Revolution*, edited by Figgis and Laurence (London: Macmillan, 1916), p. 107.