

*The Birth of the Bill of Rights.* By Robert Allen Rutland. Chapel Hill: University of North Carolina Press, 1955. Pp. 243. \$5.00.

The federal Bill of Rights is one of the most cherished documents in our national hagiography. Its clauses have been invoked by contending parties in every crisis of our history. Every sort of minority interest has sought security in its generous phrases. Its meaning has long been the subject of intense controversy among lawyers and judges. The judicial gloss upon its words and phrases has attained enormous proportions. Yet in spite of all this, surprisingly little scholarly work has been done on the history of the Bill of Rights.<sup>1</sup> The interest of American historians in constitutional history, once so pronounced, seems to have spent itself. Such newer pastures as those of intellectual and business history appear to be greener. It is a long time since our historians have produced a significant new work in the field of constitutional history. Political scientists and legal scholars are gradually moving in to fill the vacuum.<sup>2</sup> We have had, of course, a number of historical studies of particular aspects of civil liberties,<sup>3</sup> but we have never had a thorough, critical, substantial, scholarly study of the origins of the American Bill of Rights. In fact, Rutland's treatise, *The Birth of the Bill of Rights*, is, to my knowledge, the first book-length study by a historical scholar ever written on the subject.

While Rutland should be given credit for making the attempt, his book does not by any means fill this gap in historical scholarship. He has pieced together the bare bones of the subject, but not much more; the job of putting a great deal of flesh on the bones still remains to be done. For Rutland's book is little more than a chronology of events, and while even this was worth doing, it is not enough. Take, for example, the important subject of the debate in the House of Representatives on James Madison's proposed draft of a bill of rights. Rutland painstakingly spells out the various things that happened, but has almost nothing to say about the content of the debate and does not even supply the text of the amendments in the form in which Madison's committee submitted them or as they were approved by the House. This single-

<sup>1</sup> For important historical materials and a provocative discussion of the philosophical underpinnings of our civil liberties, consult Whipple, *Our Ancient Liberties* (1927); and also Fraenkel, *Our Civil Liberties* (1944), for legal, rather than historical or philosophical, analysis.

<sup>2</sup> E.g., Crosskey, *Politics and the Constitution in the History of the United States* (1953); Morgan, *Justice William Johnson: The First Dissenter* (1954); Swisher, *American Constitutional Development* (2d ed., 1954).

<sup>3</sup> E.g., Carr, *Federal Protection of Civil Rights* (1947); Chafee, *Free Speech in the United States* (1946); Pfeffer, *Church, State and Freedom* (1953); Pritchett, *Civil Liberties and the Vinson Court* (1954); Stokes, *Church and State in the United States* (1950). Consult also, Pritchett, *The Roosevelt Court* (1948).

mind devotion to the narrowest possible focus of chronology is difficult to explain and even more difficult to defend.

The author's propensity to catalogue documents and events, without analyzing their substance, is exhibited in the two opening chapters, which deal with the English beginnings and the colonial experience. There is no attempt to examine the rise of bills of rights in the perspective of an evolving body of philosophical ideas and against the background of historical events. The catalogue proceeds from the Magna Carta (1215) and the first Statute of Westminster (1275) to the Petition of Rights (1628) and the Bill of Rights of 1689. But of the great revolution in political thought, of which these and other documents were reflections or consequences, almost nothing is said. There is no serious discussion in this book of the social contract theory of government, with its corollary doctrines that government rests on the consent of the governed, and that man possesses natural and ineluctable rights which it is the purpose of government to secure. There are a half-dozen fleeting references to John Locke, and we are told that he influenced George Mason and others, but there is no description of and only bare reference to Locke's political theory. Nothing is said about the pre-existing body of political thought with which the natural rights philosophy was in conflict. Nor is there any mention of the basic factors in Western civilization—such as the rise of scientific thought, the impact of the commercial revolution, the gradual shifts in social power, and the growth of new learning induced by the printing press—which produced the tremendous ferment of the seventeenth century.<sup>4</sup>

Since the author limits himself to a bare recital of the high points in the growth of English liberties, inevitably he either overstates or oversimplifies. His statement that "the right of an accused person to have the aid of learned counsel was recognized by the twelfth century"<sup>5</sup> is hardly consistent with a later remark in the same paragraph that the Statute of Merton (1236) "conceded to every freeman the right to be represented by an attorney unless he was charged with a felony or treason." For "felony or treason" then covered most offenses, and certainly most offenses in connection with which an accused would want or need a lawyer. Actually, it was not until 1695 that a statute was enacted by Parliament permitting representation by counsel in treason cases,<sup>6</sup> and the right to a full defense by counsel was not extended to all felony cases until 1836.<sup>7</sup>

At the conclusion of the chapter on the English beginnings the author re-

<sup>4</sup> Consult the recently published Southern Methodist University Studies in Jurisprudence, *Origins of the Natural Law Tradition* (Harding ed., 1954), and *Natural Law and Natural Rights* (Harding ed., 1955).

<sup>5</sup> P. 5.

<sup>6</sup> 7 & 8 Wm. III, c. 3, § 1 (1695). Consult Beaney, *The Right to Counsel in American Courts*, c. II (1955).

<sup>7</sup> 6 & 7 Wm. IV, c. 114, § 1 (1836).

marks that "as time elapsed a strikingly new concept of individual rights evolved in the American colonies."<sup>8</sup> He goes on to explain that this occurred in respect to rights of conscience, and was exemplified particularly in the growth of religious toleration. It is true that as regards religious freedom the colonies in the eighteenth century were somewhat ahead of the mother country, though toleration was far advanced in England, too, by that time. Nevertheless, full religious freedom, as we now understand the concept, was by no means achieved in the colonies by the end of the period of colonial tutelage, and in any event, it was far from "a strikingly new concept of individual rights." The basic concept in the colonies was philosophically quite the same as that which prevailed in Britain. An examination of the persistent influence of John Locke in America would suggest as much.<sup>9</sup> Rutland acknowledges that "It would be a grave mistake to interpret the early actions of the English colonists as an attempt at something new—an innovation in legal safeguards for personal liberty. They too gloried in the English Constitution. . . ."<sup>10</sup> Rutland's account of the colonial period bears this out, since the colonial documents he describes for the most part restated contemporary English law.

The point of greatest divergence between the colonies and the home country, the author points out, was in the field of church-state relations. Indeed, in many ways Rutland's main contribution to an appreciation of the birth of the Bill of Rights lies in his emphasis, throughout the book, on the crucial importance of the struggle for religious freedom. The achievement of intellectual, and indeed also academic,<sup>11</sup> freedom depended upon the separation of the secular affairs of the state from the clerical interests of the churches. While for the most part Rutland retells a familiar story, it is nevertheless rather striking to note the central position of the religious question in every chapter of the story. In the history of the rise of liberty in the modern world, the notion that there was an area of religious thought or belief where the government, with all its great powers and responsibilities, has no legitimate right to intrude, contributed an indispensable underpinning for the delineation of other areas in which men were to be free to think as they wish. On the more mundane level of practical political experience, Rutland draws attention to the persistent significance of religious groups. Thus he emphasizes the extent to which the Baptists, and to a somewhat lesser degree the Presbyterians, were found in Anti-Federalist circles during the struggle over the

<sup>8</sup> P. 12.

<sup>9</sup> Consult Curti, *The Great Mr. Locke, America's Philosopher, 1783-1861*, 11 *Huntington Library Bulletin* 107 (1937); Northrop, *The Meeting of East and West*, c. III (1946). Professor Northrop writes: "In short, the traditional culture of the United States is an applied utopia in which the philosophy of John Locke defines the idea of the good." *Ibid.*, at 71.

<sup>10</sup> P. 13.

<sup>11</sup> Consult Hofstadter and Metzger, *The Development of Academic Freedom in the United States* (1955).

ratification of the Constitution, since they were apprehensive about the lack of firm guarantees of religious freedom and the separation of church and state.

Beginning with the Stamp Act declarations, Rutland summarizes some of the more famous statements of rights during the years of bickering with the home country immediately prior to the War of Independence. This part of the story reaches its climax with the adoption of Mason's Virginia Declaration of Rights on June 12, 1776. Unfortunately, the author is more interested in the various complex maneuvers that preceded the ultimate vote of the Virginia Assembly, than in the substance of Mason's great and influential document, which is sketchily described in a few short paragraphs. Then the author devotes a chapter to the adoption of bills of rights by the various states during the years 1776-1780. In all, eight states spelled out the basic rights of man in constitutional documents. Again, the analysis suffers from being focussed too narrowly upon only that portion of the revolutionary state constitutions concerned with the guarantee of basic human rights. A broader view of the general philosophical assumptions upon which these pioneer constitutions rested would have produced a more balanced and intelligible framework of ideas and purposes within which guarantees of rights could be seen in proper perspective. For example, the fear of political power and its possible abuse, which led to the separation-of-powers features of these constitutions, was quite the same as the impulse which demanded bills of rights.

After a review of some problems of personal freedom in the new republic under the Articles of Confederation, the author describes the federal convention of 1787 and explains why it did not adopt a bill of rights as an integral part of the Constitution. Most certainly the reason was not that the delegates were hostile to the concept of personal liberties, or were opposed to the device of spelling them out. They omitted a bill of rights mainly for two reasons. One was that their minds were fixed upon a different problem, that of enlarging the powers of the central government. As Rutland remarks, no one, not even Mason, went to Philadelphia for the purpose of further securing civil liberties. The great question before the convention, as all proposed plans indicated, had to do with endowing the central government with adequate powers and institutions. Only George Mason evinced a persistent interest in a guarantee of rights; although late in the convention, when it became apparent that the national government would have very substantial powers, he was joined by Charles Pinckney and Gerry. The other delegates were not opposed to civil rights. They simply were not thinking about them. The other reason was that under the Articles of Confederation rights had been under state protection, an arrangement which had caused no general public apprehension.

The proposed constitution, without a bill of rights, went to the states for approval, and Rutland devotes two long chapters to a state-by-state account

of the great struggle over ratification. Much of this is familiar history, and is overly preoccupied with the minutiae of parliamentary tactics. The account also suffers from too narrow a focus, for many things were discussed in this greatest of all great American debates, and I am disposed to doubt, as Rutland seems to believe, that the bill of rights issue was the most important of all.<sup>12</sup> It is quite true, as he suggests, that the bill of rights issue transcended sectional interests, and furnished a common ground upon which disparate interests could stand.<sup>13</sup> But I doubt whether a fair reading of the whole record supports the author's assessment. Just as the central issue of the convention was that of the powers of the national government, the principal objection to the proposed constitution in the ratification debate was that it established a national rather than a federal government.

It is true that the Anti-Federalists argued that a consolidated government could not be established without a loss of liberty, but not because of the lack of a bill of rights. The absence of a bill of rights was merely further proof in their eyes of the evil intentions of those who were behind the new Constitution. In their view human liberty was safe only in the states, not because the states had bills of rights—since not all of them did—but because in the states the legislative representatives, chosen annually, were closest to the people, known personally to them, and therefore less likely to abuse their powers. In their judgment freedom could flourish only on a small scale. They maintained that a national government could only result in despotism because the diversity of interests of the various sections of the country made it impossible to achieve uniformity of law without force. This central argument of the opposition to the Constitution was supported by great names among eighteenth century political philosophers, and Madison tried to reply to it in *Federalist* Number 10. The bill of rights question was therefore essentially peripheral, though of course not unimportant. The absence of a bill of rights was, mainly, further support for the argument that under the new dispensation human rights would be diminished or denied.

The author reviews the various arguments advanced by the Federalists to justify the omission of a bill of rights. Actually, most of these contentions were made by Alexander Hamilton in the penultimate number of the *Federalist Papers*. While Rutland refers to Number 84 several times, nowhere does he summarize adequately what Hamilton said on the subject. Not only did Hamilton manage to make about every point that was then being advanced, but in doing so he unwittingly disclosed some of the weaknesses and contradictions of those who were trying to assert that the omission of a bill of rights was a good thing. For example, he argued that there were in the body of the Constitution guarantees of civil rights (e.g., with reference to the writ of

<sup>12</sup> P. 124.

<sup>13</sup> P. 140.

habeas corpus, bills of attainder and ex post facto laws), and in the next breath asserted that bills of rights are unnecessary where governments rest on the consent of the governed. In any event, the Federalists had to beat a strategic retreat on this subject, and came forward with the promise that they would correct their oversight through the addition of a bill of rights to the Constitution by means of the amending procedure of Article V. This promise took a great deal of the wind out of many Anti-Federalist sails, especially in the critically important Virginia ratifying convention, which in turn strongly influenced the result in New York. This campaign pledge was fulfilled by the first session of the First Congress. Rutland concludes that "a broad base of public opinion forced the adoption of the Bill of Rights upon those political leaders who knew the value of compromise."<sup>14</sup>

Rutland brings his book to a close with a short 12-page chapter that undertakes to describe the history of the Bill of Rights from 1791 to the present day. This is a tall order, and again inaccuracies result from the oversimplification which such condensation invites.

One of Rutland's last observations is this: "At the middle of the twentieth century it was clear, as it had been in 1791, that the surest sanctuary of freedom for the citizen still was not in the Constitution or the Bill of Rights, but in the minds of the people."<sup>15</sup> I agree, and for this reason I suggest once more that a complete history of the birth of the Bill of Rights will have to do full justice to what was in the minds of the people in this formative period of our national history. Rutland has made a promising start, but much remains to be done before the full story is recorded.

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<sup>14</sup> P. 218.

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**Modern Trials.** By Melvin M. Belli. Indianapolis: The Bobbs-Merrill Company, 1954. 3 Vols. Pp. 2763. \$60.00.

Anyone who reads Melvin M. Belli's *Modern Trials* or even reads *in* it, becomes immediately aware of an attempt to span ground which cannot conceivably be treated with adequacy in the confines of three volumes. We are told at the start that the theme of the book is demonstrative evidence—evidence which is imparted to the senses without the intervention of testimony. The author's preface announces a determination to return eclectic knowledge to trial lawyers with whom he proposes to share new and provocative trial procedures. The book is an offering of what the author has discovered about the modern trial. The average trial lawyer's interest, so aroused, is not fully satisfied.