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THE ESSENTIAL ELEMENTS OF AND CONDITIONS FOR A “DEMOCRATIC REPUBLIC”: THE VIEW PREVALENT AT THE FOUNDING AND IN EARLY AMERICAN HISTORY

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ARTIN DIAMOND, WINSTON MILLS FISK, AND HERBERT GARFINKLE ENTITLED their American government textbook of some years ago *The Democratic Republic*, stating that this was the best designation to give to the American political order because it implies both of the major political principles it was intended by our Founding Fathers to embody. It is “democratic” - in the representative, not pure, sense - because the majority rules; it is “republican” because it is supposed to demonstrate such characteristics as restraint, sobriety, competence, and liberty, “the very qualities democratic government needs to be its best self.”¹ This essay adopts their term “democratic republic” and the understanding they have of it. It turns to important sources from the era of our Founding and in early American history generally in order to determine what our Founders, the political tradition they emerged from, and the political society of early America regarded as the elements and characteristics the political order had to embody and the social conditions which had to prevail in order to maintain a democratic republic. The following sources will be examined to determine this: the political philosophers John Locke and Baron de Montesquieu, selected early state constitutions and bills of rights, the writings of the Founding Fathers, and the situation prevailing at their time, the debates of the First Congress (which framed the Bill of Rights), and Alexis de Tocqueville’s *Democracy in America*.

I. THE PHILOSOPHERS OF LIBERAL DEMOCRACY: LOCKE AND MONTESQUIEU

It has generally been held that Locke and Montesquieu, the key early modern philosophic protagonists of liberal democracy, had a decided influence on the American Founding.² It is thus appropriate to begin by considering what they thought to be the essential elements and conditions for a democratic republic or similar regime. It should be noted that Locke, unlike Montesquieu, does not write specifically about a democratic republic. His *Two Treatises on Government* describe the elements of a limited government with a representative aspect, not of a republic *per se*.³

In Locke’s *Second Treatise*, he views the state of nature as having been “free from any Superior Power on Earth.”⁴ By nature a man has certain inalienable rights; he cannot “enslave himself to anyone, nor put himself under the Absolute, Arbitrary Power of another.”⁵ The state or political order comes into existence only when “Men have so consented to make one Community or Government ... and make one Body Politick, wherein the Majority have a Right to act

and conclude the rest.”⁶ Those who join the social contract establishing this new political community surrender the political powers they previously held to the majority, and this is the origin of the state’s power. Even when a particular government is dissolved, power still resides in the political community which can then turn it over to a new type of government.

Government exercises three types of power: legislative, executive, and federative (the last involving the power over war-making and foreign affairs). Regardless of the form of government, Locke seems to believe that the principle of separation of powers must be adhered to. He believes that, if otherwise, absolute arbitrary power would prevail, which men cannot submit to because it would violate the inalienability of their rights.⁷

Besides separation of powers and the absence of absolute, arbitrary power, Locke points to other elements that limited government (i.e., a “well-framed Government”) requires. One is that the supreme governmental power must reside in the legislature. Locke says the following:

In all Cases, whilst the Government subsists, the *Legislative is the Supream Power* ... all other Powers in any Members or parts of the Society, derived from and subordinate to it ...

The Executive Power ... is visibly subordinate and accountable to it, and may be at pleasure changed and displaced ...⁸

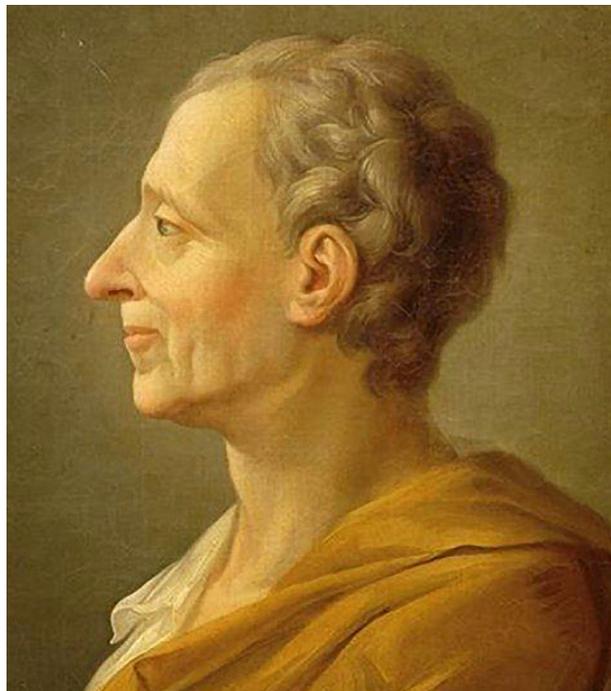
This “*Supream Power*” is the power of making laws and no enactment or edict can “have the force and obligation of a Law, which has not its *Sanction* from that *Legislative*, which the publick has chosen and appointed.”⁹ Legislative power is by no means unlimited, however. First of all, it must be recognized that the legislative power comes from the people - “Men ... put the Legislative Power into such hands as they think fit”¹⁰ - and it was not cre-

ated as an absolute power. Locke insists that there are “Bounds” to legislative power set both by the original grant of it, in the social contract, by men and by “the Law of God and Nature ... in all Forms of Government.”¹¹ Four specific limits which he sets out are: that men be “govern[ed] by *promulgated establish’d Laws*, not to be varied in particular Cases ... [and] to have one Rule for Rich and Poor”; that the “*Laws... ought to be designed for no other end ultimately but the good of the People*”¹²; since it is fundamental that “[t]he *Supream Power cannot take* from any man any part of his *Property* without his own consent,”¹³ it follows that it also “must *not raise taxes* on the Property of the People, *without the Consent of the People*, given by themselves, or their Deputies”; and that “[t]he *Legislative* neither must *nor can transfer the Power of making Laws* to any Body else, or place it anywhere but where the People have.”¹⁴

Since men’s inalienable rights preclude their establishing an arbitrary power over themselves, the legislature cannot act arbitrarily when making law. This, in turn, suggests another principle of Locke’s which, while not apparently mandated by him is certainly preferable for a commonwealth: that those who make the laws must be subject to them.¹⁵

A further principle is one which seems vital to any representative government where the legislative is supreme: majority rule. This is logical in light of the fact that,

at the time of the social contract, power was given to the majority. For a governmental action to be valid - Locke speaks specifically about the levying of taxes - it is necessary to have “the Consent of the Majority, giving it either by themselves, or their Representatives chosen by them.”¹⁶ Thus, even if Locke is not seeking to set forth principles for a representative *democracy* or a democratic republic, per se, by emphasizing such a majority-rule principle he clearly builds a fundamental democratic component into his notion of the well-ordered commonwealth.



Montesquieu

Tied in with the limitation

on the legislature of making laws only for the good of the people is another, more fundamental, Lockean principle that the “well-framed government” must exhibit: the end of the government must be the good of the community. Whatever “alterations are made in it, tending to that end, cannot be an incroachment upon any body.”¹⁷

Locke sets forth one other noteworthy principle: the right of revolution. He says that when someone - he was writing, of course, particularly with reference to the English kings before the Glorious Revolution - tries to make laws “whom the People have not appointed so to do,” the laws have no force and the people have no obligation to obey. They may resist the usurpers of legislative authority “and may constitute to themselves a *new Legislative*.”¹⁸ This “*new Legislative*” can be of the nature of a “change of Persons, or Form, or both.”¹⁹

In summary, then, we can say that the following are the elements and principles Locke saw as necessary for limited government and, logically, for a democratic republic: the absence of arbitrary, absolute power; separation of powers; political power must be understood as being derived from the people; laws must be firmly in place, adequately promulgated, and applicable to all; laws must be designed for the good of the people and the end of government, generally, must be understood as being the good of the community; property cannot be taken from nor taxes levied upon men without their, or their representatives’, consent; the legislature cannot transfer the power of making laws; those who make the laws must be subject to them; majority rule must prevail; and the right of revolution exists whenever someone who does not have the authority to do so tries to seize the legislative power in the community.



In his key work, *The Spirit of the Laws*, Montesquieu devotes much attention to the elements necessary to maintain a democratic republic.²⁰ A number of the principles he puts forth are the same or similar to Locke’s: the people should be supreme and have the sole power to enact laws, they must be able to choose their magistrates, and separation of powers is needed.²¹

He also sets forth principles involving suffrage,

which is the way the people exercise their sovereignty.²² The citizens must be able to fix those of their number who are to form the public assemblies.”²³ (He apparently is thinking here of something like the direct democracy which existed in ancient Greece, although the principle expressed would seem applicable to a larger democratic republic in the sense of the people being permitted to decide how many citizens should have the vote.)

He also advocates suffrage by lot in choosing magistrates, a practice which he says is “natural to democracy.” That is, those who will be among the candidates for election as magistrates should be chosen by lot from among the eligible electorate, or from certain classes in the electorate. This, when modified to insure that the people chosen are worthy, will motivate the desire of citizens to serve their country. He contends also that to have suffrages in public instead of secret (i.e., people stating who they are voting for) is “a fundamental law of democracy.” The early American practice of viva voce elections followed this principle. The reason for this is that “[t]he lower class ought to be directed by those of a higher rank and [be] restrained within bounds by eminent personages.”²⁴

Montesquieu also pointed to a number of moral and social conditions that had to prevail in a democratic republic. The first of these is, simply, the need for virtue. This is much more crucial in a republic than in either a monarchical or despotic government, where the “force of laws” and the “prince’s arm,” respectively, “are sufficient to direct and maintain the whole.”²⁵ Montesquieu defines this virtue as “the love of the laws and of our country,” and says that it entails “a constant preference of public to private interest,” and adopting of “good maxims” to direct people’s lives, and a love of equality and frugality.²⁶ Connected with the latter is the need to maintain a fixed and certain credit.²⁷

In addition to promoting a love of equality, a republic must also divide its land equally among its citizens, and also insure that the divisions be small. He also calls for an “equality of fortunes,” saying that this supports frugality.”²⁸ He does not insist upon a rigid, strict equality of either land or fortunes, however, merely a relative one. He says that “[a]n equal division of lands cannot be established in all democracies...[and in] some circumstances... would be impracticable, dangerous, and even subversive of the constitution”²⁹ and that “[d]emocracy has...two excesses to avoid - the spirit of inequality... and the spirit of

extreme equality, which leads to despotic power.”³⁰ In “a well-regulated democracy,” equality extends only to men as citizens (i.e., in the rights and duties of citizenship), not to their other associations and relationships (i.e., it does not extend to men “as magistrates, as senators, as judges, as fathers, as husbands, or as masters”).³¹

As equality must be limited, so must liberty. It must be understood that it involves not only the freedom to do certain things, but also the freedom to live safely in the midst of others.³² Thus, he defines liberty as “a right of doing whatever the laws permit” and seems to confine it to the realm of the political.³³

Three other social conditions must prevail for a democratic republic, two of which involve the virtue mentioned above. Education is needed to instill virtue (this “ought to be the principal business of education”)³⁴ with the aim of producing wise men to govern. He also insists, contrary to the Founding Fathers, that the overall territory of a republic must be small.³⁵

II. EARLY STATE CONSTITUTIONS AND BILLS OF RIGHTS

Another source to turn to for our inquiry are the provisions of state constitutions and bills of rights. These are especially valuable because, since they represent the establishment of the fundamental law of a state, they are illustrative of a basic political consensus. They are limited, however, as a source of information because, while containing statements of basic principles of political philosophy and institutional provisions which suggest such principles, they also contain many technical provisions about the carrying out of various governmental activities which are not especially enlightening for our purpose. No attempt will be made here to examine in detail state constitutions of the period, although a brief, general survey of state bills of rights follows in order to point out the rights most widely accepted at the time of our Founding. Rather, the constitutions of two large, important states at the time of our Founding are considered: Virginia and Massachusetts.

The most noteworthy political principles contributed by Virginia to the American Founding are seen in the Virginia Bill of Rights of 1776, which we shall consider shortly. Three significant ideas appear in Virginia’s Constitution of 1776, however: separation of powers, rotation of officeholders (referring specifically to the

state legislature) and a generally limited duration of office, and the need to maintain fixed and adequate salaries of state judges.³⁶

The Massachusetts Constitution of 1780, which succeeded the charters of the Massachusetts Bay Colony, is a much longer document and embodies many more basic political principles than the Virginia Constitution of 1776. It states or implies the following principles: separation of powers; that there must be “an equitable mode of making laws, as well as ... an impartial interpretation and a faithful execution of them”³⁷; free elections; frequent elections for both legislative and international office (it specifically calls for *annual* elections); the need for a landed electorate; election of the legislative branch on the basis of “the principle of equality,” which means appointment of legislative seats on the basis of the number of electors paying poll tax; election by written - and, it follows by implication - secret ballot; that laws should not be suspended; the requirement of money bills originating in the house of representatives; the protection of members of the legislature from arrest or process while attending or traveling to or from the legislative session; and the need for holders of executive offices (governor and lieutenant governor) to meet religious qualifications (the governor is specifically required to be a Christian).³⁸

The Massachusetts Constitution of 1780 makes some general statements of political philosophy, both in its Preamble and in its section which lists the rights of the Commonwealth’s inhabitants (the “bill of rights” was a part of the body of the document; there was no separate bill of rights as in Virginia’s case). No statements of political philosophy appear in the Virginia Constitution; they are in the Virginia Bill of Rights. We turn to these passages now.

The Virginia Bill of Rights, like the Massachusetts Constitution, makes a statement about the natural liberty and inherent rights of men. The former says that “all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity.. .”³⁹ The latter states that “[a]ll men are born free and equal, and have certain natural, essential, and unalienable rights.. .”⁴⁰ Both list these “inherent” or “unalienable” rights: enjoying life and liberty, acquiring and protecting property, and seeking and obtaining happiness and safety. The Massachusetts Constitution, perhaps reflecting the origins of the colony in the

Mayflower Compact, speaks of the origins of the “body-politic” in a “social compact.” The Virginia Bill of Rights makes only an indirect reference to such a compact in the above passage. The latter affirms that political power is derived from the people and that their magistrates are answerable to them. Both hold that the purpose of government is to help individuals secure the natural rights above and to promote the common good, and if it fails to do this the people may alter or abolish it. The Massachusetts Constitution insists also that all men have the obligation to worship God and it asks for His direction of the government it is creating. It also acknowledges that “the happiness of a people and the good order and preservation of civil government essentially depend upon piety, religion, and morality.”⁴¹

The Virginia Bill of Rights also contains a statement of additional specific governmental principles and practices besides those in the Constitution (apart from the specific guarantees of individual rights). These are that no emoluments ought to be given men by the community except in return for services, that no offices be hereditary, that elections be frequent (this is really just an elaboration about the points concerning duration of office in the body of the Constitution), that elections be free, that electors have “permanent common interest with, and attachment to, the community,” that the people cannot be bound by any law or tax levy not consented to by themselves or their representatives, and that laws cannot be suspended or executed without the people’s consent.⁴²

The political thought of early America, built in part on a Lockean base, believed that one of the most, if not the most, fundamental purpose of government is to secure man’s rights. Which rights appeared most frequently in state constitutions and bills of rights, and thereby were probably viewed as most essential to a democratic republic? All of the early state bills of rights guaranteed the right of a jury trial, freedom of the press, and that the accused be informed of the charge against him. The protection of life, liberty, and property - already alluded to as having been mentioned in the Virginia and Massachusetts documents - was the next most frequent guarantee. Related to this was the specific guarantee of *habeas corpus*, which Massachusetts and Georgia guaran-

teed. Six states required that persons accused of crimes be permitted to have witnesses in their behalf. General warrants were forbidden by five states, the same number which granted protection from self-incrimination. Five states also forbade cruel and unusual punishments and prohibited the exaction of excessive bail. Three other states besides Virginia and Massachusetts provided that laws not be suspended. Four states prohibited *ex post facto* laws and (in the words of the Magna Carta) provided that justice not be sold, denied or delayed.⁴³

Other rights found their way into a smaller number of state constitutions and bills of rights. These were the following: guarantees against double jeopardy and being held for an infamous crime without indictment or presentment of a grand jury; the disallowance of bills of attainder; the guarantee that private property not be taken for public use without compensation; the right - to emigrate to another state; the impartiality or independence of judges; the barring of the quartering of soldiers in private homes in time of peace; the forbidding of monopolies; the guarantee that citizens will enjoy common law rights; the requirement that penalties be proportionate to the offense; the guarantee that the military was to be strictly subordinated to the civil power; the requirement - stated above as a general governmental principle found in the Massachusetts Constitution of 1780 - that taxes be levied only with legislative consent; the right of counsel to accused persons; protection against unreasonable searches and seizures; the right to bear arms, freedom of religion, the right to assemble and petition.⁴⁴



“The Massachusetts Constitution insists also that all men have the obligation to worship God and it asks for His direction of the government it is creating.”



We can reasonably conclude that the rights that appear most frequently in the various early state constitutions and bills of rights would be judged to have been viewed as the most essential to a democratic republic. Nevertheless, all the rights mentioned above except the right to emigrate, the forbidding of monopolies, the guarantee of common law rights, the proportionality of penalties, and the subordination of the military to the civil power were adopted, in some form, by either the federal Constitution or Bill of Rights. Arguably, even these latter were implicitly adopted. The first two are perhaps implied in the privileges and immunities clause of the Constitution, the third in the Ninth Amendment,

the fourth in the Eighth Amendment, and the fifth in the Third Amendment and the entire idea behind the U.S. Constitution. It even *added* such provisions as the inclusive due process clause found in the Fifth Amendment and the Seventh Amendment guaranteed that facts found by a jury could not be reexamined except according to the practice of the common law.

Even though the federal Constitution and Bill of Rights emerged as an almost all-inclusive statement of the political rights of Americans, we can judge from the discussion above that in the years leading up to the adoption of the federal Bill of Rights by the First Congress - which really must be viewed as an extension of the Founders' work on the Constitution since many were also in the first Congress - that some of the rights were viewed as more essential or basic than others. This is reinforced by the debate in the First Congress. During that debate, Madison singled out for mention the rights of conscience (i.e., freedom of religion), freedom of speech, press freedom, and trial by jury. He suggested these were the preeminent rights. Other members of the first House of Representatives during the debate singled out certain other rights in such a manner as to lead to the conclusion that they believed them to be the most basic and necessary. These were *habeas corpus*, freedom of religion, freedom of speech and assembly, and (in the words of one representative) the "rights granted to the [British] subject." The latter would seem to refer primarily to trial by jury of one's peers, *habeas corpus*, and various due process guarantees.⁴⁵

In spite of this clear basis for asserting that the Founding Fathers and the American political society of their time and the years before it viewed certain rights as more important, the enactment of the Bill of Rights, as it stands, can be understood as an acceptance of almost all of the above rights as "necessary" and basic for a democratic republic, or at least that they should be viewed as such from that point forward.

III. THE VIEWS OF THE FOUNDING FATHERS AND THE POLITICAL SOCIETY OF THEIR TIME

We shall now consider the Founding Fathers' views and the thinking generally prevalent in their time - as put forth directly in important writings or as seen implicitly in political practices - about the principles and elements that had to characterize a democratic republic and the conditions necessary to maintain it. We shall first

note the ideas most widely prevalent in their political society about this, then the ideas put forth by the most eminent of the Founders and others who were particularly active or influential at the 1787 Constitutional Convention.⁴⁶

Two historians of the politics of colonial America, Bernard Bailyn and George Dargo, mention a number of commonly held principles of this sort before the Revolution. Bailyn says that it was "almost an axiom of political thought in eighteenth century America" that the colonial legislatures were replicas, albeit imperfect, of England's "mixed and balanced constitution." In fact, however, the colonial notion of a mixed constitution deviated from the Mother Country's in one fundamental way, the fact that there was no traditional aristocracy, the "middle order" in England, which kept the "extremes of power and liberty from tearing each other apart," and in many lesser ones, such as refusing a permanent salary to colonial executives.⁴⁷

Later, after independence, the early state constitutions introduced ideas and structures which suggested the notion of separation of powers. Bailyn, however, contends that they really derive from this English idea of the mixed constitution, not from the idea of balancing the functions of branches of government, and from a belief that government faced dangers from "influence" and "corruption."⁴⁸ In fact, Dargo tells us that, instead of emphasizing separation of powers, "[t]he colonial experience had pointed toward a system of legislative supremacy."⁴⁹ This is not surprising, in light of the long colonial struggles against the arbitrary power of colonial governors appointed by the Crown. Ultimately, of course, legislative supremacy was rejected and what came to be accepted emerged as the cornerstone principle of American government: "separation of powers, mixed with an elaborate system of checks and balances among roughly equal branches..."⁵⁰ By the mid-eighteenth century, "separation of powers" had assumed its modern meaning that the functions of government were to be kept apart by separating the agencies, or departments, that performed these functions and by barring the personnel of one from serving simultaneously in another. In practice, however, legislative supremacy continued until after the ratification of the federal Constitution.⁵¹

The other principles that Bailyn and Dargo point to as characterizing early American political thought and practice are freedom of speech,⁵² an independent

judiciary,⁵³ a broad franchise⁵⁴ representation corresponding with population levels,⁵⁵ equitable apportionment,⁵⁶ and the beginnings of the Madisonian view of factions and political parties.⁵⁷

Some brief elaboration on the latter four points is in order. On the subject of the franchise, Bailyn states that as a generalization in the colonies as a whole, “it seems safe to say that fifty to seventy-five per cent of the adult male white population was entitled to vote - far more than could do so in England...”⁵⁸ He says that representation kept up with expanding populations and that apportionment, by eighteenth century standards, was “remarkably equitable, well adjusted to the growth and spread of population...”⁵⁹

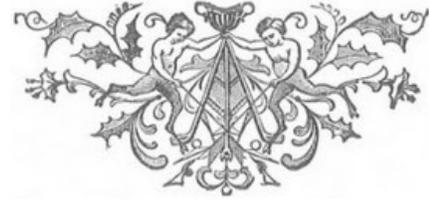
Bailyn states the following about the view of parties and factions in America before the second quarter of the eighteenth century:

Parties and factions - their destructiveness, the history of the evils they brought upon mankind, their significance as symptoms of disease in the body politic - are endlessly condemned and endlessly abjured.⁶⁰

In the 1730s, however, the view began to change. One New York writer states that “some opposition, though it proceed not entirely from a public spirit, is not only necessary in free governments but of great service to the public. Parties are a check upon one another, and by keeping the ambition of one another within bounds, serve to maintain the public liberty.” A Pennsylvanian writes that “there can be no liberty without faction.” Sporadically, this new perspective surfaced in American political writings during the middle fifty years of the eighteenth century until it was fully elaborated by Madison in Federalist 10.⁶¹

What Madison says in Federalist 10 becomes, of course, standard American thought at the time of the drafting of the Constitution. He says that since the “mischiefs of faction” cannot be cured by removing its causes - this would require actually destroying liberty or performing the task rendered impossible by human nature of giving everyone the same opinions, passions, and interests - it is necessary to try to control its effects. This is done in the following ways: if the faction is less than a majority, the “republican principle” enables the majority to defeat it simply by a vote; if the faction includes a

majority, popular government must render its members “unable to concert and carry into effect schemes of oppression.” It does the latter by means of the “extensive republic,” which has the result both of providing a larger pool of capable, virtuous citizens from which to choose representatives, of making cabals less likely because of the vast territory, and of increasing and diversifying the number of parties and interests making it less likely that a power-clutching majority will develop.⁶²



Separation of powers has already been mentioned as a principal tenet of early American political thought. The Founding Fathers, of course, also installed it into the Constitution. The Constitution does not explicitly endorse the principle, but it is clearly built into the structure and proposed functioning of the federal government by the enumerated duties and prerogatives of each of the branches. The importance of separation of powers is emphasized in the writings of several of the Founders; in fact, it can fairly be said to be for them the primary structural or operational principle of government. Hamilton, for example, defines “despotism” as a government in which all power is concentrated in a single body.⁶³ John Dickinson writes that government must never be lodged in a single body.⁶⁴ Edmund Randolph, a delegate at the Convention who first opposed the Constitution then later defended it, also emphasizes the importance of separation of powers in his writing,⁶⁵ as does Madison in Federalist 476 who says about it that “No political truth is certainly of greater intrinsic value.”⁶⁶ Jefferson, of course, was not at the Convention, but his influence on the shaping of American political thought give him not only a place, but a prominent one, among our Founding Fathers. The centrality of separation of powers in his thinking is clearly seen in his proposed constitutions for Virginia in 1776 and 1783.⁶⁷

The other essential element of a democratic republic listed most frequently by the Founders in their writings is the guarantee of certain rights. Jefferson stresses particularly freedom of press and religion, but mentions also other rights and insists on a bill of rights in his correspondence with Madison about the proposed Constitution.⁶⁸ Madison speaks of freedom of speech and press and property rights.⁶⁹ James Wilson empha-

sized liberty of the press.⁷⁰ The Federalist makes reference specifically to trial by jury, freedom of the press, and the constitutional provision against bills of attainder. The fact, as we have already seen, that all the original thirteen states had bills of rights or otherwise built guarantees into their constitutions indicates the widespread belief at the Founding that protecting political rights was seen as a crucial role of republican government. The only real dispute regarding government and citizen rights at the time of the Founding, of course, concerned a federal bill of rights. There was probably little doubt that a primary purpose of the federal as well as state governments - as affirmed by the Preamble of the Constitution which speaks of “secur[ing] the blessing of liberty” and by the Declaration of Independence, which must also be viewed as one of our Founding documents - was the defense of individual rights. The main point in the controversy between the Federalists and Anti-Federalists was not whether the rights existed or should be protected, but simply whether they needed to be enunciated in a federal bill of rights as they already were in state ones.

There are many other principles that the more prominent of our Founding Fathers enunciated in their writings as being important in a democratic republic. We might place these principles into four categories: institutional features of the government, aspects of democratic practice not specifically relating to governmental institutions, the conducting of government, and moral and social conditions necessary to sustain a democratic republic.

A number of the principles in the institutional category are related to the notion of separation of powers. For example, John Adams writes in his *Defence* of the importance of “mixed government,” by which he meant both the Lockean idea of the functional division among different branches and the older, Aristotelian notion of different social and economic classes being represented in and balanced off in government. He contended that birth, fortune, and property should all be considered in the governments of the various American states - indeed, property should be represented in the legislatures - but

that “merit should be preferred.” A mixed government, where political power is divided among different branches, is more likely to acknowledge merit than one where there is only one repository of power; there, “it has three resources, one in each branch of the legislature, and a fourth in the courts of justice.” Connected with Adams’ conception of mixed government is another principle which has significance both for this Aristotelian notion and the modern idea of separation of powers: that the “people’s house” of the legislature should have equal power as the senate and have a genuine check on it. This, of course, was embodied in the U.S. Constitution with the House and Senate being co-equal branches. While a people’s house is needed in a mixed government to protect the poor, an “executive power, vested with a negative” [a veto] is needed to protect the propertied.⁷¹

Madison and Hamilton echo some of these same points in their arguments in support of the federal Constitution of 1787. They say that a senate - an institution identified with stability because it is not so subject to popular pressures - is needed to prevent, in Madison’s words, the “infirmities of popular government.”⁷² Hamilton emphasizes that both a Senate and a popular assembly are essential: “balance and mutual control [are] indispensable to a wise administration.”⁷³ The importance of “a broad democratic branch” cannot be overstated, according to Hamilton, because “[i]n free republics ... the will of the people makes the essential principle of government.” There must be, however, “mutual checks” among the branches, and, in general, legislative power must be limited.⁷⁴

Another institutional principle relating to the division of powers which is emphasized by such Founders as Adams, Jefferson, and, in Federalist 78, Hamilton is the need for an independent judiciary. The Founders, of course, did not elaborate much on the structure or powers of the judiciary except that, if we are to judge from Federalist 78, they believed it, by nature, had less power than either the legislative or the executive because it “has no influence over either the sword or the purse; no direction either of the strength or the wealth of the society;



and can take no active resolution whatever.”⁷⁵

Hamilton, representing the view of the majority at the Constitutional Convention, speaks of two other essential institutional principles for a democratic republic, or at least the American democratic republic: a maintenance of the strength of state governments and a preservation of a balance of power between them and the federal government (in other words, the principle of federalism), and a strong union (“a firm union is as necessary to perpetuate our liberties as it is to make us respectable”).⁷⁶

I am placing under the category of “democratic practice” those political principles and practices which do not pertain to the institutional arrangements of government but to the means of insuring that there is popular participation in the government and that it is responsible to the popular will. A number of these principles and practices pertain to voting. On this subject, there were some differences among the most eminent Framers, but we still can perceive a consensus about basic aspects of this question. Adams and Jefferson both assert the need to have certain qualifications for voting, property among them. Adams’ scheme of mixed government called, of course, for propertied interests along with persons of high birth and considerable fortune to be represented in the government, specifically in the senate. He does not mention requirements for voting for the popular assembly in his writings; if he favored any they would presumably be considerably broad. Jefferson speaks of qualifications, but he is not insistent on one for property. In his 1783 draft of a constitution for Virginia, for example, he stipulates that all free male citizens who have reached the age of majority, are sane, and have either resided in their county for at least one year, possessed real property in it of a certain value, or have been enrolled in the militia shall be permitted to vote for the legislature.⁷⁷ Jefferson thus believed that to vote a man had to give evidence of some ongoing attachment to the community, although this did not have to be established by real property ownership. Madison, on the other hand, is opposed to a property qualification for voting, even while acknowledging that government must be concerned about protecting property rights. He says that “confining the right of suffrage to freeholders, and to such as hold an equivalent property, convertible ... into freeholds ... violates the vital principle of free Government that those who are to be bound by the laws ought to have a voice in making them.”⁷⁸ He also opposes Adams’ idea of one branch for property hold-

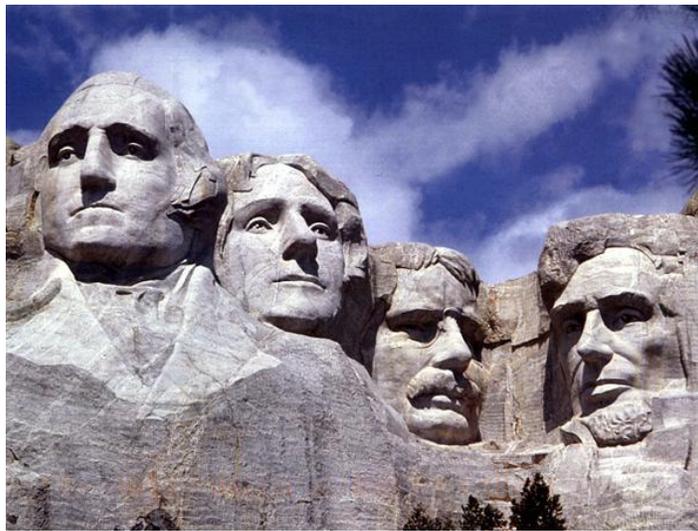
ers and the other for those without property, saying that instead property might be protected by enlarging election districts for one branch and extending the term of office for that branch (the solution which, by and large, was adopted at the Constitutional Convention). He also suggests that it would be in keeping with the nature of our political order for us to have “equal and universal suffrage,” if experience or public opinion ultimately should require it.⁷⁹

Probably Madison stands in a minority on the right of suffrage, both in light of the thinking of his fellow Framers and the general practice of his time. Property, or at least some attachment to the community, was seen as a necessary requirement. This is a clear-cut example of the Founders putting a limit on popular rule and recognizing, in the Constitution, the need for a balancing of interests. The Convention, in a sense, accepted Madison’s view as a principle of the national government by not setting any requirements but leaving the regulation of the franchise to the states. Madison’s view represents, however, a recognition by the Framers of something Tocqueville later discussed: the likelihood of pressures for the increasing democratization of the American political order.

Another aspect of democratic practice, often linked in the Framers’ writings with the right of suffrage, is duration in office. There seems to have been a view prevalent among the Framers and in the American political society of their time that terms of office should be short - except for the branch representing property, the senate - and elections should be frequent.⁸⁰ Except, again, for the senate, offices should be filled by popular election, which Hamilton says is “the most unbounded liberty allowed.”⁸¹

The latter point about popular election is an expression of a much more basic principle, which has been indirectly alluded to above, which permeated the thinking of the Founders and of the political society of America in their time: popular sovereignty. We can see this principle stated directly in a number of their writings and speeches. There is no doubt, as Diamond, Fisk, and Garfinkle state, the political philosophy behind the American Constitution is a democratic one,⁸² contrary to the arguments of some twentieth century scholars and writers.⁸³ Thus, Jefferson writes that the “mother principle” of democratic republics must be that “they embody the will of their people and execute it” and says of the notion of popular control of our government through

elected representatives that we must “bring to the test of this canon every branch of our constitution.”⁸⁴ Hamilton insists there be free and fixed representation based on pure and equal principles.⁸⁵ Madison contends that “the vital principle of republican government is the *lex majoris partis*, the will of the majority.”⁸⁶ John Adams insisted that “the people’s fair, full, and honest consent, to every law, by the representatives, must be made an essential part of their constitution.”⁸⁷ George Washington said, “The basis of our political systems is the right of the people to make and to alter their constitutions of government.”⁸⁸ Edmund Randolph maintains that a free government is one in which “laws [are] made with the assent of the people.”⁸⁹



The above dimension of the idea of popular sovereignty concerns the actions and policy of government proceeding along democratic lines. Another dimension was seen clearly in the emphasis placed on individual rights, which is clear from what has already been discussed. The general principle governing the latter was enunciated by Jefferson: “The true foundation of republican government is the equal right of every citizen, in his person and property, and in their management.”⁹⁰ In a similar vein, Jefferson says that “though the will of the majority is in all cases to prevail, it must be reasonable” and “the minority possess their equal rights, which equal laws must protect...”⁹¹

Two other aspects of democratic practice connected with the principle of popular sovereignty which are stressed in the writings of a number of Framers are that taxation cannot be levied without the consent of the people’s representatives - and, more generally, that the state’s power to tax is not unlimited - and that there be civilian control of the military regulated by the laws.⁹²

Two other principles that could be placed, although perhaps not precisely, into the category of “democratic practice” are put forth by John Adams. The first is that the laws are preeminent in a democratic republic. He says: “the laws ... are the only possible rule, measure, and security of justice”⁹³ and “alone can be trusted with

unlimited confidence.”⁹⁴ The second is that the laws must embody the natural and divine laws.⁹⁵

A number of points, which Washington and Jefferson enunciate, fall into the category of the conducting of government. These represent their views about practices which had to be followed by the statesmen at the helm of

the American government if it is to remain a democratic republic. The first of these is that the national government must have “energy” or “vigor.” Both Washington and Jefferson seem to see this as something grounded in the institutional framework of our government - in the Constitution - but realized in the continuing practice and action of our statesmen.⁹⁶ This theme of an “energetic” or “vigorous” national government being needed is also seen in such Hamilton-composed Federalist papers as 23, 25, and 70.⁹⁷

Washington and Jefferson also put forth points about government expenditures and the public debt, which are particularly worth noting at this time when this is a subject of so much public discussion. Washington, in his famous Farewell Address, instructs his countrymen to, “[a]s a very important source of strength and security, cherish public credit.” He proposes two practices to accomplish this: using public credit “as sparingly as possible” and avoiding the accumulation of debt.⁹⁸ Jefferson, in his First Inaugural Address, recommends these practices: “economy in the public expense, that labor may be lightly burdened” and “the honest payment of our debts and sacred preservation of the public faith.”⁹⁹ In a later letter, he emphasizes that perpetual government debt can interfere with liberty: “We must make our election between *economy and liberty* or *profusion and servitude*. This is because taxation follows debts, “and in its train wretchedness and oppression.”¹⁰⁰

Another related point that Jefferson stresses is that the government should undertake policies which promote or assist the economy. It should encourage agriculture and commerce as its “handmaid.”¹⁰¹

Both Washington and Jefferson enunciate a num-

ber of other principles which relate to the military and foreign affairs. As stated above, civilian control of the military is one of these. Another, according to Jefferson, is “a well-disciplined militia.”¹⁰² Washington insists that we must avoid “overgrown military establishments which under any form of government are inauspicious to liberty. . .”¹⁰³ As far as foreign affairs is concerned, Washington cautioned the nation about the dangers of foreign influence and of “[e]xcessive partiality for one foreign nation and excessive dislike for another.”¹⁰⁴ His administration is remembered for putting these principles into practice in its policy of neutrality between England and France.

Jefferson adds one other principle involving the conduct of government: “the diffusion of information and the arraignment of all abuses at the bar of public reason.”¹⁰⁵ What he seems to mean by this is that the conduct of government must essentially be in the open, not secret or hidden from public view. This will prevent abuse or permit it to be exposed and corrected by the force of public opinion.

Let us now turn to the fourth category of principles enunciated by the Founding Fathers, those relating to moral and social conditions necessary for free government. The first of these is respect for the government on the part of its people and an obedience and reverence for its laws.¹⁰⁶ Adams, as noted above, said that the laws must be preeminent in a democratic republic; there must be the rule of law. If there is to be the rule of law, however, there must be something more than even respect or obedience for them; indeed, there must be reverence. Adams links this with virtue in the citizenry, the second condition emphasized by the Founders which can be pointed to. He says the following: “that form of government which unites all the virtue, honor, and fear of the citizens, in a reverence and obedience to the laws, is the only one in which liberty can be secure and all ... [made] to prefer the public good before their own.”¹⁰⁷

Jefferson and Madison say that something still further is required in the minds and hearts of the people besides reverence for the laws: a spirit of commitment to republican principles.¹⁰⁸ Madison speaks of “the vigilant and manly spirit which actuates the people of America.” The spirit “nourishes

freedom, and in return is nourished by it.”¹⁰⁹

The importance of virtue, both for the citizenry and for political leaders, is also stressed by other Framers. Jefferson writes that the people are to be trusted so long as they remain virtuous, a condition which he believes will prevail “as long as agriculture is our principal object”¹¹⁰ (this no doubt accounts for his belief in his later First Inaugural Address that it is essential that free governments encourage agriculture). Hamilton - in effect, enunciating a prime principle of the new system of government - maintains that free government requires that a people have “strongly connected the virtue of... [their] rulers with their [the rulers'] interest.”¹¹¹ In other words, the political leaders must be made to see - the political order must be fashioned to motivate this - that acting virtuously is in their interest. Virtue, then, is one of the factors the Founding Fathers believed necessary for insuring both respect for the government and laws and a republican spirit.

The Framers believed that education, religion and morality, in *addition* to virtue, were needed to shape respect for the government, reverence for laws, republican spirit, etc. The importance of education for a democratic republic appears frequently in Jefferson’s writings. For example, the Bill for the More General Diffusion of Knowledge, drafted by Jefferson in Virginia in 1779, endorses education as the means of preventing even the best forms of government from degenerating into tyranny.¹¹² He viewed moral education¹¹³ and a form of citizenship education as the means by which people in a republic, specifically, could be made to see that “it is in their interest to preserve peace and order.”¹¹⁴ Madison speaks of “[l]earned institutions” throwing “that light over the public mind which is the best security against crafty and dangerous encroachments on the public liberty.”¹¹⁵ Washington similarly encourages the development of such institutions, saying that “[i]n proportion as the structure of a government gives force to public opinion, it is essential that public opinion should be enlightened.”¹¹⁶ John Adams states that to preserve a democratic republic, “[c]hildren should be educated and instructed in the principles of freedom.” He insists that “[e]ducation is more indispensable, and must be more general, under a free government than any other ... In a government of three branches, they hope to be called to public service, where it is necessary.”¹¹⁷



“The people are to be trusted so long as they remain virtuous,”



A particularly direct acknowledgement of the need for religion and morality comes from Washington in his "Farewell Address":

Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism, who should labor to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens.¹¹⁸

Jefferson, in a famous letter to John Adams late in his life, pointed to another social condition which he believed is required by a democratic republic: a natural aristoi of virtue. He writes this:

The natural aristocracy I consider as the most precious gift of nature ... for the government of society ... May we not even say, that that form of government is the best, which provides the most effectively for a pure selection of these natural aristoi into the offices of government?¹¹⁹

He does not talk, as Hamilton does, about this group of persons destined to be leaders having to be shown that acting virtuously is in their own best interest. The virtue is there already; that is, it is "natural" or present because the people have a natural inclination to it and have worked to develop it. This type of aristocracy, however, is not incompatible with republican government as the old hereditary aristocracy was (Jefferson calls the latter "artificial aristocracy"). Republican government, rather, *makes it possible* because free elections are needed to bring it forth to separate this natural aristocracy from the artificial.¹²⁰ (There is thus a symbiotic relationship between the natural aristoi and republican government. While the latter is needed to bring it forth, it is Jefferson's whole point in this letter that republican government needs this natural aristoi to thrive.)

IV. THE OBSERVATIONS OF TOCQUEVILLE ABOUT THE ESSENTIAL PRINCIPLES AND CONDITIONS FOR A DEMOCRATIC REPUBLIC

In this final section, we consider the observations of one of the great students and commentators of the American political and social orders, Alexis de Tocqueville, about our subject. Studying Tocqueville enables us to point to the views about the essential principles and conditions for a democratic republic which prevailed in the United States of a generation or so after the Found-

ing Fathers. Examining this period is useful because it is still close enough to our Founding for the original principles and ideas to have retained their integrity and vitality and also is a time by which substantial experience had been gotten in putting these principles into practice. Since Tocqueville's discussion in *Democracy in America* is of the attitudes and principles of the political society he observes and of his conclusions after examining it - as opposed to being simply an expounding of his own political philosophy - it is a good source for us.

Tocqueville's observations about the essential principles and conditions can be divided into three categories: geographical, political, and - the most numerous - social-economic. Tocqueville singles out two geographical factors: the vast, empty, uncultivated land that Americans were still exploring in his time and the great natural resources available. He makes clear, however, that this is only a minor factor in maintaining a democratic republic, as evidenced by the fact that South America has the same desirable natural circumstances but has not succeeded in this. He suggests, particularly, that this natural abundance helps maintain American democracy because it provides prosperity, which in turn insures democratic laws.¹²¹



As far as political factors are concerned, Tocqueville mentions the following (most of which are institutional): the federal system of government (which he calls "one of the most powerful combinations favoring human prosperity and freedom"); the way the judicial power is organized in the U.S. (he refers specifically to such limits upon the judiciary as being able to pronounce upon the validity of a law only with reference to a particular case, making decisions only "on particular cases and not on general principles," being able to act only when called upon, and being subject to the Constitution like other political actors and citizens),¹²³ good laws,¹²⁴ the existence of "communal institutions," which "moderate the despotism of the majority and give the people both a taste for freedom and the skill to be free" (by "communal institutions," he apparently means legislative bodies and the like),¹²⁵ and the fact that the U.S. then had "no great capital," which he says would result in the destinies of a whole country being placed in the hands of only a "section of the people ... acting on their own."¹²⁶

It is, essentially, the practical effects of the federal system that Tocqueville is referring to in the section of *Democracy in America* where he speaks of how free institutions combat the negative effects of the ubiquitous individualism of America. He says that “[t]he law gives of America .., thought it ... right to give each part of the land its own political life so that there should be an infinite number of occasions for the citizens to act together and so ... everyday they should feel that they depended on one another.” This motivates all citizens to take an interest in public affairs and the public good.¹²⁷

Tocqueville states that while the physical circumstances are important in maintaining a democratic republic, and good laws are even more important, mores are the most important factor.¹²⁸ It is to these, and generally to social-economic factors, that we now turn.

The one essentially economic factor that Tocqueville speaks of has been mentioned already: material prosperity. Prosperity, he indicates, has an important moderating effect on political behavior. It tends to temper political extremism and to create an attachment to law and order.¹²⁹

Several of the social factors Tocqueville points to involve attitudes in the citizenry (which include mores). The others concern, essentially, the means by which the attitudes are shaped. The attitudes needed are a skill and a taste for freedom (which as noted, he links to the existence of communal institutions), “a restless spirit, immoderate desire for wealth, and an extreme love of independence,”¹³⁰ great respect and even a willingness to sacrifice for the common good, and Tocqueville’s famous “doctrine of self-interest properly understood.” This latter is defined as “enlightened self-love [which] continually leads ... [Americans] to help one another and disposes them freely to give part of their time and wealth for the good of the state.” It is a kind of pragmatism which does not have high, noble ideas of virtue, but prompts many frequent small sacrifices and leads to lesser virtuous practices. Also, “its discipline shapes a lot of orderly, temperate, careful, and self-controlled citizens.”¹³¹ Tocqueville is thus like Hamilton in believing that virtue and self interest can be made to coincide, Hamilton saying this about political leaders and Tocqueville of people in general.

Other factors are needed to shape these attitudes or, more accurately, shape them correctly, because if this is not done they can be perverted to the harm of the

political community. These factors are education, mores, and, especially, religion and the Christian religion in particular.

About education, Tocqueville contends that the U.S. Constitution assumes much diverse knowledge and discernment on the part of the governed. “[I]t is only suited to a people long accustomed to manage its affairs, and one in which even the lowest ranks of society have an appreciation of political science.”¹³² Stated more generally, “a democracy must ... have reached a certain degree of civilization and enlightenment.”¹³³ While acknowledging the importance of education, however, Tocqueville insists that most people in a democratic republic do not need the same type of education as the sons of European aristocracy received. Their education should not be a classical one, but scientific, commercial, and industrial.¹³⁴

Tocqueville says that education strongly influences mores, which, again, he says are the critical factor. Mores “can turn even the most unfavorable circumstances and worst laws to advantage.”¹³⁵ What he includes as “mores” are not only “habits of the heart,” but “the different notions possessed by men, the various opinions current among them, and the sum of ideas that shape mental habits.”¹³⁶ Tocqueville explains the role of education in shaping mores: “the instruction of the people [in the U.S.] powerfully contributes to support the democratic republic. That will always be so ... where the instruction which teaches the mind is not separated from the education which is responsible for mores.” Indeed, the relationship between private mores and habits and public life is emphasized by Tocqueville when he says that in the U.S., “education as a whole is directed toward the political life.”¹³⁷

Religion and particularly Christianity, for Tocqueville, seems to be the *most* important influence in shaping mores, however. He writes that “in the United States religion ... direct[s] mores, and by regulating domestic life it helps to regulate the state” and “should ... be considered as the first of their [the Americans’] political institutions...” Noting the “innumerable multitude of sects” in the U.S., he says that because “all preach the same morality in the name of God” (he was able to say in his time, as we cannot today, that “Christian morality is everywhere the same”) it is not important that “all citizens should profess the true religion but that they should profess religion.”¹³⁸ He emphasizes the dangers a free

people face if they become irreligious:

[D]oubt invades the highest faculties of the mind and half paralyzes all the rest. Each man gets into the way of having nothing but confused and changing notions about the matters of greatest importance to himself and his fellows. Opinions are ill-defended or abandoned, and in despair of solving unaided the greatest problems of human destiny, men ignobly give up thinking about them.

Such a state inevitably enervates the soul, and relaxing the springs of the will prepares a people for bondage.

Then not only will they let their freedom be taken from them, but often they actually hand it over themselves.¹³⁹

V. SUMMARY AND CONCLUSION

We can thus say that America's early political tradition, the political philosophers who influenced it, the Framers of our constitution, and such an astute commentator about our way of life as Tocqueville pointed to very definite ideas, conditions, practices, and institutional and legal arrangements that were needed to sustain a democratic republic. If many of these elements were not present, or if certain individual ones were not, liberty would not be present or would not last and tyranny would quickly follow. All of the elements discussed in this essay must be said to be important, but some - because they are mentioned by so many of the sources examined or mentioned so frequently or are given special emphasis in the sources - stand out as more crucial than others. In the area of governmental institutions, the latter include: separation of powers (perhaps the most frequently emphasized factor of any); the concomitant factor of checks and balances; an independent judiciary; and the existence of a federal system (even though the

latter, in the writings considered, is referred to mostly as helping sustain a democratic republic in America, not as necessary in a general sense to sustain it). The most important factors involving both institutional matters and democratic practice are the following: that the makers of laws be subject to them; that there by, in some sense, a mixed government with both propertied interests and the people represented; that the presence of parties and factions to check each other and insure liberty is desirable; and that the laws must be accepted as preeminent.

In the category of strictly democratic principles and practice, the following can be pointed to: the view that men have inherent rights and the purpose of government is to secure them and promote the common good; popular sovereignty with all the practices and principles that have been mentioned as falling under it including those relating to voting; a limitation of the franchise to those who demonstrate some kind of permanent attachment to the community; political liberty but with definite limitations; equality, but with modifications and limitations; and that the laws embody natural law or established principles of morality not made by men. The guarantee of political and legal rights is especially important and certain of these rights, as follows, can be judged to be preeminent: freedom of the press, freedom of religion, trial by jury, the protection of life, liberty, and property, habeas corpus, freedom of assembly, certain due process guarantees, and the prohibition of bills of attainder. On the matter of the conduct of government, the practice which stands out is being cautious about the public credit and avoiding excessive public debt. Finally, on the subject of social conditions, the following can be pointed to: the need for religion, education, morality (i.e., Christian moral beliefs), virtue, respect for law and the common good, a commitment to freedom, and a natural aristocracy of virtuous men to rule. The importance generally of mores must also be stressed.



NOTES

1Martin Diamond, Winston Mills Fisk, and Herbert Garfinkle, *The Democratic Republic: An Introduction to American National Government*, 2nd ed. (Chicago: Rand McNally), pp. 89-91.

2See, for example, Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law* (Ithaca, N.Y.: Cornell University Press), Pt. IV (Locke); Diamond, Fisk, and Garfinkle, pp. 125, 474 (Locke); Alpheus Thomas Mason, *Free Government in the Making: Readings in American Political Thought*, 2nd ed. (N.Y.: Oxford University Press, 1956), pp. 6-7 (Montesquieu); Russell Kirk, *The Roots of American Order* (LaSalle, Ill.: Open Court, 1974), pp. 347-358 (Montesquieu). What has commonly been meant by "liberal democracy," of course, is the same characteristics as are usually associated with the American "democratic republic," as Diamond, et. al. define it: there is a governmental order involving the election of a small number of representatives who form a legislative assembly - this is the "democratic" aspect - and there is also a commitment to maintaining certain constitutional and political principles and individual rights, such as "due process of law," equality before the law, freedom of speech and assembly, protection for minorities, and equal opportunities - the "liberal" aspect. (See David Robertson, *A Dictionary of Modern Politics* [Philadelphia: Taylor and Francis, 1985], pp. 186-187.)

3Locke's theory could also apply, for example, to a limited monarchy. Indeed this was most directly what he was seeking to bring about in England.

4John Locke, *Two Treatises of Government*, Peter Laslett, ed., rev. ed (N.Y.: Cambridge University Press, 1960), IV, 22, 1-2, p. 324. 5Ibid., IV, 23, 6-7, p. 325, emphasis in the text.

6Ibid., VIII, 13-16, p. 375, emphasis in the text.

7Locke states the necessity for separation of powers in such passages as the following in the Second Treatise: "For he being suppos'd to have all, both Legislative and Executive Power in himself alone, there is not Judge to be found, no Appeal lies open to anyone, who may fairly, and indifferently, and with Authority decide, and from whose decision relief and redress may be expected of any Injury or Inconveniency, that may be suffered from the Prince or by his Order" (VII, 91, 1-7, p. 370).

"But in Governments, where the Legislative is in one lasting Assembly always in being, or in one Man, as in Absolute Monarchies, there is danger still, that they will think themselves to have a distinct interest, from the rest of the Community; and so will be apt to increase their own Riches and Power, by taking, what they think fit, from the People" (XI, 138, 24-30, p. 407; emphasis in the text).

"Where the Legislative and Executive Powers are in distinct hands, (as they are in all moderated Monarchies, and well-framed Governments) there the good of the Society requires, that several things should be left to the discretion of him, that has the Executive Power" (XIV, 159, 1-5, p. 421).

8Ibid., XIII, 150, 1-2, 9-10; 151, 1-4, pp. 413-414, emphasis in the text.

9Ibid., XI, 134, 14-16, p. 401, emphasis in the text.

10Ibid., 136, 20, 24-25, pp. 404-405.

11Ibid., 142, 1-4, p. 409.

12Ibid., 5-10, emphasis in the text.

13Ibid., 138, 1-2, p. 406, emphasis in the text.

14Ibid., 142, 11-20, p. 409, emphasis in the text.

15 Locke says that arbitrariness "is not much to be fear'd in Governments where the Legislative consists, wholly or in part, in Assemblies which are variable, whose Members upon the dissolution of the Assembly, are subjects under the common Laws of their Country, equally with the rest" (XI, 138, 19-23, p. 407, emphasis in the text).

16Locke, XI, 140, 5-7, p. 408.

17Ibid., XIV, 163, 10-12, p. 423, emphasis in the text.

18Ibid., XIX, 212, 26, 29-30, p. 456, emphasis in the text.

19Ibid., XIX, 220, 4, p. 459.

20In Volume One, Book II of *The Spirit of the Laws*, which Montesquieu entitles "Of Laws Directly Derived from the Nature of Government" the section on the laws in a republic is entitled "Of the Republican Government, and the Laws in relation to Democracy." This combination of the terms "republican" and "democracy" and Montesquieu's ensuing discussion show that he has the same general idea of a "democratic republic" in mind as Diamond, Fisk, and Garfinkle (stated above) believe the Founding Fathers did. See Baron de Montesquieu, *The Spirit of the Laws*,

Thomas Nugent, trans. (N.Y.: Hafner, 1949), One, II, p. 8.

21Ibid., One, II, pp. 8, 9,13; XI, pp. 151-152.

22Ibid., II, p. 8.

23Ibid., p. 9.

24Ibid., pp. 11-12.

25Ibid., p. 20.

26Ibid., pp. 34,40-41.

27Ibid., XIX, p. 310.

28Ibid., II, p. 45.

29Ibid., p. 47.

30Ibid., VIII, p. 110.

31Ibid., p. 111.

32Ibid., XI, p. 151.

33Ibid., p. 150.

34Ibid., II, p. 34.

35Ibid., VIII, p. 120. His reasons are set out in this passage: “It is natural for a republic to have only a small territory; otherwise it cannot long subsist. In an extensive republic there are men of large fortunes, and consequently of less moderation; there are trusts too considerable to be placed in any single subject; he has interests of his own; he soon begins to think that he may be happy and glorious, by oppressing his fellow-citizens; and that he may raise himself to grandeur on the ruins of his country.

“In an extensive republic the public good is sacrificed to a thousand private views; it is subordinate to exceptions and depends on accidents. In a small one, the interest of the public is more obvious, better understood, and more within the reach of every citizen; abuses have less extent, and, of course, are less protected.” (Ibid.)

36Constitution of Virginia - 1776. Source: Ben Perley Poore, compiler, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States*, 2nd ed. (Washington: U.S. Government Printing Office, 1878), vol. 2, 1910-1912.

37Constitution of Massachusetts - 1780. Source: Ibid., vol. 1, p. 957.

38Ibid., pp. 960-973. It should be noted that the last of these principles - a religious qualification for office - was specifically rejected by the U.S. Constitution, which forbids religious tests. Also, Bernard Bailyn writes that many state constitutional provisions after independence were seen as manifestations of the doctrine of separation of powers, but he gives a more accurate explanation of them below. (See Bernard Bailyn, *The Origins of American Politics* [N.Y.: Alfred A.Knopf, 1968], p. 79.)

39Virginia Bill of Rights - 1776, *ibid.*, vol. 2, p. 1908.

40Constitution of Massachusetts - 1780, *ibid.*, vol. 1, p. 957.

41Virginia Bill of Rights - 1776, *ibid.*, vol. 2, pp. 1908-1909 and Constitution of Massachusetts - 1780, *ibid.*, vol. 1, pp. 956-957. This last quote is from the latter, p. 957.

42Virginia Bill of Rights - 1776, p. 957.

43Stephen M. Krason, *Abortion: Politics, Morality, and the Constitution -A Critical Study of Roe v. Wade and Doe v. Bolton and a Basis for Change* (Lanham, Md.: University Press of America, 1984), pp. 253-254. Cf. Roscoe Pound, *The Development of Constitutional Guarantees of Liberty* (New Haven, Conn.: Yale University Press, 1957), pp. 83-89.

44Krason, pp. 254-255. Even though the right to a grand jury indictment or presentment appeared in only a minority of state constitutions and bills of rights, the view that the grand jury was an important defense of individual liberties and check on prosecutors and other officials was apparently widespread in colonial America. (See George Dargo, *Roots of the Republic: A New Perspective on Early American Constitutionalism* [N.Y.: Praeger, 1974], p. 70.)

45Krason, pp. 256-257. See the book for references.

46It should be noted that I follow Charles A. Beard’s assessment of the members of the Convention “whose character, ability, diligence and regularity of attendance separately or in combination, made them the dominant element.” (Beard, “The Supreme Court - Usurper of Grantee,” in *Essays in Constitutional Law*, Robert G. McCloskey, ed. [N.Y.: Alfred A. Knopf, 1962], p. 27. Originally published in *Political Science Quarterly*, vol. 27, p. 1[1912].)

47 Bailyn, pp. 131-135.

- 48Ibid., p. 79.
- 49Dargo, p. 52.
- 50Ibid.
- 51Ibid., p. 51.
- 52Bailyn, p. 146.
- 53Dargo, p. 48.
- 54Bailyn, p. 86.
- 55Ibid., p. 81.
- 56Ibid.
- 57Ibid., pp. 124-127.
- 58Ibid., pp. 87-88.
- 59Ibid., p. 81.
- 60Ibid., p. 125
- 61Ibid., pp. 125-127, quoting the New York and Pennsylvania writers without providing their names.
- 62Federalist 10 (Madison), Alexander Hamilton, John Jay, James Madison, *The Federalist* (N.Y.: The Modern Library, n.d.), pp. 54-62.
- 63Alexander Hamilton, "Speech on Compromises," in *The Works of Alexander Hamilton*, vol. II, John C. Hamilton, ed. (N.Y.: Charles S. Francis, 1850), p. 430.
- 64John Dickinson, "Letters of Fabius on the Federal Constitution" *Letter IV*, April 10, 1788, in *Pamphlets on the Constitution of the United States*, Paul Leicester Ford, ed. (N.Y.: Burt Franklin, n.d.), p. 182.
- 65Edmund Randolph, "Letter on the Federal Constitution," October 16, 1787, in Ford, p. 268.
- 66Federalist 47 (Madison), *The Federalist*, p. 313.
- 67 See Saul K. Padover, ed., *The Complete Jefferson* (N.Y.: Duell, Sloan and Pearce, 1943), pp. 106, 114.
- 68Jefferson, letter to Madison, December 20, 1787, *ibid.*, p. 123.
- 69See Marvin Myers, ed., *The Mind of the Founder.- Sources of the Political Thought of James Madison*, pp. 304, 502-503.
- 70James Wilson, "Substance of an Address to a Meeting of the Citizens of Philadelphia," October 16, 1787, in Ford, p. 156.
- 71John Adams, "Defence of the Constitutions of the United States of America," in *The Works of John Adams*, vol. 6 (Boston: Little & Brown, 1851), pp. 65, 78, 91, 105-106.
- 72Madison, "Remarks on Mr. Jefferson's Draught of A Constitution [for Virginia]" sent to John Brown, October 12, 1788, in Myers, p. 56.
- 73Hamilton, remarks in the New York ratification convention, June 24, 1788, in *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, Jonathan Eliot, ed. (Philadelphia: J.B. Lippincott, 1901), vol. II, p. 302.
- 74Hamilton, "Speech on Compromises," in J.C. Hamilton, vol. II, pp. 437, 444, and "Speech on the Senate of the United States" in the New York ratification convention, 1788, in *ibid.*, p. 453. It is worth noting that George Washington, in his famous Farewell Address of 1796, with the first years of actual experience with the Constitution just behind and theory thus converted into practice, reaffirms in the strongest terms the essentiality of separation of powers and check and balances. (See Washington, *Farewell Address*, General Society, Sons of the Revolution, booklet edition [N.Y.: 1963, 1982], p. 24.)
- 75 Federalist 78 (Hamilton), *The Federalist*, p. 504.
- 76Hamilton, "Speech on Compromise," in J.C. Hamilton, vol. II, p. 444 and remarks in the New York ratification convention, June 21, 1788, in Eliot, vol. II, pp. 257, 258.
- 77Jefferson, "Draft of a Constitution for Virginia," in Padover, p. 112.
- 78Madison, speech of August 7, 1787 at the Convention, redone in 1821 for planned posthumous publication of his Convention notes, in Myers, p. 506.
- 79Ibid., pp. 507-508.
- 80Jefferson, letter to Samuel Kercheval, July 12, 1916, in Padover, p. 288; Adams, "Defence" in *Works*, vol. 6, p. 74; John Dickinson, "Letters of Fabius on the Federal Constitution," letter II, April 10, 1788, in Ford, p. 171.

Hamilton makes the point about Senate terms being long in his speech in the New York ratification convention, June 24, 1788, in Eliot, Vol. II, p. 307. The extent to which the idea of short terms and frequent elections was accepted at the Framers' time is seen by the fact it is emphasized also by such Anti-Federalists as Melancton Smith and John Lansing, Jr. in the New York ratification debate (Eliot, vol. II, pp. 249, 295) and in the writings against the Constitution by Elbridge Gerry, see "Observations on the new Constitution ..." in Ford, pp. 9, 11, 12.

81Hamilton, N.Y. ratification debate, June 21, 1788, in Eliot, vol. II, p. 257. Jefferson concurs with this. See his First Inaugural Address, in Padover, p. 386 and his letter to Samuel Kercheval, July 12, 1816, in Padover, p. 288.

82Diamond, Fisk, and Garfinkle, p. 10.

83See, for example, Charles A. Beard, *An Economic Interpretation of the Constitution* (N.Y.: Macmillan, 1913); Staughton Lyrd, *Class Conflict, Slavery and the United States Constitution* (Indianapolis: Bobbs-Merrill, 1967); and Michael Parenti, *Democracy for the Few*, 3rd ed. (N.Y.: St. Martin's, 1980).

84Jefferson, letter to Samuel Kercheval, in Padover, pp. 287-288.

85Hamilton, *Speech on Compromises*, *ibid.*, in J.C. Hamilton, vol. II, p. 453.

86Madison, letter to unknown correspondent, 1833, in Myers, p. 530.

87Adams, "Defence," in *Works*, vol. 6, p. 64.

88Edmund Randolph, speech in the Virginia ratification convention, June 16, 1788, in Eliot, Vol. III, p. 84.

89Washington, p. 16.

90Jefferson, letter to Samuel Kercheval, July 12, 1816, in Padover, p. 289.

91Jefferson, First Inaugural Address in Padover, p. 384.

92Adams, "Defence," in *Works*, vol. 6, p. 197 (military); Dickinson, in Ford, letter IV, p. 186 (taxation); Hamilton, "Speech on compromises" in J.C. Hamilton, vol. II, p. 430 (taxation and military); Jefferson, First Inaugural Address, in Padover, p. 386 (military and drafts of Declaration of Independence and Proposed Constitution for Virginia, 1776 (by implication, taxation), in Padover, pp. 31, 104.

93Adams, "Defence," in *Works*, vol. 4, p. 295.

94Ibid., vol. 6, p. 56.

95Ibid. See also vol. 4, pp. 293-295.

96See Washington, p. 18, and Jefferson, First Inaugural Address, in Padover, p. 386.

97See *The Federalist*, pp. 141-146, 153-158, 454-463.

98Washington, p. 26.

99Jefferson, in Padover, p. 386.

100Jefferson, letter to Kercheval, *ibid.*, pp. 290-291.

101Jefferson, *First Inaugural Address*, *ibid.*, p. 386.

102Ibid.

103Washington, p. 12.

104Ibid., pp. 30, 32.

105Jefferson, *First Inaugural Address*, *ibid.*, p. 386.

106See Adams, "Defence," in *Works*, vol. 6, p. 208; Washington, p. 16.

107Adams, *ibid.*

108See Jefferson, letter to Kercheval, in Padover, p. 288 and Madison, Federalist 57, in *The Federalist*, p. 373.

109Madison, *ibid.*

110Jefferson, letter to Madison, December 20, 1787, *ibid.*, p. 123.

111Hamilton, "Speech on the Senate" in New York ratification convention, 1788, in J.C. Hamilton, vol II, p. 453.

112Jefferson, "A Bill for the More General Diffusion of Knowledge," in Padover, p. 1048.

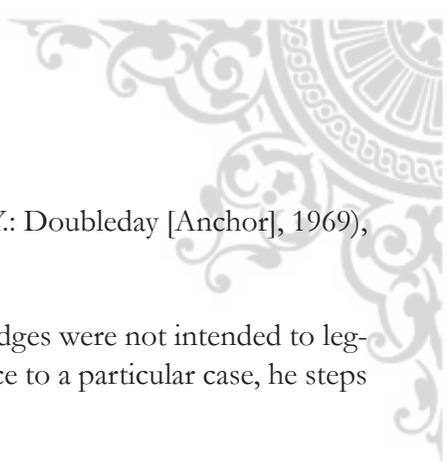
113Jefferson, letter to Thomas Law, Esq., June 13, 1814, in Padover, pp. 1032-1034.

114Jefferson, letter to Madison, December 20, 1787, in Padover, p. 123.

115Madison, letter to W.T. Barry, Aug. 4, 1822, in James Madison, *The Forging of American Federalism: Selected Writings*, Saul K. Padover, ed. (N.Y.: Harper and Row [Harper Torchbooks], 1953), p. 313.

116Washington, p. 26.

117Adams, "Defence," in *Works*, vol. 6, pp. 197-198.

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- 118 Washington, p. 24.
- 119 Jefferson, letter to John Adams, Oct. 28, 1813, in Padover, p. 283.
- 120 Ibid., p. 284.
- 121 Alexis de Tocqueville, *Democracy in America*, J.P. Mayer, ed. (Garden City, N.Y.: Doubleday [Anchor], 1969), book one, part II, pp. 280-281, 306.
- 122 Ibid., one, I, p. 170.
- 123 Ibid., one, II, p. 287 and one, I, pp. 99-105. Tocqueville makes clear that judges were not intended to legislate in the U.S. when he says, “If he [a judge] pronounces upon a law without reference to a particular case, he steps right beyond his sphere and invades that of the legislature” (p. 100).
- 124 Ibid., one, II, p. 307.
- 125 Ibid., one, II, p. 287.
- 126 Ibid., one, III, p. 279.
- 127 Ibid., two, II, p. 511.
- 128 Ibid., one, II, p. 307.
- 129 See *ibid.*, one, II pp. 287-288.
- 130 Ibid., one, II, p. 284.
- 131 Ibid., two, II, pp. 526-527.
- 132 Ibid., one, I, pp. 164-165.
- 133 Ibid., one, II, p. 225.
- 134 Ibid., two, II, pp. 476-477.
- 135 Ibid., one, II, p. 308.
- 136 Ibid., one, II, p. 287
- 137 Ibid., one, II, pp. 304-305.
- 138 Ibid., one, II, pp. 290-291.
- 139 Ibid., two, I, p. 444.