

## Dependence on the People

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## “A DEPENDENCE ON THE PEOPLE”

*Senator Orrin G. Hatch†*

This society has chosen a propitious moment to explore the link between individual responsibility and the law. In the last month, we all witnessed world-historic events in what—we can thankfully say—used to be known as the Soviet Union. As that empire dissolves and formerly captive peoples grapple with the monumental task of establishing limited government amid the human, spiritual, economic, and environmental wreckage left by seven decades of totalitarian rule, there will be some in this country eager to offer their advice—solicited or otherwise—about constitution-making. Before offering such advice, it behooves us to first reflect on the first principles of limited government. It seems to me that individual responsibility is not only *a* first principle of limited government, it is *the* first principle of limited government.

The Framers of the American Constitution had no illusions about human nature. Because the experience of man taught—and I should add, still teaches—that to concentrate governmental power is to invite tyranny, the Framers divided power horizontally among a unitary executive, an independent judiciary, and a bicameral legislature, and vertically between the national government and the states in the form of federalism.

Americans are justly proud of their Constitution and its two centuries of continuous operation. Too often we fail to remember, however, that the Framers did not consider the Constitution to be the primary guarantor of our liberties. Publius, in the 51st *Federalist*, characterized the architectural features of the Constitution as “auxiliary precautions”<sup>1</sup> for the preservation of liberty.

If the authors of the *The Federalist Papers* saw the Constitution itself consisting of mere “auxiliary precautions,” what then did they consider the *principal* guarantor of liberty and limited government? Publius answers in the 51st *Federalist* that “[A] dependence on the

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<sup>1</sup> THE FEDERALIST No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

people is, no doubt, the primary control on the government."<sup>2</sup> In the 55th *Federalist*, Publius somewhat offhandedly explains limited government's "dependence on the people" even as human nature counsels against dependence on self-restraint by the rulers:

As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence. *Republican government presupposes the existence of these qualities in a higher degree than any other form.*<sup>3</sup>

*The Federalist Papers* contain few, if any, other references to this "dependence on the people" for the "primary control" of the government. Apparently the *sine qua non* of a virtuous citizenry for limited government was so self-evident that there was no need for further discussion of the proposition. Whatever their disagreements with Publius about constitutional architecture, the Anti-Federalists would have agreed with Publius that the whole undertaking was futile if the people themselves were not fitted for self-government.

Thus, as Professor Forrest McDonald has observed, the Framers were guided by the principle that "the extent to which limited government is feasible is determined by the extent to which the people, socially and individually, can govern themselves."<sup>4</sup> Professor McDonald puts that more simply for the sake of emphasis: "If citizens can behave themselves and make do for themselves, they need little government; if they cannot, they need a great deal of government."<sup>5</sup>

What qualities of character in the people did the Framers presuppose? Founding-era documents give us a very clear picture. The Virginia Bill of Rights, drafted by George Mason and adopted in 1776, provided that "[N]o free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles."<sup>6</sup> Similarly, the Massachusetts Bill of Rights of 1780 drafted by John Adams declared that "[A] constant adherence to . . . piety, justice, moderation, temper-

<sup>2</sup> *Id.*

<sup>3</sup> THE FEDERALIST No. 55, at 346 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

<sup>4</sup> FORREST McDONALD & ELLEN McDONALD, REQUIEM: VARIATIONS ON EIGHTEENTH-CENTURY THEMES 10 (1988).

<sup>5</sup> *Id.*

<sup>6</sup> The Virginia Bill of Rights (June 12, 1776), in HENRY S. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 103, 104 (9th ed. 1973).

ance, industry and frugality, are absolutely necessary to preserve the advantages of liberty, and to maintain a free government.”<sup>7</sup>

The Northwest Ordinance of 1787, which was adopted by the Congress under the Articles of Confederation while the Constitutional Convention was meeting in Philadelphia, prescribed the manner states from the Northwest Territory were to be admitted into the Union, and like the Declaration of Independence, the Constitution and the U.S. Code is still part of the “organic law” of the United States. Article 3 of the Ordinance proclaimed that “[R]eligion, morality, and knowledge [are necessary for] good government and the happiness of mankind.”<sup>8</sup>

In his farewell address in 1796, President George Washington admonished his countrymen that:

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. The mere politician, equally with the pious man, ought to respect and cherish them. . . .<sup>9</sup>

When Alexis de Tocqueville toured America in the 1830s, he found a citizenry that seemed mindful of Washington’s farewell admonition of four decades earlier. He observed that in America,

Everything in the moral field is certain and fixed, although the world of politics seems given over to argument and experiment. So the human spirit never sees an unlimited field before itself; however bold it is, from time to time it feels that it must halt before insurmountable barriers. Before innovating, it is forced to accept certain primary assumptions and to submit its boldest conceptions to certain formalities which retard and check it.

\* \* \*

Up till now no one in the United States has dared to profess the maxim that everything is allowed in the interests of society, an impious maxim apparently invented in an age of freedom in order to legitimize every future tyrant. Thus, while the law allows the American people to do everything, there are things which religion prevents them from imagining and forbids them to dare. Religion, which never intervenes directly in the government of American society, should therefore be considered as the first of their political institutions, for although it did not give them the taste for liberty, *it singularly facilitates* their use thereof.<sup>10</sup>

<sup>7</sup> The Massachusetts Bill of Rights (1780), in COMMAGER, *supra* note 6, at 107, 109.

<sup>8</sup> *Id.* at 131.

<sup>9</sup> GEORGE WASHINGTON: A COLLECTION 521 (W. Allen ed. 1988).

<sup>10</sup> ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 269 (Mayer ed. 1966) (emphasis added).

After touring America and observing its citizens and institutions, de Tocqueville concluded that what made America a singularly stable and prosperous country was not its geographical advantages, nor the particular structures of its government and laws, but rather the character of its people, which he attributed to their mores:

I am convinced that the luckiest of geographical circumstances and the best of laws cannot maintain a constitution in despite of mores, whereas the latter can turn even the most unfavorable circumstances and the worst laws to advantage. The importance of mores is a universal truth to which study and experience continually bring us back.

\* \* \*

If in the course of this book I have not succeeded in making the reader feel the importance I attach to the practical experience of the Americans, to their habits, opinions, and, in a word, their mores, in maintaining their laws, I have failed in the main object of my work.<sup>11</sup>

In his discussion of the importance of the mores of the people in a free government, de Tocqueville asked a question that is relevant to us today: "How [can] society escape destruction if, when political ties are relaxed, moral ties are not tightened?"<sup>12</sup> Professor Harry Jaffa answers that rhetorical question this way: "A free, self-governing society, more than any other kind, depends upon the qualities—the virtues—of its citizens. \* \* \* In a Republic, the sobriety of the citizens replaces the force of authority as the principal source of order."<sup>13</sup>

Over the last three decades or so in this country, we have seen a considerable relaxation of the societal moral constraints formerly imposed on individual conduct. As these moral constraints have relaxed, we have seen an explosion of social pathologies, which in turn has driven an expansion of government to respond to these pathologies, proving Professor McDonald's dictum that individuals who are unable to govern themselves need a great deal of government.

Take one but very important example: the family. The leading social problem in this country today is the breakdown of the American family. Put more precisely, it is the failure of families to form. In 1989, the latest year for which statistics are available, one out of

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<sup>11</sup> *Id.* at 283-84.

<sup>12</sup> *Id.* at 71.

<sup>13</sup> HARRY JAFFA, AMERICAN CONSERVATISM AND THE AMERICAN FOUNDING 34 (1984).

four children born in this country were born out of wedlock.<sup>14</sup> A substantial portion of these children will never be supported by their fathers, but instead, will be supported by the government.

This fall, the Supreme Court will hear argument in a case that presents the question of whether a State violates the federal Constitution by permitting a rabbi to give an invocation during a school commencement ceremony.<sup>15</sup> I would suggest to you George Washington would be astounded that under the same Constitution that he swore to preserve, protect, and defend, such a practice would be deemed to require adjudication by the highest court in the land, at a time when many school districts routinely dispense contraceptives to high school and even junior high students, and others teach AIDS prevention to preschoolers.

In closing, whether we choose to offer our advice to those abroad about the best way to establish limited government, we, as individual citizens, would do well to try to re-establish limited government at home by heeding the lines of the second stanza of *America the Beautiful*, which in their simple way capture the essence of George Washington's farewell address:

America, America  
God mend thine every flaw  
Confirm thy soul in self-control  
Thy liberty in law.

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<sup>14</sup> National Ctr. for Health Statistics, U.S. Dep't of Health & Human Serv., Advance Report of Final Natality Statistics, 1989, 40 Monthly Vital Statistics Report No. 8(5), published Dec. 12, 1991, at 1, 8.

<sup>15</sup> *Weisman v. Lee*, 908 F.2d 1090 (1st Cir. 1990), cert. granted, *Lee v. Weisman*, 111 S. Ct. 1305 (1991).