



Summer 6-1-1999

The American Founders' Responsibility

Ralph Lerner

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Constitutional Law Commons](#), and the [Legal History Commons](#)

Recommended Citation

Ralph Lerner, *The American Founders' Responsibility*, 56 Wash. & Lee L. Rev. 891 (1999).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol56/iss3/9>

This Article is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

The American Founders' Responsibility

Ralph Lerner*

Well, might you ask, what can the American Founders tell us about responsibility that is worth listening to today? We surely owe thanks to those singular individuals who led the struggle for this people's independence. Nor can we look back with indifference at their efforts to shape the political institutions of the states and the nation. For their legacy, with all its strengths and shortcomings, is our own. We continue to live with the consequences of the choices they made for us in the eighteenth century. But again, why prick up our ears when they speak of responsibility?

My first approximation of an answer to this question will be short and direct. The Founders thought about responsibility; they wrote about it; and they embodied it. If we think of responsibility as somehow lying at the intersection of practical wisdom, moral judgment, and a capacity for presenting good reasons for what one has done, then we should regard the American Founders as virtuosos. Their virtuosity goes beyond the fact that as political men, they encountered events that forced them to confront the problem of responsibility day in and day out. They also were exceptional men because of their talents, their education, their public spiritedness, and the opportunities they sought and made for themselves. The features that set them apart fostered in them an unusual degree of self-awareness. As they struggled in countless ways to guide the thoughts and actions of others, they hardly could be blind to the issue of their own responsibility. Indeed, given the precarious and unprecedented feat of statesmanship they were undertaking, it is unlikely that their ambitions would have allowed others to claim the credit or glory, hence the responsibility, for what they themselves had done.

I. Institutionalizing Responsibility

A good place to begin exploring the Founders' understanding of this concept is their most coherent exposition, the collective work known as *The Federalist*. It is, to be sure, a collection of essays in persuasion, not a treatise,

* Benjamin Franklin Professor, University of Chicago, and member of the University's Committee on Social Thought. Professor Lerner delivered this address on September 17, 1998, as part of Washington and Lee University's Law and Responsibility Lecture Series. This Lecture Series celebrated the 250th Anniversary of the University and the 150th Anniversary of the School of Law.

and written, moreover, under great pressure during the campaign to secure the ratification of the constitution that the Philadelphia convention proposed in 1787. Yet the political and polemical setting in which Alexander Hamilton, James Madison, and John Jay composed these essays cannot diminish the weightiness of their reasonings. These Founders meant to make themselves understood and to impart their understanding to their fellow citizens. Because their own understanding was in important respects off the beaten path and at odds with then-common opinions, they thought themselves obliged to indicate the important theoretical considerations that informed their reasonings. It is in this context that responsibility became an overt theme for them.

It is a fact – and a curious one as well – that the *Oxford English Dictionary* records no appearance of the word "responsibility" earlier than Hamilton's use of it in *The Federalist*.¹ This is not to say that the political phenomenon itself is new. One need only recall the intensity with which the ancient Athenians held their magistrates hyperaccountable. Nor is it to say that the term "responsible" and its synonyms, "accountable" and "answerable," are newcomers to the English language. And of course the phenomenon of legal responsibility antedates that language. On and off throughout legal history, law has held persons responsible – e.g., for negligence, nuisance, trespass, nonpayment of debt, and breach of contract generally, as well as for criminal conduct. And persons have been thought, from time to time, morally responsible – e.g., for ill treatment of one's children, or for failure to lend a hand to people in peril. The state, or one's tribe, or some plaintiff, or one's conscience will hold one responsible. I will have to answer for what I did or failed to do, or for the manner in which I have behaved. And in explaining myself, I must have good reasons as I address the public, or a legal tribunal, or my friends and family, or God. In old-fashioned language, I need to show that I did my duty.

Yet recognizing "the responsibility implied in the duty assigned,"² as Hamilton put it in *Federalist* 23, invites a more searching inquiry. What are the grounds for my behaving as I did? The hope of reward (re-election, reappointment, promotion); the fear of punishment (censure, dismissal, impeachment); the dictates of conscience; the standards that a life freely dedicated to honor or virtue demand? In current English, calling someone "re-

1. See 13 OXFORD ENGLISH DICTIONARY 742 (2d ed. 1989) (recognizing first use of "responsibility" as that in Hamilton's *Federalist* No. 63). But see DOUGLASS ADAIR, *FAME AND THE FOUNDING FATHERS* 357, 366 n.8 (Trevor Colbourn ed., 1974) (attributing to James Madison first use of "responsibility" in report to the Continental Congress on July 22, 1780); Letter from Alexander Hamilton to James Duane (Sept. 3, 1780), in 1 THE FOUNDERS' CONSTITUTION 150, 151 (Philip B. Kurland & Ralph Lerner eds., 1987) (speaking of responsibility of Congress).

2. THE FEDERALIST NO. 23, at 149 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

sponsible" mutes or obscures these distinctions, yet might also encompass them. Today it often seems enough just to assert that *X* is "responsible" – that is, reliable. At any rate, "responsible" and "responsibility" seem to push questions of character to one side, without quite eliminating them. The authors of *The Federalist* prefigured our current usage and thinking in two ways. First, as aforesaid, we accepted their too ready reduction of political virtue to staid and boring reliability, called responsibility. Second, we learned from their annoyance the preposterousness of holding persons responsible for performance of duties of office, on the one hand, without, on the other, first equipping them with the power and authority necessary to meet those assigned responsibilities. Consider the second point now.

Against the background of a hamstrung Continental Congress, Hamilton insisted that power is a necessary condition for the performance of duty. It is not enough to charge some body of people with an object they are duty-bound to achieve. They also must be vested with the authority to perform that duty. "A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and to the complete execution of the trusts for which it is responsible; free from every other control, but a regard to the public good and to the sense of the people."³ Failing that, there can be no talk of "responsibility."

The Founders' largest point about responsibility is that it calls for *judgment*. Individuals, collectivities, actions, inactions – all are to be weighed and measured, praised or blamed, rewarded or punished. This kind of judgment presupposes a world that is relatively transparent and open to scrutiny by those standing outside. To be responsible means to be answerable and to care about how another receives your answer. If you have nothing riding on the response to your answer, if you are indifferent to, or disdainful of, those who might judge, you are no longer in the realm of responsibility. One might speak more properly of godlike self-sufficiency or of radical independence.

But such exalted distancing of men and measures was no part of the Founders' expectations or desires. A few of them – I think of Gouverneur Morris in particular – looked forward to an America that held its head high, filled with a haughty, generous, and noble national spirit.⁴ For the most part, however, the Founders labored for a modest political system of interlocking responsibilities. This interlocking responsibility obviously would be the case with individuals elected or appointed to public office. Singly and collectively, they would be responsible *for* something and *to* someone. Indeed, the Founders lavished much ingenuity on contriving means of fostering or even ensuring

3. THE FEDERALIST NO. 31, at 195 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

4. See Gouverneur Morris, *National Greatness* (ca. 1800), reprinted in 1 THE FOUNDERS' CONSTITUTION, *supra* note 1, at 687, 688 (discussing Morris's vision for America).

reasonable responsibility. They sought to proportion the means to the end. For example, it made little sense to charge a numerous legislative assembly that was subject to frequent elections and frequent turnover with the responsibility for crafting a long-term policy for American foreign relations. The electorate could not affix personal responsibility in this setting; it would misapply both praise and blame.

The authors of *The Federalist* took it for granted that "the sense of responsibility is always strongest in proportion as it is undivided."⁵ Hence, it looked askance at plural executives, large assemblies, indeed at any arrangement that lends itself to serving as a clog or a cloak for nonfeasance and malfeasance in office. Wherein consists the safety of the governed? Not in hobbling the officers of state who are charged with managing the public's business. Rather, in assuring that those officials should not be able to free themselves of the constraints of public opinion by hiding, as it were, in a crowd. And further, by preserving "the opportunity of discovering with facility and clearness the misconduct of the persons they trust."⁶ Each of these elements deserves elaboration.

The Constitution of the United States is famous for its many checks and balances. It grants powers, but with a wary eye. It tethers officials and reminds them of that fact. It places much weight upon arrangements such as the separation of powers to help make the officers of state responsible precisely because they cannot otherwise be relied upon to be responsible. But for all that, it is striking that *The Federalist*, the great explicator and celebrator of these institutional devices and safeguards, should insist so firmly upon the role of public opinion in keeping officials trustworthy. At issue here is less a matter of law-breaking and thievery – taking bribes, stealing from the postage fund, and the like – than of censurable conduct. The Founders intended to heighten the magistrate's sense of responsibility by keeping his sense of public scrutiny vivid and sharp. "The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation."⁷ Good government needs both elements: the awareness of one's obligation to others, and the personal interest in preserving and adorning one's good name. In the mutual support of public and private motives, the Founders hoped to find a sturdy basis for safe and reliable, or responsible, governance. They certainly did not presume that men of discernment would be immune to the partialities and personal considerations that warp our all-too-human judgments. The Founders knew better. However, they did presume that a magistrate who values his character will be especially mindful that his actions, his judgments, and hence his character are fully on display.

5. THE FEDERALIST NO. 74, at 501 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

6. THE FEDERALIST NO. 70, at 478 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

7. THE FEDERALIST NO. 76, at 510-11 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

On the point of minimizing divisions of responsibility Hamilton insisted that the relative anonymity afforded by assemblies, councils, and the like, was much to be avoided: "[W]hile an unbounded field for cabal and intrigue lies open, all idea of responsibility is lost."⁸ President Truman, whose political apprenticeship made him aware of such shenanigans, used to remind himself and others that "the buck stops here." The Founders strove to institutionalize that self-awareness. They abhorred labyrinthine mysteries that concealed faults and destroyed responsibility. The public had a right to know because the public had a civic responsibility to judge. Whatever obscured or confounded that judgment to that extent subverted the public safety and the public good.

Frustrated observers of today's government, with its inflated White House and Congressional staffs, to say nothing of bloated administrative agencies, can rest assured that the following words were uttered, not by a suspicious opponent of the proposed Constitution, but by an advocate of a government well mounted, the author of *Federalist 70*:

It often becomes impossible, amidst mutual accusations, to determine on whom the blame or punishment of a pernicious measure, or series of pernicious measures ought really to fall. It is shifted from one to another with so much dexterity, and under such plausible appearances, that the public opinion is left in suspense about the real author. The circumstances which may have led to any national miscarriage or misfortune are sometimes so complicated, that where there are a number of actors who may have had different degrees and kinds of agency, though we may clearly see upon the whole that there has been mismanagement, yet it may be impracticable to pronounce to whose account the evil which may have been incurred is truly chargeable. . . . [P]retexts are constantly at hand, whether true or false. And who is there that will either take the trouble or incur the odium of a strict scrutiny into the secret springs of the transaction? Should there be found a citizen zealous enough to undertake the unpromising task, if there happen to be a collusion between the parties concerned, how easy is it to cloath the circumstances with so much ambiguity, as to render it uncertain what was the precise conduct of any of those parties?⁹

The members of government ought to be "accountable to the society over which they are placed."¹⁰ This was a truism of the age – at least in America. Those who serve the public must display a due dependence upon the people, primarily but not exclusively by having a limited tenure of office, but not so radically limited, let me hasten to add, as to hinder their gathering the practical knowledge needed to perform their service well. The authors of *The Federalist* knew that a very short tether can make legislators more responsive to immedi-

8. THE FEDERALIST NO. 77, at 518 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

9. THE FEDERALIST NO. 70, at 476-77 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

10. THE FEDERALIST NO. 55, at 377 (James Madison) (Jacob E. Cooke ed., 1961).

ate popular desires but that too much responsibility of that kind can defeat responsibility of another, truer kind. Periodically, officials would present themselves for the electorate's inspection and judgment. Beyond that, officeholders would be subject to a variety of devices for reinforcing "a due responsibility":¹¹ impeachment, reprimand, and dismissal from office. Furthermore, the various branches of government themselves would keep watch over the derelictions of responsibility in the others. *The Federalist* took evident pleasure in drawing its readers' attention to an auxiliary precaution, that of connecting the interest of the officeholder with the constitutional rights of his office. In that way "the private interest of every individual, may be a centinel over the public rights."¹² Such inventions of prudence may strike the severe moralists of our age as deficient. This calculating turn of mind falls short of some people's grander notions of responsibility. Yet *The Federalist* took pride in recommending a "policy of supplying by opposite and rival interests, the defect of better motives,"¹³ and did not apologize for adopting this pedestrian view of the matter. "It may be a reflection on human nature, that such devices should be necessary to controul [sic] the abuses of government. But what is government itself but the greatest of all reflections on human nature?"¹⁴

Hamilton could hardly deny that "there are men who could neither be distressed nor won into a sacrifice of their duty."¹⁵ In fact, he regarded himself as one of that select band. But he admitted in the same breath that "this stern virtue is the growth of few soils."¹⁶ Given the rarity of a "superlative virtue" able to withstand the ever present temptations to sacrifice duty to interest,¹⁷ *The Federalist* found it sufficient to admire this excellence without counting on its timely presence. While hoping for the best, the Founders did not presume a divine dispensation on America's behalf. Instead, let the President stand alone, in the spotlight, at center stage, and answer for his personal responsibility: "[A] single object for the jealousy and watchfulness of the people."¹⁸ Let the term of appointments to the House of Representatives be such as "to support in the members an habitual recollection of their dependence on the people, . . . a proper responsibility to the people."¹⁹ Let there be

11. THE FEDERALIST NO. 77, at 520 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

12. THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961).

13. *Id.*

14. *Id.*

15. THE FEDERALIST NO. 73, at 493 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

16. *Id.*

17. See THE FEDERALIST NO. 75, at 505 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (discussing qualities needed in executive).

18. THE FEDERALIST NO. 70, at 479 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

19. THE FEDERALIST NO. 57, at 386, 384 (James Madison) (Jacob E. Cooke ed., 1961).

a Senate to provide for such objects as require a continued attention and a succession of well-chosen and well-connected measures. Invested with "sufficient permanency," and kept small enough so that each member could enjoy "a sensible degree of the praise and blame of public measures," this would be a body "justly and effectually answerable for the attainment of those objects."²⁰ Surprisingly, perhaps, the national judiciary too has a part to play. "The responsibility for an injury ought ever to be accompanied with the faculty of preventing it."²¹ And because the union as a whole is answerable to foreign powers for the conduct of its members, to whom might such delicate questions involving foreign nationals, foreign governments, and treaties be better committed than to "the jurisdiction and judgment of courts appointed by, and responsible only to one national Government[?]"²² The general rule was to be, "immediate responsibility to the nation in all those, for whose conduct the nation itself is to be responsible."²³

Readers know *The Federalist* best for its preoccupation with the powers and structure of the projected government. Underlying its discussion, however, is a set of assumptions about the people to whom and for whom this new constitution was being proposed. To begin with, in its general form and aspect the new government would have to be strictly republican. "It is evident that no other form would be reconcilable [sic] with the genius of the people of America; with the fundamental principles of the revolution; or with that honorable determination, which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government."²⁴ But the fact that republican, popular government was a foregone conclusion did not mean that its proponents could take for granted the success of those experiments. "The capacity of mankind for self-government" was still an open question, and one with universal consequence. Without abstracting from the singularities of the American situation, there remained this general problem: How could a people be made and kept fit for self-governance? History could detail a dreary record of failures and dashed hopes. The Americans might yet supply a different and more heartening answer.²⁵

20. THE FEDERALIST NO. 63, at 424, 423, 424 (James Madison) (Jacob E. Cooke ed., 1961).

21. THE FEDERALIST NO. 80, at 536 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

22. THE FEDERALIST NO. 3, at 15 (John Jay) (Jacob E. Cooke ed., 1961).

23. THE FEDERALIST NO. 44, at 299 (James Madison) (Jacob E. Cooke ed., 1961).

24. THE FEDERALIST NO. 39, at 250 (James Madison) (Jacob E. Cooke ed., 1961).

25. See DAVID F. EPSTEIN, *THE POLITICAL THEORY OF "THE FEDERALIST"* 179-85 (1984) (examining Framers' discussions of responsibility); HARVEY C. MANSFIELD, JR., *TAMING THE PRINCE: THE AMBIVALENCE OF MODERN EXECUTIVE POWER* 270-71, 292, & 247-97 (1989) (looking at role of responsibility in shaping executive branch); GERALD STOURZH, *ALEXANDER*

II. Educating for Responsibility

Earlier I characterized the political system envisioned by the Founders as one of interlocking responsibilities. This was true not only for the several branches of government but for the citizenry at large. It is not farfetched to assert that the American Founders' notion of republican governance demanded of each branch of government that it live up to its prescribed responsibility even as it invited contributions from each citizen according to his capacities. Of the latter, however, *The Federalist* speaks little. Its main concern is a frame of government. And while it presupposes a people moderately informed and perhaps immoderately jealous, a people both patriotic and busy with its own affairs, *The Federalist* does not look into the nurture of that public. For that we must turn elsewhere, to two other Founders: John Adams and Thomas Jefferson. They addressed the problem of self-governance repeatedly over the course of their long, active lives. As movers and shakers in the first stirrings of revolutionary fervor, as central figures in the momentous making of a new nation, and as reflective observers of their handiwork's subsequent career (both Jefferson and Adams lived to see the fiftieth anniversary of the Declaration of Independence), these Founders enjoyed many opportunities to consider and to reconsider their own responsibility and that of others.

Early and late in his life, Adams called for a people attentive and resolute – responsible, we might say: "Every step in the public administration of government, concerns us *nearly*. Life and fortune, our own, and those of our posterity, are not *trifles* to be neglected or *totally entrusted* to other hands."²⁶ With so much at stake, Adams wrote in 1763, it behooved every British subject "to be in some degree a *statesman*: and to examine and judge for *himself* of the *tendency* of political *principles* and *measures*."²⁷ For Adams, self-governance emphatically presupposes a citizenry, not a populace otherwise so preoccupied, distracted, or indifferent as to neither care nor notice what is being done in their name. Neither is the American public to be a people so diffident as to come, cap in hand, for such information as their betters may see fit to share with them. Rather, this people must be ready to take responsibility, and to hold others responsible, for a steady supply of information bearing on the people's business. Consider this contrast of contemporaneous expectations. Turgot, Louis XVI's minister of finance, could characterize a French parish as a group of huts not more passive than

HAMILTON AND THE IDEA OF REPUBLICAN GOVERNMENT 180-86 (1970) (contrasting political views of Hamilton with those of Jefferson).

26. John Adams, "U" to the *Boston Gazette* (Aug. 29, 1763), in 1 PAPERS OF JOHN ADAMS 76, 80-81 (Robert J. Taylor ed., 1977).

27. *Id.* at 81.

their tenants.²⁸ He was speaking of a population to whom the very idea of self-governance simply had not occurred. And now, hear John Adams rousing Americans to a sense of their duty by reminding them of their rights:

[L]iberty cannot be preserved without a general knowledge among the people, who have a right from the frame of their nature, to knowledge, as their great Creator who does nothing in vain, has given them understandings, and a desire to know – but besides this they have a right, an indisputable, unalienable, indefeasible divine right to that most dreaded, and envied kind of knowledge, I mean of the characters and conduct of their rulers. Rulers are no more than attorneys, agents and trustees for the people; and if the cause, the interest and trust is insidiously betray'd, or wantonly trifled away, the people have a right to revoke the authority, that they themselves have deputed, and to constitute abler and better agents, attorneys and trustees.²⁹

We may speak here of the people's responsibility – to themselves, to their children, and to mankind at large. They have a responsibility to become and to remain the kind of people who are able to hold others to account. It would be foolish – and fatal – to assume that this necessary character of a self-governing people would come about as a matter of course.

The social science will never be much improved, until the people unanimously know and consider themselves as the fountain of power, and until they shall know how to manage it wisely and honestly. Reformation must begin with the body of the people, which can be done only, to effect, in their educations. The whole people must take upon themselves the education of the whole people, and must be willing to bear the expenses of it. . . . They must be taught to reverence themselves, instead of adoring their servants, their generals, admirals, bishops, and statesmen.³⁰

This kind of self-respecting people would reward public service as a matter of justice, not gratitude. Adams's view might be summarized in his own pungent language: "Hang well and pay well."³¹

Thomas Jefferson assumed the task of working out the details of the education of a people ready and willing to govern. He knew well enough, having already said so in *his* draft of the Declaration of Independence, that the Americans were "a people fostered & fixed in principles of freedom."³² Yet

28. See ALEXIS DE TOCQUEVILLE, 1 *THE OLD REGIME AND THE REVOLUTION* 130 (Furet-Mélonio ed., 1998).

29. John Adams, *A Dissertation on the Canon and the Feudal Law*, no. 3 (Sept. 30, 1765), in 1 *PAPERS OF JOHN ADAMS*, *supra* note 26, at 118, 120-21.

30. Letter from John Adams to John Jebb (Sept. 10, 1785), in 9 *THE WORKS OF JOHN ADAMS* 538, 540 (Charles Francis Adams ed., 1854).

31. Letter from John Adams to John Jebb (Aug. 21, 1785), in 9 *THE WORKS OF JOHN ADAMS*, *supra* note 30, at 532, 536.

32. Thomas Jefferson, *Autobiography*, in *THOMAS JEFFERSON: WRITINGS* 1, 22 (Merrill D. Peterson ed., 1984).

that cast of mind alone would not suffice or persist through the generations: "The spirit of the times may alter, will alter. Our rulers will become corrupt, our people careless. . . . From the conclusion of this war we shall be going down hill."³³ Adams, in Massachusetts, could fall back upon his native colony's tradition (however imperfectly honored) of supporting local schooling with local taxation. Jefferson could not, for Virginia was largely a blank slate in this respect. Hence he rose to the challenge of re-examining the problem of self-governance, thinking it afresh.

The enduring monument of Jefferson's cool, comprehensive view of self-governance is Bill No. 79, "A Bill for the More General Diffusion of Knowledge."³⁴ This bill was part of a far-reaching revisal of the laws of revolutionary Virginia that Jefferson, Edmund Pendleton, and George Wythe labored over for two and a half years. As one might expect, their 126 proposals to the state's General Assembly met with uneven success. This particular bill, one of a handful in which Jefferson was very heavily invested, came to naught. His disappointment was lasting; even a third of a century later, it was a subject he could not let rest. In his correspondence, he would raise it again and again, with ardor and with undiminished commitment.³⁵

Our present preoccupation with the theme of responsibility compels us to linger over the peculiar way in which Jefferson, in this bill, intertwined educational objectives and political principles with the nuts and bolts of administrative procedures. He exhibits here a strategy for informing and educating the people of Virginia by involving them in school or educational administration. He wanted to require Virginians to form a fine-meshed network of local governance responsible for establishing and supporting elementary and secondary public schools.³⁶ In providing for the education of their own children, adult Virginians would gain an education befitting freemen. He believed nothing more effectually would foster the habits and diffuse the knowledge useful for a self-governing people – a people the very opposite of the French peasantry – than to have them work within the political infrastructure prescribed by his bill. Studying this document, we can enter into Jefferson's moral and political vision.³⁷

One of the striking features of Bill No. 79 is its great particularity in prescribing the manner of defining school districts, determining the location

33. Thomas Jefferson, Notes on Virginia, Query 17, in THOMAS JEFFERSON: WRITINGS, *supra* note 32, at 283, 287.

34. See Thomas Jefferson, A Bill for the More General Diffusion of Knowledge, in THOMAS JEFFERSON: WRITINGS, *supra* note 32, at 365-73.

35. See generally THOMAS JEFFERSON: WRITINGS, *supra* note 32.

36. See *id.* at 365-67 (outlining Jefferson's proposed school governance schema).

37. The following three paragraphs are drawn from the discussion in RALPH LERNER, THE THINKING REVOLUTIONARY: PRINCIPLE AND PRACTICE IN THE NEW REPUBLIC 80-81, 90 (1987) (describing Jefferson's public education initiative).

of the schools, prescribing the modes of condemning property for public use, and the like. Almost two-thirds of the bill proper is devoted to administrative details of this kind, descending even to the minutiae of the grammar school steward's job description and the exact time and manner for selecting scholarship students. The details bespeak an intention to impress upon local electors, aldermen, and overseers that they *have* responsibilities and *what* those responsibilities are. The gravity of Jefferson's specifications is remarkable. If the legislature is to take such pains with every detail, imparting to each an almost ritual significance, citizens are bound to be struck by the urgency of their own parts in this civic education.³⁸ Electors of the hundreds (or of what Jefferson later came to call the wards), are charged with determining where the local elementary schoolhouse shall be located. Aldermen are charged with determining and regulating the boundaries of local districts; further, they are to conduct the public interrogation of candidates for scholarships to the next level of education, the grammar school. Overseers have the "business and duty" of appointing and removing teachers, examining the scholars, and fixing a centrally situated place for a grammar school. Visitors of the grammar schools are charged with hiring and firing the master and steward of the school, setting tuition, and examining the school, its staff, and its students. Both the overseers of the schools of the hundreds and the visitors of the grammar schools are charged with giving effect to any general instructional plan recommended by the visitors of William and Mary College. Teachers are responsible for their performance, just as they are for their fidelity to the commonwealth. Overseers are responsible for their recommendations and appointments. Scholars are responsible for making the best of whatever genius they have. In short, the entire scheme for establishing and maintaining an educational system constitutes in itself an education in responsible self-governance. In lavishing these details upon the bill, Jefferson also gave his fullest explanation by example of what he meant by self-government.

The scheme's elaborations make it of a piece with a curriculum that would teach the three R's to all the free boys and girls of the Commonwealth by drawing on useful lessons from Greek, Roman, English, and American history. For their own safety and that of others, for their own happiness and that of their children, a free people must be qualified "as judges of the actions and designs of men."³⁹ Jefferson's bill encompassed that intention at every level.

Here was a goal worthy of his revolutionary impulse. Making the people aware of what it took to be and remain their own masters was a daring under-

38. All this reminds of the practical political education ordinary Americans gain through jury service. Alexis de Tocqueville grasped this consequence sixty years later. See ALEXIS DE TOCQUEVILLE, 1 *DEMOCRACY IN AMERICA* 291-97 (J.P. Mayer ed., 1969) (describing role of juries in completing Americans' civic educations).

39. Thomas Jefferson, Notes on Virginia, Query 14, in THOMAS JEFFERSON: WRITINGS, *supra* note 32, at 256, 274.

taking. Each person had to be addressed in a manner suitable to his capacities, even while those capacities were themselves being stretched and developed. Furthermore, all this was to be done in a setting where a thousand daily circumstances drew citizens' thoughts and energies earthward and inward, where the enticements of immediate material reward threatened to drain public life of the indispensable involvement of the many and the indispensable contribution of the best. For Jefferson such wholesale indifference would be the very hemorrhaging of public life. A nation of private calculators with short memories would forget the long-term consequences of not tending to the public business. More than anything else, they needed to be instructed and confirmed in their present revolutionary resolve not to be the wards of others.

This system for inculcating responsibilities became a veritable mantra for Jefferson. "As Cato, then, concluded every speech with the words, '*Carthago delenda est*,' so do I every opinion, with the injunction, 'divide the counties into wards.' Begin them only for a single purpose; they will soon show for what others they are the best instruments."⁴⁰ As Jefferson confessed freely to Adams and others, the model for the system of "little republics" was New England itself, a region that Jefferson otherwise viewed with a mixture of admiration and distaste.⁴¹ He had learned through bitter experience in 1808 how effective town meeting government could be in expressing and giving political effect to public opinion.⁴²

But over and beyond this, Jefferson focused his mind on a political system that would be not only responsive but responsible, not only safe but strong. "It is by dividing and subdividing these republics from the great national one down through all its subordinations, until it ends in the administration of every man's farm by himself; by placing under every one what his own eye may superintend, that all will be done for the best."⁴³ All experience, he thought, argued against the belief that the general authority can manage elementary schools better than those most immediately concerned – the parents within each ward. Here was a principle to adopt, to test, and from which to

40. Letter from Thomas Jefferson to Joseph C. Cabell (Feb. 2, 1816), in THOMAS JEFFERSON: WRITINGS, *supra* note 32, at 1377, 1381.

41. Letter from Thomas Jefferson to John Adams (Oct. 28, 1813), in THOMAS JEFFERSON: WRITINGS, *supra* note 32, at 1304, 1308.

42. See Letter from Thomas Jefferson to Joseph C. Cabell (Feb. 2, 1816), in THOMAS JEFFERSON: WRITINGS, *supra* note 32, at 1377, 1380-81 (reflecting Jefferson's recollection of town meeting). "How powerfully did we feel the energy of this organization in the case of embargo? I felt the foundations of the government shaken under my feet by the New England townships. . . . The organization of this little selfish minority enabled it to overrule the Union." *Id.* For Jefferson's comparison of the characteristics of Northerners and Southerners, see Letter from Thomas Jefferson to the Marquis de Chastellux (Sept. 2, 1785), in THOMAS JEFFERSON: WRITINGS, *supra* note 32, at 826, 827.

43. Letter from Thomas Jefferson to Joseph C. Cabell, *supra* note 42, at 1380.

extrapolate. Here, he thought, was a system that would encourage each citizen to perform the functions falling within his competence and to derive satisfaction from knowing that his contribution mattered.

Where every man is a sharer in the direction of his ward-republic, or of some of the higher ones, and feels that he is a participator in the government of affairs, not merely at an election one day in the year, but every day; when there shall not be a man in the State who will not be a member of some one of its councils, great or small, he will let the heart be torn out of his body sooner than his power be wrested from him by a Caesar or a Bonaparte.⁴⁴

Like his fellow Founders, Madison and Hamilton, Thomas Jefferson rejected any institutional arrangements that left a screen behind which officials might "skulk from responsibility."⁴⁵ But unlike his partner Madison and his opponent Hamilton, Jefferson was not haunted by the specter of populism. He could view with equanimity the popular election of Connecticut judges to six-month terms and even find reason to praise such a system: "[S]o powerful is the curb of incessant responsibility."⁴⁶ What loomed largest in his consideration was not the prospect that popular government would turn out to be all sail and no anchor, as Macaulay once lamented.⁴⁷ Rather, he centered his thoughts on whatever might make every citizen "an acting member" of the body politic, and on whatever might "attach him by his strongest feelings" to his country's independence and republican constitution.⁴⁸

III. *The Founders' Responsibility – and Ours*

What, finally, may be said of the responsibility of the Founders themselves? Those of them who were most active, indeed tireless, in creating a venue in which the federal government might be altered so as to render it adequate to the exigencies of the union – those Founders in particular knew they had much for which to answer. Recall that the United States of America already had a constitution in place, the Articles of Confederation and Perpetual Union. Recall too that the states had appointed members of the convention that met in Philadelphia in the summer of 1787 for the sole and express

44. *Id.*

45. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in THOMAS JEFFERSON: WRITINGS, *supra* note 32, at 1395, 1398 (discussing ways to interest citizens in government).

46. *Id.*

47. See Letter from Thomas B. Macaulay to Henry S. Randall (May 23, 1857), reprinted in *Lord Macaulay on American Institutions*, 54 HARPER'S NEW MONTHLY MAG. 460, 461 (Feb. 1877).

48. Letter from Thomas Jefferson to Samuel Kercheval, *supra* note 45, at 1398.

purpose of proposing alterations to that existing constitution. Yet the result of their secret proceedings, disclosed to the world on September 17, 1787, was an altogether newly minted constitution. More troubling still, the convention proposed that constitution for ratification and adoption under terms utterly unknown to the existing law of the land. Thus, two plainspoken misgivings arose at the threshold of debate: First, whether the convention that brought forth this new constitution was in fact authorized to do so; and second, whether in the absence of regular authority, the convention might nonetheless be justified in acting as it did. In short, did the convention behave responsibly by exceeding its responsibility?

The Federalist raised and addressed these challenging questions in essay number 40, falling back at times on legalistic subtleties that are too clever by half. But after insisting that the proposed constitution merely expands upon the principles embodied in the Articles of Confederation, Madison conceded that the convention had indeed "departed from the tenor of their commission."⁴⁹ He was quick to add, however, that there were justifications for such radical departures, and precedents as well. The members of the convention could not ignore what they saw as a continuing crisis in public affairs.⁵⁰ Neither could they be oblivious that "the hopes and expectations of the great body of citizens, throughout this great empire, were turned with the keenest anxiety, to the event of their deliberations."⁵¹ In that light it would be disingenuous to play down the magnitude of the convention's undertaking. *The Federalist* then reminded its readers that "in all great changes of established governments, forms ought to give way to substance."⁵² How else preserve "the transcendent and precious right of the people to 'abolish or alter their governments as to them shall seem most likely to effect their safety and happiness'"?⁵³ With this muted reference to the Declaration of Independence, Madison called attention to the fact that the *achievement* of this objective is beyond the grasp of a people acting "spontaneously and universally," without a guiding hand.⁵⁴

Madison continued his reconstruction of the convention's thought processes, preserving all the while a fictitious stance that ignored and concealed both his presence and prominence at Philadelphia. "They must have reflected . . . it is therefore essential, that such changes be instituted by some *informal and unauthorised* [sic] *propositions*, made by some patriotic and

49. THE FEDERALIST NO. 40, at 263 (James Madison) (Jacob E. Cooke ed., 1961)..

50. See *id.* at 264 (remarking on troubles facing public affairs at time of constitutional Convention).

51. *Id.*

52. *Id.* at 265.

53. *Id.*

54. See *id.* (contemplating inability of people to act without guidance).

respectable citizen or number of citizens."⁵⁵ Indeed, there was no blinking the fact that those who labored to convene this assembly and to see its work through to the end had acted on the "irregular and assumed privilege of proposing to the people plans for their safety and happiness."⁵⁶ In going beyond their charge, the convention plausibly might be said to have acted *irresponsibly*. Yet there were celebrated precedents for acting thus. Those who had made the revolution and those who had established new state constitutions on new republican grounds had done no less; they shunned pusillanimity. In both cases necessity marked out the course to be followed. Knowing that the ultimate decision would be in the hands of the people themselves, these venturesome patriots cast aside "little ill-timed scruples."⁵⁷ Instead, they exercised "a manly confidence in their country," trusting in the people's approval of what they were proposing, and knowing that that "approbation [would] blot out all antecedent errors and irregularities."⁵⁸

In this unusually self-referential essay, *The Federalist* examined another dimension of responsibility – in this case, the Founders' own responsibility. Even allowing that they had exceeded their powers, "they were not only warranted but required, as the confidential servants of their country, by the circumstances in which they were placed, to exercise the liberty which they assumed."⁵⁹ In acting for the safety and happiness of those who could not act effectively for themselves, the Founders exhibited the highest kind of responsibility. For in so doing they made it possible for "the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not, of establishing [and conducting] good government from reflection and choice."⁶⁰ This rare exercise of high responsibility enlarged the opportunities of ordinary men and women to live lives worthy of a self-governing people. In a word, the Founders' exercise of *their* political responsibility is nothing less than an invitation for us to exercise our own.

Yet we are entitled to wonder whether this public-spirited invitation – a truly significant achievement in its own right – discharges the Founders of all that might reasonably have been expected of them. The sheer sobriety of their proposals, their realistic assessment of the workings of human nature, all these led them to favor mechanical expedients: an extended republic, a federal system, a separation of powers, a network of interlocking responsibilities that checked the rash and the vindictive. These devices were to keep America

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 266.

59. *Id.* at 267.

60. THE FEDERALIST NO. 1, at 3 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

from adding yet another sad chapter to the sorry history of popular government. The Founders dared not count on the periodic and timely recurrence of people such as themselves, people of high ambition who could neither be coerced nor won into a sacrifice of their duty. Indeed, how could they expect a replication of themselves? Are there Washingtons waiting only to be asked? And yet neither did they prepare the soil in which such rare types might be raised and helped to flourish.

Adams and Jefferson were not alone in seeing the problem of citizen character entailed in securing the republic, but even they earn praise in this connection more for their observations than for their achievements. Products of a world that their revolutionary statecraft helped displace, even these two Founders cannot be said to have made provision for their like. (I leave aside the distinguished line that sprang from the union of Abigail and John.) Looking more broadly, we are puzzled by that extraordinary band of American revolutionaries and Founders. Did they reject or despair of a project arguably at odds with the egalitarian premise of their new regime? Did they imagine or expect that the successful establishment of the new constitutional order would foreclose the need for great parties and great leaders? Did they foresee the gradual erosion of concern for individual character implicit in their reliance on institutional arrangements? Or, as I am inclined to believe, did they do what they could in full expectation that succeeding generations would do what *they* could?

It was no part of the Founders' notion of responsibility to relieve others of as high a responsibility as their own, as those successors could envision and aspire to for themselves. Having discovered their duty and discharged it, the American Founders were content to let others try to do as well or better. Their moderation left room for grander hopes.