

Ellis Sandoz

## The American Difference

In one particularly frenzied debate over *equality* in the Constituent Assembly during the French Revolution, the old story goes, a citizen-deputy enthusiastically asserted that “there is very little difference between men and women!” At which assertion the entire body rose as one to its feet, shouting “*Vive la différence!*”

So it was with Britain and America during the period of the American founding—although the little difference might not have been quite so entertaining. Everything important seemed to be quite the same: language, religion, ethnicity, political institutions and practices, legal heritage, patrimony, allegiances. Paradoxically, everything was the same and yet totally different, depending on one’s perspective and interpretation.

Viewed from the end of the process, the little difference is magnified. The United States emerged from the American Revolution a republic (if we can keep it) and Great Britain remained a monarchy and empire, even without most of its North American colonies. From the Stamp Act (1765) through the Battle of New Orleans (1815), what began as discussion became debate, and debate became war not once but twice. To their chagrin and astonishment, the British lost both times—convincingly at Yorktown, decisively in the Chalmette

swamp, where the crack Black Watch (the 93rd Highlanders) and several elite units fresh from sacking and burning Baltimore and Washington were decimated by Baratavia pirates and Tennessee frontiersmen commanded by Jean Lafitte and Andrew Jackson. (Two thousand six hundred British soldiers were killed in the Battle of New Orleans, compared to eight American dead and thirteen wounded.) The common man took his rise. In the passionate course of these events America defined itself, through a process that may be said to have continued even until the present.

The incipient characteristics and principles distinguishing America and the American mind emerged during what began as a civil war within the English-speaking world—the worst kind of warfare, as we know. Ezra Stiles, the Congregationalist minister and president of Yale during the revolution, was convinced that the Scots were instrumental in the drive toward independence (led by John Witherspoon and James Wilson), and that

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America might have patched things up with the mother country but for their fomenting discontent and rebellion.<sup>1</sup> Salient attributes of genuine difference between the two countries soon became evident, and help us to see what it means to be an American.

First, for the American, there was a kind of dogged literal-minded insistence born of pervasive Evangelical Christianity and a legalist cast of mind that words mean what they say, especially such words as *consent* and *representation*. “Laws they are not which public approbation hath not made so,” the Judicious Hooker had elegantly intoned, John Locke had repeated, and Americans believed. This meant *real* consent by *real* representatives—not some fanciful virtual representation in a remote Parliament having no electoral connection with American constituents and notoriously corrupted by Robinarchy. This is the bedrock of free government for free men, and nothing less would suffice. Samuel Adams was especially clear on the matter. In 1765, Adams wrote to the governor on behalf of the Massachusetts House of Representatives as follows:

Zealous advocates for the constitution usually compared their acts of Parliament with Magna Charta; and if it ever happened that such acts were made as infringed upon the rights of that charter, they were always repealed.... There are certain *original inherent rights* belonging to the people, which the Parliament itself cannot divest them of, consistent with their own constitution: among these is the right of representation in the same body which exercises the power of taxation.... The right of the colonies to make their own laws and tax themselves has never been questioned.... The very supposition that the Parliament, through the supreme power over the subjects of Britain universally, should yet conceive of a despotic power within themselves, would be most disrespectful.... To suppose an indisputable right in any government, to tax the subjects without their consent, [includes] the idea of such a power.<sup>2</sup>

John Witherspoon, James Madison’s mentor at Princeton, remarked that “the

generous principles of universal liberty” are incomprehensible to the British, who think Parliament can do anything and who, therefore, “consider the liberty of their country itself as consisting in the dominion of the House of Commons.”<sup>3</sup>

Second, the *Liber homo*—free man—of Magna Charta was alive and well and living in Boston, Philadelphia, and Charleston.<sup>4</sup> With a painful firsthand knowledge of slavery, Americans knew it when they saw it, and Parliament’s Declaratory Act (1766) undoubtedly was it. Edmund Burke (as well as Pitt and Camden) knew it, too, and scathingly denounced the ministry to within an inch of committing treason on the floor of the House of Commons for abandoning the great heritage of English freedom and embracing slavery for the Englishmen in America, as a weed that grows in every soil, thereby stabbing their very vitals. Moreover, Burke observed to his fellow Parliamentarians, if you can reduce your Englishmen to slavery with your army over there, you can do it as well to your countrymen who stayed at home. In his old age a half-century later the last of the founders, James Madison, still found the argument cogent and esteemed his countrymen for their perspicacity in seeing the hand of tyranny in a three-penny tax on tea.

Third, liberty and tyranny were the antipodes of the political and constitutional argument. The categories were as old as Aristotle, Cicero, and the immemorial English constitution, as ancient as coercive Nimrod and the free republic of Elders in Israel. Religion and metaphysics as well as mere political theory were in play and gave great resonance to related assertions—as the Declaration of Independence itself succinctly stated the familiar case. A cool rationalism such as Jefferson’s might have declared the independence of these religious Americans, but that could never have persuaded them to fight for it, as Perry

Miller observed. Miller added that the Revolution itself was preached as a religious revival and had the astonishing result of succeeding. Patriotism without piety is mere grimace, one Philadelphia preacher thundered. “The Sabbath was made for man, not man for the Sabbath” (Mark 2:27), and the same held true of government. “We are not children of the bondwoman, but of the free” (Galatians 4:31) became an unlikely rallying cry, as did also: “We ought to obey God rather than men” (Acts 5:29), and “If God be for us, who can be against us?” (Romans 8:31). Celebrated elements of American political theology therewith appeared and were propagated by James Otis’s “black regiment” of clergymen, but not only his. We remember the practice of James Madison (cousin of the U.S. president, and himself later the Protestant Episcopal Bishop Madison, the president of William and Mary College during the Revolution, who led his students into battle), who sometimes prayed the Lord’s Prayer with the words, “thy *Republic* come, Thy will be done on earth as it is in heaven.”

Fourth, there was natural law, with correlative natural rights, as abiding structures drawing from the biblical, classical, and medieval horizons of faith and from Enlightenment philosophy in an eclectic fashion. However noble and enduring the English constitution and its celebrated liberties, the transcendent reality of God and hegemonic nature loomed supreme and beyond all human devising in *recta ratio* as the providential sources of order and justice. But this generous understanding already was reflected in Gratian and affirmed by Thomas Aquinas: “The natural law is what is contained in the Law and the Gospel...by which everyone is commanded to do to others as he would be done by”: all law is founded on the Golden Rule, in other words (Matthew 7:12). “An unjust law is no law at all,” Augustine wrote, Aquinas re-

peated, and Martin Luther King Jr. made the centerpiece of the civil rights revolution. Liberty itself had been instilled into human nature by the hand of God, Sir John Fortescue affirmed, in what has been called the Englishing of Thomism in the fifteenth century. Sir Edward Coke and later on Jefferson and the Adamses in 1776 agreed. This settled conviction supplied the groundwork for *inalienable* rights in men who had been created equal by their Creator and, consequently, might rightly aspire to *political* equality as well—the common sense of the subject, Jefferson later called it, and an augury of the democratic republicanism to come. At the concrete level of the American debate, Camden declared that “Taxation and representation are inseparably united: This position is founded on the laws of nature: *It is more: It is itself an eternal law of nature*—Whatever is a man’s own is absolutely his own; and no man has a right to take it from him without his consent... Whoever does it, commits a Robbery: *He throws down the distinction between liberty and slavery.*”<sup>25</sup>

Fifth, constitutionally the framers in 1787 placed their “true map of man” (as John Adams called their philosophical anthropology) at the center of the self-equilibrating institutional order as the chief technical means of achieving a government of laws and not of men, conceived as a noble residue of the operation of separated and divided powers textured by an intricate web of adversarial checking. This ingeniously helped to supply for fallible and self-serving men the defects of better motives, Madison said. It did so, also, without sacrificing the possibility in the Supreme Law of the Land of an energetic executive when that might be called for; even Plato insisted that his philosopher-king (who might be a woman, we remember) had to be a person best in both philosophy and in *war*, given the human condition (*Republic*

543–544). The novel Philadelphia vision of a compound mixed republic was persuasively explained in *The Federalist*—with palpable echoes back to Aristotle, Cicero, Aquinas (the first Whig, Acton thought), Charles I’s 1642 *Answer to the Nineteen Propositions of Parliament*, and the Cromwellian commonwealth. This last, an English republic, had endured a mere twelve years, ended with the Restoration, and was said to have been buried in an unmarked grave after the Glorious Revolution and Settlement of 1689—only to be resurrected in splendor in America a century later.

What had been *wrong* in the eighteenth century was not the British constitution itself, as venerated by everyone from Montesquieu to John Adams, but the abandonment of Old Whig principles in favor of imperial hubris and *libido dominandi*. This was amply reflected in policy grown insufferable in American eyes, but also in theory as propounded by the “honeyed Mansfield-ism” of Blackstone with its embrace of the principle of an irresistible “supreme power” vested in Parliament along with the undergirding natural right theories of Grotius and Puffendorf making such rights “absolute” in autonomous human beings—who might thereby absolutely reject as well as claim them. Hobbes is reborn and the positivist jurisprudence of John Austin looms. The recourse to transcendence was thus cast aside. The effect of a naturalistic reduction of this magnitude was to sever the anchoring of human society in divine Being, invoked in the Declaration of Independence, and insisted on by a faithful community that resolutely interpreted politics and history in

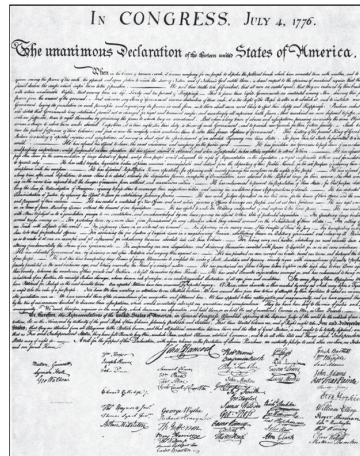
biblical and providential terms. The result was philosophically unacceptable and became politically repugnant when unmasked as a smokescreen concealing old-fashioned tyranny.

Thus, the American adaptations of their precious English and broadly Western heritage aimed at justice and insisted on personal and corporate liberty, not simply at independence at any cost as some then suspected. The U.S. Constitution required a Bill of Rights for ratification. It also required guardians of those rights against

majoritarian tyranny in an independent judiciary. The power of judicial review established in *Marbury v. Madison* (1803) was anticipated by Coke in *Dr. Bonham’s Case* (1610) but was, of course, rejected by Blackstone. “Parliament can do anything but make a man a woman and a woman a man,” Lord Herbert hopefully remarked in the seventeenth century—a minor im-

pediment lately removed by Danish medicine. Albert Dicey, effectively confirming the obnoxious claim of the old Declaratory Act over a century later, nailed the door shut in 1885 by summarizing how things stood: “Parliament ...has...the right to make or unmake any law whatever; ...no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.”<sup>6</sup> The founders knew what they were doing after all. There had been no misunderstanding.

Sovereignty shifted to popular or constituent sovereignty in America, where it was said “the People are king,” a matter vexed by “this mixed Constitution” composed of sovereign states.<sup>7</sup> Parliamentary



A document with a difference.

sovereignty and ministerial responsibility formed the British path. The American adaptations manifested continuity but took quite a different and less decisive path, favoring an empire of liberty under law. The founders relied on an admirable store of *experience* in self-government and public affairs, the fruit of long “salutary neglect” to be sure, but also of admirable sophistication and astute practice in self-government and constitution-making.

The statesmen of the founding period thus drew upon the prudential science of the old Greeks such as that esteemed in Aristotle’s *phronimos* and in Tully; upon the enlightened faith of a citizenry long practiced in the operations of free institutions—economic, political, and ecclesiastical; and upon what they themselves called “the divine science of politics.” Their noble synthesis made all the difference for republican free government on the presidential model, then and now. Finally, they also lay claim under divine Providence to the high ground of history, expressing the prayerful hope “that the rod of tyrants may be broken into pieces, and the oppressed be made Free—that wars may cease in all the Earth, and that confusions that are and have been among the Nations may be overruled...” so that Peace might prevail.<sup>8</sup>

*Vive la différence!*

1. Cf. Ezra Stiles, *The Literary Diary of Ezra Stiles*, ed. Franklin B. Dexter, 3 vols. (New York: Charles Scribner’s

Sons, 1901), 2:184–185: “There are only two Scotchmen in Congress, viz. Dr. Witherspoon... & Mr. Wilson.... Both strongly national, & can’t bear any Thing in Congress which reflects on Scotland.... Let us boldly say, for History will say it, that the whole of this War is so far chargeable to the Scotch Councils, & to the Scotch as a Nation (for they have nationally come into it) as that had it not been for them, this Quarrel had never happened.” Dated July 23, 1777.

2. “Answer of the House of Representatives of Massachusetts to the Governor’s Speech. October 23, 1765.” *The Writings of Samuel Adams*, ed. Harry A. Cushing, 4 vols. (New York: Octagon Books, Inc., 1968), 1:13–18 (capitalization modified and italics added).

3. Quoted from Ellis Sandoz, *A Government of Laws: Political Theory, Religion, and the American Founding* (1990; rpr. Columbia: University of Missouri Press, 2001), 165.

4. For the term *liber homo* in the 1225 Magna Charta, which became the first statute of the realm in 1297, see esp. chaps. 1, 14, 24, 29, and 32. On the meaning of the term, see the discussion of J. C. Holt, *Magna Carta*, (second edn. Cambridge: Cambridge University Press, 1992), esp. 10–20, 276–280: “It was a grant to all free men throughout the realm” (276).

5. Quoted by Samuel Adams, *Writings*, 2:302.

6. A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (Eighth ed., 1915, rpr. Indianapolis: Liberty Classics, n.d.), 3–4

7. Cf. *The Federalist*, nos. 39 and 40. Quoted phrase is in the Rossiter edition (New York: New American Library, 1961), 247.

8. “A Proclamation for a Day of Solemn Fasting and Prayer,” March 20, 1797, in *Writings of Samuel Adams*, 4:407. The Proclamation’s text quoted continues with: “for the promoting and speedily bringing on that holy and happy period, when the Kingdom of our Lord and Saviour Jesus Christ may be everywhere established, and all the people willingly bow to the Sceptre of Him who is the Prince of Peace” (ibid.).