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THE BEGINNING OF THE CONSTITUTIONAL ERA: A BICENTENNIAL COMPARATIVE STUDY OF THE AMERICAN AND FRENCH CONSTITUTIONS

*Rett R. Ludwikowski**

INTRODUCTION

The expansion of constitutionalism is one of the most interesting phenomena of our time. Since World War II, a great number of states have either adopted new constitutions or changed their constitutional systems. The process of constitutional development was particularly intensified through the emergence of the socialist countries and the new states in Asia, Africa and the Near East.¹

The post-war constitutional experiences were, for the most part, dissatisfying. Without the extra-parliamentary means of constitutional control, the constitutions of the socialist countries operated more like political-philosophical declarations than legally binding norms. Most of the constitutions of the new third world countries were copied from previous, well-tested constitutional structures without regard to their applicability to the unique geopolitical circumstances in which the new states had emerged. The successes of these new constitutional systems were short-lived. The political structures of the countries that emerged due to the collapse of colonialism during the 1950s and 1960s were subject to frequent and substantial transformation which, contrary to popular expectations, usually resulted in the establishment of a form of military government.

Experts studying the processes of political transformation observe that the successful transfer of power or the emergence of new centers of political responsibility require a vast knowledge of the social, eco-

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1. H. SPIRO, *GOVERNMENT BY CONSTITUTION* 5-6 (1959). As Albert P. Blaustein pointed out, "Of the world's 162 existing constitutions (approximately 20 of which are presently "suspended"), only 15 were promulgated prior to World War II and only 14 more date from before 1960. The pre-war constitutions are United States (1789), Norway (1814), Belgium (1831), Liberia (1847 suspended), Argentina (1853), Luxembourg (1868), Switzerland (1874), Colombia (1886), Australia (1901), Mexico (1917), Finland (1919), Austria (1920), Liechtenstein (1921), Lebanon (1926 inoperative), and Ireland (1937)." A. BLAUSTEIN, *THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD* 33 n.25 (1986).

nomic, cultural and geopolitical circumstances in which the new institutions are to be installed. Successful constitutional engineering also requires advanced comparative technique to help locate political devices applicable to unique combinations of local factors. The comparative method is an indispensable tool for successful constitution-making. To accomplish his goal, the constitutional engineer must not only study the context in which the examined constitutional system operates, but also the historical circumstances in which it was adopted and in which it functioned. Successful constitutions have deep roots in constitutional traditions and in the political and legal culture of the nations that have completed the constitution-making process.² Since 1960, over 100 new constitutions have been promulgated. Most of these constitutions copied (or adopted) some features of the constitutions recognized as models in constitutional scholarship, such as the U.S. Constitution, the French Constitution, the famous Spanish Constitution of 1812 and others. Furthermore, it can be argued that successful and long-lasting political structures are usually the legacy of more than one nation; an examination of cross-national intellectual, political, and cultural ties and interrelations therefore requires profound historical knowledge. For the constitutional engineer, comparative historical studies may provide new and deeper insights into the constitutional structures should be adopted.

Of the earliest written constitutions, the survival of the American Constitution and its contribution to the development of constitutional institutions has been most widely studied — a fact that does not require confirmation. As Albert Blaustein wrote, “[t]he United States Constitution is the nation’s most important export. It was meant to be; it has been since even before its promulgation; and it continues to be. It could not help but be, and it cannot help but be.”³

This great Constitution did not emerge, however, in a philosophical and political vacuum. It was rooted not only in the American colonial experience and in the British constitutional tradition, but also grew out of centuries of European constitutional history. The development of the American Constitution was influenced by other constitutions adopted at the end of the eighteenth century; and the American Constitution had a great deal of force on the development of the constitutional structures in other countries. Through the Polish Constitution of May 3, 1791, the basic idea of constitutionally limited power spread over Eastern Europe. The short-lived French Constitu-

2. See Kirk, *Edmund Burke and the Constitution*, 21 INTERCOLLEGIATE REV. 3 (1985-86).

3. A. BLAUSTEIN, *supra* note 1, at 1.

tion of September 3, 1791, influenced the Spanish Constitution of 1812 and Norway's Constitution of 1814,⁴ which became models for many Latin American and Scandinavian constitutions.⁵ For the prospective constitutional architect who examines the conditions of constitutional success, an exploration of the diffusion process of constitutional ideas in the beginning of the constitutional era may be very instructive.

The bicentennial of the framing of the American Constitution and the bicentennial of the French Revolution bring to mind several reflections. Although American and French politics at the end of the eighteenth century have been carefully examined, the links between the constitutional developments of both countries have never been researched exhaustively. The reasons seem to be threefold. First, with the exceptions of the American Constitution and the Polish Constitution of May 3, 1791, the French Constitution of September 3, 1791 preceded all other written constitutions in the world, and the influence of the French Act on European constitutions seems to be the primary focus of attention of the European constitutional experts. Second, the sequence in which the American and French Constitutions were adopted naturally favored the claim of American parentage of the French Act. This conclusion seemed to undermine the originality of the French Constitution and irritate the historians who believed that the key ideas of the French constitutional documents were rooted in the philosophy of the French Enlightenment. Third, the American draftsmen emphasized the continuity of their constitutional works and eventually looked for roots in British rather than French constitutional ideas and traditions. For these reasons, the American contribution to the process of drafting the French revolutionary acts, such as the Declaration of the Rights of Man and Citizen and the subsequent influence of the Declaration on American constitutional development — particularly the formation of the American Bill of Rights — has never received adequate attention.

This article is intended only to be introductory.⁶ The author is quite aware that the period surrounding the creation of the American

4. The document has been amended many times but its principal features remain unchanged. It makes Norway's Constitution the second oldest operative constitution in the world.

5. Kirk, *supra* note 2, at 8-9.

6. This article is an introduction to a book-length comparative study on the beginning of the constitutional era, which will be published by the Miller Center at the University of Virginia. For the first part of this study, focusing on the American Constitution and the Polish Constitution of May 3, 1791, see Ludwikowski, *Two Firsts: A Comparative Study of the American and the Polish Constitutions*, 8 MICH. Y.B. INT'L LEGAL STUD. 117 (1987). The chapter on the French Declaration of the Rights of Man and Citizen and its influence on the constitutions was prepared as a paper for the XIIIth Congress of Comparative Law in Montreal, August 1990. It will be published in *American Journal of Comparative Law*.

Constitution has been profoundly studied; thorough analysis has been provided concerning both the origin and historical development of the American Constitution, as well as the intellectual background of the "founding generation." Characteristically, these studies have focused on the "American constitutional tradition," which means that they have been limited to little more than two centuries of colonial experience. This essay follows a different vein of inquiry. The author's purpose is not to add another article to the numerous works already devoted to American constitutional development. Rather, the focus of this work is on France. The first part of the article concentrates on the period in which the British colonies had not yet been established or when their organization was in embryo; this part will focus mostly on French constitutional traditions as compared to English traditions, and traditions of Poland — the first European country to adopt a written constitution. The ensuing parts compare the intellectual background of the framers of the American and French Constitutions, central principles of those documents, and their impact on the constitutional developments in both countries.

I. FRANCE: ABSOLUTISM V. CONSTITUTIONAL TRADITIONS

Those who claim that lengthy constitutional traditions are of fundamental importance for constitution-making will find France at odds with their argument. France's approximately two centuries of absolutism appears to contradict the thesis that a lengthy constitutional history was a constitutive element of the creative process of the first written constitutions. If the constitutional history of a country begins when institutions and procedures have been established to limit the power of government, it must be admitted that France's attempts to impose efficient restraints on the exercise of the king's power were not particularly successful when compared to the Anglo-American constitutional traditions.

Whereas the United States Constitution arose from the roots of British constitutional experience,⁷ the Anglo-American constitutional tradition can be traced back to the adoption of the Magna Carta in 1215, the Petition of Rights in 1628, the Bill of Rights in 1689 and the Act of Settlement in 1700.⁸ We can examine the leading ideas of constitutional government by studying British judicial decisions and constitutional conventions, and by analyzing the evolution and

7. See Kirk, *supra* note 2, at 4.

8. Poole, *The Publication of Great Charters by the English Kings*, 28 *ENG. HIST. REV.* 444 (1913).

breakdown of a colonial experience that concluded with the formation of the American constitutional movement at the end of the eighteenth century.⁹

The sixteenth century was a particularly crucial period for the establishment of royal authority in England. Under the reign of the Tudors, England experienced the golden age of her absolutism. However, the concept of absolute sovereignty was mitigated by the English doctrine that the king is beneath the law and that the supreme power is vested not in the king alone, but in the "king in parliament." The principle "lex facit regem" acknowledged that the king was a "fountain of justice," but required him to be bound by the law which was enacted by himself and his council. The seventeenth century brought more restraints on the exercise of royal authority in England,¹⁰ and the political system of the country began to diverge more distinctly from the model of French absolutism.

In comparison, the monarchy in Poland — the other European country of mature constitutional traditions — was neither hereditary nor absolute. The elective king was not "divinely appointed," although in theory it was assumed that God directed the electorate during each election. Theoretically, the monarch was answerable to no one save God, but in practice his power was effectively limited by the vast privileges of the gentry and the activity of the gentry's representation.¹¹ As in England, the power was vested in the "king in parliament" and the king was required to rule justly, but the Polish nobility worked out much stronger instruments for the application of their standards to the concept of royal justice. When English absolutism reached its peak and the French monarchy built the potential to surpass the hampering restraints on the exercise of royal authority, the drive towards absolutism in Poland was losing its momentum.

The position of the French king in the sixteenth century was already distinguishable from that of the English and Polish monarchs. The king was above human law and could override both parliament and custom.¹² On the other hand, as Jean Bodin argued, the monarch was bound both by the law of God and by natural law.¹³ The royal authority was also limited by the fundamental laws of the kingdom

9. For a more detailed analysis of American constitutional traditions, see generally M. HOCKETT, *THE CONSTITUTIONAL HISTORY OF THE UNITED STATES, 1776-1826* (1939); C. SWISHER, *AMERICAN CONSTITUTIONAL DEVELOPMENT* (1943).

10. See E. WADE, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 231-33 (9th ed. 1977).

11. See Ludwikowski, *supra* note 6, at 118-30.

12. D. PARKER, *THE MAKING OF FRENCH ABSOLUTISM* 1 (1983).

13. E. KNAPTON, *FRANCE: AN INTERPRETIVE HISTORY* 132 (1971).

dealing with royal domain and succession. The king was the sovereign monarch, and as Bodin declared, "sovereignty is the absolute and perpetual power of a commonwealth . . . that is to say, the greatest power to command."¹⁴ The king's absolutism was to be restrained only by the contracts he made with his people, by his Christian virtues which required him to rule justly, and by the voluntary restraints he accepted to enhance the prestige and stability of the monarchy. As Parker argued,

It was generally agreed in the early sixteenth century that royal authority [in France] was both absolute and limited: absolute inasmuch as the king was divinely appointed and answerable to no one save God, yet limited in the sense that his prime task was to rule justly in accordance with precepts of divine and natural justice.¹⁵

The extent of royal authority was increased in both France and England by the advanced process of unifying the realm. The principality of Wales was annexed by England in the fourteenth century and English domination in Ireland was firmly established by the Poyning's Law of 1494. Scotland was still a separate kingdom, but after 1603 one monarch ruled in both countries. Finally, the kingdom of Great Britain was formed by the union of England and Scotland in 1707. The royal domain in France also increased considerably in the second half of the fifteenth century, especially when Anjou, Maine, and Provence were added to the Crown.¹⁶ Brittany remained a semi-independent province, but was finally incorporated with France in 1532.

The trend to consolidate royal authority in Poland was less successful. The unification of the country in the late thirteenth and early fourteenth century was followed by the union with Lithuania in 1395, but both countries retained separate treasuries, administrations, and judiciaries. Even after the union of 1569, which formally established the Polish Commonwealth as one state, the process of unification was far from complete. The unifying efforts of the Polish kings were counterbalanced by the attempts of the Polish magnates — "kinglets" as they were called — who retained private armies, courts and their own clientele. Hence, contrary to England, France, and Austria, Poland gradually became a grouping of (landed estates) ruled by individual magnates.¹⁷ The magnates won the struggle with the gentry's movement and in the seventeenth century successfully affected the elections

14. J. BODIN, *LES SIX LIVRES DE LA REPUBLIQUE* [Six Books on the Republic] 122 (1683).

15. D. PARKER, *supra* note 12, at 1.

16. See E. KNAPTON, *supra* note 13, at 97.

17. See A. GIEYSZTOR, S. KIENIEWICZ, E. ROSTWOROWSKI, J. TAZBIR & H. WERESZYCKI, *HISTORY OF POLAND* 224 (1968) [hereinafter A. GIEYSZTOR & S. KIENIEWICZ].

and controlled the budget of the kingdom. Their relatively independent position frequently weakened their loyalty to the king and to the country.

In England, the successful financial arrangements at the end of the fifteenth century increased the income drawn from Crown lands, feudal dues, customs and profits from justice, which helped the monarchy rely more on its own revenues. The old feudal nobility had been decimated during the War of the Roses. The rising new gentry and aristocracy were largely dependent on the king, whose court offered them offices and social esteem. Hence, even though the principle of "no taxation without representation" gradually gained broad recognition, the monarch never became as dependent on the gentry's parliament as he was in Poland during the seventeenth and eighteenth centuries.

In France, absolutism also won its struggle with the magnates (*les grands*) and the old feudal nobility (*noblesse d'épée*). A number of high-ranking nobles were indicted for treason during the fifteenth century, some of whom were executed. With the establishment of the *gendarmérie*, it became treasonable to raise an army without royal permission.¹⁸ In the beginning of the seventeenth century the remnants of the old nobility tried to revolt against the monarchy, but were unsuccessful.¹⁹ The new office-holding nobility was more closely linked to the court and supported the royal budget through the purchases of offices generously sold by the king since the beginning of sixteenth century. The burden of taxation was, however, placed on the commoners. Direct taxes were paid mostly by the peasants, while the burden of indirect taxes was placed on the peasants and townspeople together.²⁰ The budgetary arrangements overburdened the third estate and to some extent reduced the royal income. On the other hand, the budgetary arrangements made the French king much less dependent on the nobility.²¹

18. D. PARKER, *supra* note 12, at 25.

19. See A. LUBLINSKAYA, *FRENCH ABSOLUTISM: THE CRUCIAL PHASE 1620-1629*, at 330 (1968).

20. The nobility paid direct taxes only in Languedoc and Provence. See *Id.* at 227-28. Important parts of the budgetary income were internal and external customs dues and levies. *Id.* at 228.

21. Some historians of French absolutism emphasize that growth of the king's authority during the seventeenth century was due to the royal capacity of controlling the economic and political crisis of the seventeenth century and explain most of the social and political phenomena typical of the seventeenth century against the background of economic transformations. See R. MOUSNIER, *LES XVII^E ET XVIII^E SIECLES. LES PROGRES DE LA CIVILIZATION EUROPEENNE ET LA DECLINE DE L'ORIENT (1492-1715)* (1954). Others, such as H. R. Trevor-Roper, argue that the development of events in Europe during the seventeenth century can be explained by analyzing the series of political revolutions which affected life in the major European countries (the Puritan Revolution in England, the Fronde in France, the coup d'état of 1649 in the Netherlands, the Cossacks' Revolt in Poland in 1648, the revolts in Catalonia and Portugal in 1640, the

Another attribute of the growing royal power in France and England was the king's ability to control and exploit urban communities. This was not so in Poland, where the supremacy of the gentry significantly reduced towns' independent development. In Poland, towns located within the magnates' latifundia were subject to the magnates' increased exploitation. The royal towns were under the administration of the kings' officials — the *starostas* — who drew handsome profits from the exploitation of the townspeople.²² Generally speaking, the Polish towns were not strong enough to offer valuable financial support for the weakening royal authority. In England and France, however, expanded West European trade enriched the towns and made them valuable sources of additional royal income which was drawn from loans or taxes. The nobility and clergy remained highly privileged, but the towns won their independent administration while the wealthy bourgeoisie became a valuable partner for the Crown. The king supported the development of commercial capitalism and used the merchants' capital to break down the magnates' opposition to absolutism.²³

An additional attribute of the growing royal power in France was the successful control of church-state relations. The French monarchy observed with keen interest the general development of the Reformation in Europe, with primary focus on England. The severance of bonds with Rome was followed by serious religious turbulence that lasted at least one and a half centuries in England. Unrest enfeebled the Church, which had not become an independent religious institution. Even the accession of power by the Hanoverian dynasty, which seemed to calm down the religious conflicts, did not restore the prestige of the Church. On the other hand, separation from Rome strengthened the absolutist aspirations of Tudor kings. The monarch, who became "Supreme Head of the English Church" controlled Church nominations, and with the support of Parliament, was able to increase the financial burden of the Church. Submission by the clergy to the king's law and appeals from the bishop's courts to the king in chancery, firmly established royal supremacy in all spiritual and ecclesiastical matters.

In France, the Gallican Church managed its own affairs relatively

near revolt in Andalusia in 1641 and others). See Trevor-Roper, *The General Crisis of the Seventeenth Century*, in PAST AND PRESENT (no. 16, 1959); see also A. LUBLINSKAYA, *supra* note 19, at 82-102. The representatives of both schools usually admit that the French monarchy was capable of overcoming both the political and economic crises of the seventeenth century.

22. See A. GIEYSZTOR & S. KIENIEWICZ, *supra* note 17, at 227.

23. See A. LUBLINSKAYA, *supra* note 19, at 29.

independent of papal interference. It gave the king the opportunity to strengthen royal control over Church nominations, ecclesiastical jurisdiction, and church income without official separation from Rome. Gallicans who viewed the Church as more "French" than "Roman" considered the king to be the protector of their rights.²⁴ Since the confrontation between Philip IV the Fair and Pope Boniface VIII at the turn of the thirteenth century, the clergy was taxed by the king without papal consent.²⁵ At that time, ecclesiastical jurisdiction was reduced. Traditionally, ecclesiastical courts adjudicated a variety of cases having a non-spiritual character — primarily those dealing with property involving the Church and feudal obligations to which the Church was a party. "In addition, the Church had complete control over litigation relating to heresy, sorcery, widows and illegitimate children, marriage and disputes between clerics. Gradually the areas of competence were reduced, a process helped by the increasing readiness of the clergy to appeal to the royal courts."²⁶

At the end of the fourteenth century only matters dealing with faith (excommunication, interdiction, the sacraments) remained in the jurisdiction of ecclesiastical courts; the royal courts even began to hear cases involving the sacrament of marriage. Later, at the end of the fifteenth century, ecclesiastical justice was almost totally subordinated to royal supervision.²⁷ The Concordat of Bologna (1515) stated that the pope would install archbishops, bishops and abbots after prior nomination by the monarchy. Also, France did not officially incorporate the final decrees of the Council of Trent (1563), which seemed to be aimed at the Gallican Liberties.²⁸ Furthermore, in 1682, an assembly of French clergy issued the famous statement of Gallican Liberties that emphasized royal sovereignty in temporal matters, limitation of control by Rome over the French Church by the Gallican "constitutions, rules and customs," and general subordination of the pope to the Church even in regard to questions of faith. The statement, condemned by Pope Innocent XI, was never officially rejected by the monarchy. "Thus, while Gallicanism had been officially condemned in Rome, it continued to be, in fact, the practice in France."²⁹

The monarchy successfully abolished the political independence of

24. See E. KNAPTON, *supra* note 13, at 5.

25. See D. PARKER, *supra* note 12, at 4.

26. *Id.* at 5.

27. *Id.*

28. See E. KNAPTON, *supra* note 13, at 147.

29. *Id.* at 208. After 1690 the so-called Articles of Gallican Liberties ceased to be taught in French seminars.

the Huguenots who, as Cardinal Richelieu confessed in his *Political Testament* "shared the state with the king."³⁰ The Edict of Nantes of 1598, which proclaimed that the Protestants would not be "molested because of faith," was revoked by the Edict of Fontainebleau of 1685. Protestant worship was forbidden. This caused almost a quarter of a million Protestants to leave France.³¹ For a long time the emigration of Protestants was recognized as a major cause of the French economic decline. Current research challenges this view and points out that "a severe economic decline must be explained in the light of complex factors, among them the severe natural disasters affecting agriculture, the heavy cost of the wars and the failure of Colbert's successors to carry out successfully the policies which he had envisaged."³² It is argued that, while France suffered economically and even militarily,³³ the royal administration's control over society increased when the Protestants' independent centers were broken. The persecution of Protestants seemed to be a weapon that cut both ways: on the one hand it contributed to economic hardship in France, while on the other hand, some Catholics took advantage of the Huguenot migration and the Catholic monarchy strengthened control over both the Gallican Church and society, which became more homogeneously Catholic.

Once again, a comparison with Poland clearly shows how important successful control by royal authority of church-state relations was to the formation of French absolutism. In Poland, the special and privileged position of the Roman Catholic Church was also undermined in the sixteenth century. In 1551 the Polish bishops relinquished their jurisdiction over laymen for one year in matters of faith (*causae spirituales* and *causae spiritualibus annexae*). Until then, ecclesiastical execution of court decisions had been placed in the discretion of the king's district administration (*starostas*). In 1563-1565, the ecclesiastical courts were deprived of the lay execution that had been recognized as the official introduction of full religious toleration. In fact, matters of faith remained outside royal jurisdiction, but decisions of the ecclesiastical courts were not observed by the nobility without the support of the king's administration.³⁴ The gentry movement dur-

30. Quoted in E. KNAPTON, *supra* note 13, at 156.

31. *Id.* at 209.

32. *Id.* at 209. For more detailed analysis of the impact of the persecution of the Protestants in France, see W. SCOVILLE, *THE PERSECUTION OF HUGUENOTS AND FRENCH ECONOMIC DEVELOPMENT, 1680-1720* (1960).

33. It is estimated that nine thousand sailors and twelve thousand trained soldiers deserted their posts as a result of the crackdown imposed on the Protestants.

34. See 2 Z. KACZMARCZYK & B. LESNODORSKI, *HISTORIA PANSTWA I PRAWA POLSKI* [History of the Polish Law and State] 82-83 (1966).

ing the Reformation period demanded that the Church become subordinate to the state and that the laymen's religious contributions be reduced. The concept of "inexpensive church" coincided with the gentry's struggle for a national Polish church. The attempts to establish a separate Church of Poland were unsuccessful, although these efforts strongly affected the independent position of the Roman Catholic hierarchy in Poland. As a result of the religious turbulence during the Reformation, the Catholic Church remained predominant, but the policy of religious toleration gained an upper hand.³⁵

Thus, the weakened Polish monarchy was not able to use the Reformation movements to gain control over the Church. In fact, Lutheranism spread among the Polish burghers and Calvinism became popular among the Polish aristocracy, which found theocratic elements of Calvin's doctrine in the confirmation of their independence from the religiously alien monarchy.³⁶ The combination of the strong links of the Polish Catholic Church with Rome and general religious toleration affected royal authority in Poland. The loyalty of the Catholic hierarchy to the king was strongly impaired by the links with Rome. The Polish prelates lacked the feeling that the king was their sole protector. The powerful Protestant magnates were linked by religious and family ties to foreign rather than Polish royal families. Catholicism in Poland remained strong primarily due to the attachment of the gentry and peasantry to this religion, however, the Church was never a reliable ally of the monarchy, as it was in England and France.

It is therefore apparent that the monarchy in France was both absolute and limited. So far, we have focused on the factors that contributed to the growth of royal authority. Now we will examine those few elements that worked for the apparently self-contradictory concept of "limited absolutism."

During the Renaissance, voluntary restraints were placed upon the monarchs in France. These restraints lessened tensions between absolutist tendencies represented by the royal administration and constitutional tendencies stemming from the growth of representative institutions. It was widely agreed that even if the king was capable of overriding opposition in the representative and judiciary organs, a permanent conflict with those institutions would damage his image as a Christian monarch who did not abuse the divine and natural laws.

35. Except for the anti-Arian crackdown by Sigismund-Augustus, religious persecution was almost unknown in Poland. The formal status of non-Catholic churches was regulated officially by the Warsaw Confederation of 1573. *See id.* at 84.

36. *See* A. GIEYSZTOR & S. KIENIEWICZ, *supra* note 17, at 186.

Confronted with this problem, the monarch attempted to control the growth of the representative institutions.

"There was in France, as in England," wrote David Parker, "a tradition of 'taking wise counsel' by assembling the chief vassals of the crown when appropriate; in addition it was generally, albeit somewhat vaguely, supposed that those who contributed to the necessities of the king should have a voice on the matter."³⁷ The French Estates-General began meeting in the beginning of the fourteenth century shortly after the establishment of the English parliament at the end of the thirteenth century.³⁸

The origins of the French Estates-General have long been a subject for debate. Whether one goes back to the *Concilium Trium Galliarum* of the *Placitum Generale* of Pre-Capetian France or chooses to emphasize either the feudal duties of aid and counsel or the Roman Law theories of *Plena Potestas* and *Quod omnes tangit*; whether one finds a new departure in 1302 or chooses to say that the Estates-General did not take its completed form until 1484, the fact remains that by the late fifteenth century the French kings had permitted the development of an institution that allowed the representatives of certain groups to present their complaints to the king in return for their support of royal policy or the collection of new taxes.³⁹

At the turn of the thirteenth and fourteenth centuries, both in England and in France, even the growing income from the royal domain was not sufficient to provide for the needs of the kingdom, not even during time of peace.⁴⁰ To solve these problems, the kings of both countries looked for "wise council" from their vassals and especially for their support for more extended taxation. While in England traditions of taking counsel contributed to the steady growth of the role of Parliament, in France, the Estates-General was summoned irregularly, mostly during periods of the abatement of the king's authority. The attempts of the successors of Phillip IV the Fair to get more permanent support from the Estates for additional taxation were unsuccessful. The Estates' resistance, combined with a willingness to take advantage of the weakness of the king, worked against the establishment of a continued practice of periodical use of the central assemblies.⁴¹ The principle that taxation and representation are inseparable,

37. D. PARKER, *supra* note 12, at 14.

38. In 1295 the English King Edward I, in need of popular support for his policy, reverted to the practice of Simon de Montfort from 1265 and summoned both the representatives of knights and boroughs. This often has been recognized as the transition of the feudal council into the national representative body.

39. J.M. HAYDEN, *FRANCE AND THE ESTATES-GENERAL OF 1614*, at 4-5 (1974).

40. See J.R. MAJOR, *REPRESENTATIVE GOVERNMENT IN EARLY MODERN FRANCE* 12 (1980).

41. See *id.* at 12-30; see also D. PARKER, *supra* note 12, at 15.

which strengthened the permanent character of the Polish and English parliaments, never won support in France.⁴² During the sixteenth century, the Estates-General was convened only four times (1560, 1576, 1588 and 1593) in periods of fiscal and political necessity, and between 1614 and 1789 this body was not called at all.⁴³

Despite the Estates-General's failure to become a regularly representative institution, it did establish some traditions and rituals in presenting grievances to the king. The decline of a central representative assembly during this period of absolutism did not amount to a general abatement of the representative system because the growth of the representative government in France was not at the national level. The most important representative functions were taken over by the provincial estates which began to meet frequently and claimed that no taxes should be levied without their consent.⁴⁴ As Charles Major pointed out:

At the dawn of the seventeenth century, there had been estates in about 52.4 percent of France that had given consent to taxation and in about 8.2 percent more that had met regularly, employed a bureaucracy, voted taxes for their own purposes, and prepared remonstrances to the king. In about 12.6 percent of France the estates had occasionally met to deal with taxes. Even in the remaining 26.8 percent, the estates had sometimes assembled to redact customs, ratify treaties, and elect deputies to the Estates-General.⁴⁵

The concept of the Estates-General did not die after 1614 and, in fact, the possibility of calling this body was considered even by Richelieu and Mazarin.⁴⁶

Some of the functions of the Polish and English representative institutions were performed in France by the *parlements*, the most powerful of which (the Parlement of Paris) attempted to intervene in the political affairs of the kingdom. Parlement was not a representative body like the Spanish *Cortes* or Swedish *Rikstag*; nevertheless, it was an institution limiting the king's despotic power. As J.H. Shennan wrote, "[a]s the monarchy became more powerful, the Parlement became the chief institutional opponent of royal arbitrariness and its attitude provoked a number of conflicts, of which the Fronde of 1648-9 is

42. See J.R. MAJOR, *supra* note 40, at 15; see also J.R. POLE, *POLITICAL REPRESENTATION IN ENGLAND AND THE ORIGINS OF THE AMERICAN REPUBLIC* pt. 1, at 3-32 (1966).

43. See J.M. HAYDEN, *supra* note 39, at 5; see also J. CADART, *LE REGIME ELECTORAL DES ETATS GENERAUX DE 1789 ET SES ORIGINES* (1952).

44. See J.R. MAJOR, *supra* note 40, at 160-61.

45. *Id.* at 663.

46. *Id.* at 623.

perhaps the best known and the most violent."⁴⁷ During the fourteenth century the Parlement of Paris, which was gradually established as the highest court, also acquired the additional function of registering royal edicts. The parliamentary process of registration, which was to popularize and authenticate royal legislation, soon became a significant restraint on the exercise of the king's power as the Parlement declared its right to eliminate eventual contradictions between the new royal edicts and the existing legislature.⁴⁸ The royal administration developed special procedures to overrule the remonstrances. The king could issue a special letter (*Lettre de jussion*) ordering registration, or he could come to the court personally and force Parlement to register the edict during a special *lit de justice* ceremony.⁴⁹ In fact, however, refusing registration gave undesired publicity to controversial royal edicts and frequent use of *lit de justice* worked against the image of a "just" king who ruled in the interests of his citizens. As its sense of political power grew, the Parlement of Paris began to encroach upon the king's power. The efforts to impose restraints on the king's absolutism were especially impressive during Fronde when Parlement sought to place its own legislative authority above that of the regent.⁵⁰ Finally, although the Parlement of Paris was unable to take over legislative functions from the royal administration, through *droit de remonstrances* it began to play a political role which had to be recognized even by the most powerful monarchs.⁵¹

At the end of the seventeenth century, both the Parlement of Paris and the provincial estates became more submissive. None of the estates were officially closed down by the king's administration, but under the pressure of the king's intendants, some became openly controlled by the king's administration while others ceased to work.⁵² The concept of representation did not vanish, however, especially when given new inspiration in the political theory of representation worked out by the French Enlightenment.

Hence, in conclusion, it must be admitted that French representative medieval institutions were established along with similar bodies in Western Europe. In the fifteenth century, French representation was less powerful than the Cortes in Spain and, in fact, less vigorous than

47. J. SHENNAN, *THE PARLEMENT OF PARIS* 4 (1968); see also A.L. MOOTE, *THE REVOLT OF THE JUDGES: THE PARLEMENT OF PARIS AND THE FRONDE 1643-1652* (1971).

48. See J. SHENNAN, *supra* note 47, at 159-60.

49. See K. KORANYI, *POWSZECHNA HISTORIA PANSTWA I PRAWA* [General History of the State and Law] 134 (1966).

50. For a more extensive analysis of Fronde, see J. SHENNAN, *supra* note 47, at 289.

51. See A. LUBLINSKAYA, *supra* note 19, at 25-26.

52. See J.R. MAJOR, *supra* note 40, at 664.

many estates in German principalities during the sixteenth century. On the other hand, in Renaissance Germany, the powers of estates were exceptionally strong and, in fact, even greater than those of the English Parliament.⁵³ This power collapsed, however, with the enhancement of the Habsburg central government. Similarly in Spain, in the second half of the sixteenth century, under the rule of Philip II (1556-98), the power of the Cortes was also limited, and in the eighteenth century this once powerful institution became hardly more than a rubber stamp.⁵⁴ Also, during the late sixteenth and seventeenth centuries the activity of the Italian parliaments abated, and by the beginning of the eighteenth century, only the parliament of Sicily had any real power. So, the restraints imposed upon the activity of French representative bodies were not unusual during the age of absolutism. As Professor Marongiu wrote:

There can be little doubt that from the mid-sixteenth century parliaments were on the defensive. Outwardly they may still have appeared to be important institutions, sometimes even formally acknowledged as possessing constitutional authority. But apart from England, they were no longer of prime importance in the history of their countries, and — except for specific moments — no longer took the initiative. It is enough to look at Germany and the Empire, where the *Landstände* still enjoyed extensive powers; their behaviour was conservative; there was no development.⁵⁵

It is therefore apparent that an examination of the constitutional traditions in a country of classical absolutism is by no means a self-contradictory concept. The fact is that representative institutions in France fulfilled a significant historical function. Absolutism hampered their growth along with that of similar institutions in many European countries. But in their defense, the representative bodies were able to impose considerable restraints on the king's arbitrary decisions and to prevent the transformation of absolutism into despotism. In fact, the French monarchy was conscious of these limitations even during the classical period of absolutism of Louis XIV. As J.H. Shennan stated,

Even Louis XIV was forced to discuss the application of his edicts with a variety of bodies: clergy, towns, craftsmen's guilds, the nobility in certain provinces, provincial estates, Parlements In fact, Louis was no less

53. See F.L. CARSTEN, *PRINCES AND PARLIAMENTS IN GERMANY FROM THE FIFTEENTH TO THE EIGHTEENTH CENTURY* 442 (1959).

54. In the beginning of the nineteenth century, the provincial estates in Spain were merged with the Cortes of Castile. The Constitution of 1812 finally pronounced that the king would legislate with the Cortes. See A. MARONGIU, *MEDIAVAL PARLIAMENTS: A COMPARATIVE STUDY* 61-76 (1968).

55. *Id.* at 235-36.

aware than his predecessors had been of the restricted nature of royal authority in France, of the need for the king to take council and then to act in accordance with the dictates of justice and legality.⁵⁶

In pre-revolutionary France, the representative institutions were in defense, but the concept of a constitutional government was gaining prominence. The centuries of struggle with royal absolutism contributed to the maturity of constitutional consciousness, which in the beginning of the constitutional era was one of the most important factors in the creation of the constitution.

II. THE FRAMERS AND THEIR INTELLECTUAL BACKGROUND

One who studies the origins of the constitutional movements and who wishes to identify the framers of France's first constitution will face a much more difficult task than his counterpart who studies American or Polish constitutional traditions.

The American Constitution was adopted in the name of the people and was intended to express their will. In fact, however, the formal work was done by the fifty-five delegates to the Constitutional Convention, of which, on average, only about thirty attended the convention's meetings.⁵⁷ In this group of founding fathers, a small group of prominent members may be distinguished as the framers of the Constitution.

In Poland, political and social reforms were discussed widely, but the constitutional drafts were prepared by several political leaders. The final projects were subject to secret discussions within a small circle of the King's advisors. The Constitution was passed by the Sejm after reading and voting took place on the same day. The group that made up the framers of the Polish Constitution was also easily distinguishable.

The French Constitutional Assembly included 1196 deputies, and the Constitution adopted on September 3, 1791 represented the result of their arduous work over a period of more than two years. Among the deputies, one may easily distinguish the more active and influential figures such as Mirabeau, Lafayette, Robespierre, Sieyes, Camus, Mounier or Talleyrand; the task of indicating more precisely the group of drafters of the Constitution would have a slight chance of winning more general agreement.

Pursuing his study, the student of the French constitutional history learns that it is much easier to identify the crucial ideas of France's first written constitution than its intellectual origins. The

56. J. SHENNAN, *supra* note 47, at 283.

57. See C. SWISHER, *supra* note 9, at 30.

Constitution of 1791 was preceded by extensive legislation and many of its major provisions were already functioning. Although the Constitution was not a mere compilation of the numerous decrees which had been adopted during the first revolutionary period (1789-1791), it comprised the main principles laid down by these pieces of legislation. These principles had been worked out during the process of long constitutional debates in the Assembly, clubs, street fights, press polemics and intellectual clashes. Quite often, the origins of these principles are not clear. Some of the ideas have been attributed to particular philosophers, while others have been simply "in the air" in the sense that they belonged to the intellectual creed of the revolutionary era rather than to an identifiable school of political thinking.⁵⁸ The historians of the political ideas clashed quite often, attempting to back either the "elitist" or the so-called "populist" concept of the intellectual origins of the French Revolution. The proponents of the first approach stress the role of the great writers in shaping the revolutionary climate of ideas, while the others claim that the great philosophers expressed what already had been in the minds of the people and developed thoughts which were produced by the general intellectual ferment of the Enlightenment.⁵⁹

Ultimately, the student will often learn that, in fact, he is only at the beginning of his study because the importance of intellectual factors can be properly understood only against the background of social and economic conditions. From this perspective, both the ideas of the Enlightenment and the revolutionary ferment at the end of the eighteenth century should be viewed as the product of the rise of the bourgeoisie and its struggle against feudalism.⁶⁰ In addition, the student will discover that even the selection of the bourgeoisie as a social group whose hostility to the old regime caused the Revolution has not always been accepted without reservation by historians who favor a

58. See J. TALMON, *THE ORIGINS OF TOTALITARIAN DEMOCRACY* 70 (1960).

59. See K. MARTIN, *FRENCH LIBERAL THOUGHT IN THE EIGHTEENTH CENTURY* 19 (1962).

60. The social and economic interpretation of the Revolution was particularly typical of historians trained in the tradition of the Marxist historical methodology who claimed that the *superstructure* (which included, among others, political and legal ideas, morality, religion, and social habits) is determined by *economic basis*, and that major social transformations may be explained through the theory of class conflicts. Among the representatives of this school is the widely recognized George Lefebvre — a French Marxist and author of numerous works on the origins of the French Revolution. The best known are: the early, concise, *Quatre-Vingt-Neuf*, published originally in 1939 and in English translation (by Robert R. Palmer) in 1947, and *La Révolution Française*, published for the first time in 1930 in collaboration with Raymond Guyot and Philippe Sagnac, and later in 1951 as Lefebvre's own, entirely rewritten edition which was translated and published in English (by Elizabeth Moss Evanson) in 1962. The English edition is entitled *The French Revolution from Its Origins to 1793*; see also G. LEFEBVRE, *ÉTUDES SUR LA RÉVOLUTION FRANÇAISE* (1954); J. GODEHOT, *LES RÉVOLUTIONS 1770-1799*, at 129 (1963).

social interpretation of the revolutionary events in France. Those who oppose the predominantly bourgeois character of the Revolution argue that the peasants, not the bourgeoisie, were the main opponents of the old regime and, in fact, the Revolution was the product of disappointed bureaucrats: office holders, government servants, renters and primarily, lawyers.⁶¹

It is not the intention of the author to continue a description of the difficulties usually faced by students regarding the origins of the French Revolution. The point is, however, that the reader has to be aware of the controversial character of any work dealing with intellectual origins of this epoch. None of the trends presented above won a consensus and the chances for such an agreement in the future are slim.⁶²

The voluminous literature devoted to this topic imposes limitations on any type of scrutiny, and forces authors to articulate their tasks precisely. Obviously, the format and comparative character of this study also determine its priorities. The author is primarily interested in the factors that make the first constitutions comparable. To examine these factors, one has to answer the following questions: was the timing and textural similarities incidental or due to the considerable interflow of ideas between the countries which created the first constitutions and was the intellectual background of the framers at least comparable?

61. The main exponent of this trend is often recognized as Alfred Cobban, Professor of the French History at the University of London. His critical opinion of the bourgeois character of the Revolution was presented in his inaugural lecture in London in 1955, published as *The Myth of the Revolution*, reprinted in A. COBBAN, ASPECTS OF THE FRENCH REVOLUTION (1968); see also A. COBBAN, THE SOCIAL INTERPRETATION OF THE FRENCH REVOLUTION (1964).

The group of more moderate students of the revolutionary events try to promote a compromising concept of the Revolution which they view as resulting from a combination of intellectual, economic and social factors. Revolution was neither a sort of philosophical conspiracy nor a pure result of class conflict. As William Doyle has concluded, "The principles of 1789, therefore, cannot be identified with the aspirations of any one of the pre-revolutionary social groups." W. DOYLE, ORIGINS OF THE FRENCH REVOLUTION 210 (1988). Disputing the role of the intellectual factors regarding the rise of the revolutionary spirit, the moderates followed the cautious suggestions of Daniel Mornet, the author of an immense work on the intellectual origins of the revolution. In the conclusions of his profound survey, Mornet suggested that the origins of the Revolution can only be understood through a careful study of the interaction of political events and ideas. In Mornet's opinion, the ideas developed and bloomed in the concrete revolutionary circumstances which, on the other hand, were influenced by the climate of opinions. The great philosophical doctrines contributed to this climate as much as the ideas in the air contributed to the fame, development and influence of the great theories. See D. MORNET, LES ORIGINS INTELLECTUELLES DE LA RÉVOLUTION FRANÇAISE 1715-1787, at 419-430 (1933); see also J. MOUNIER, ON THE INFLUENCE ATTRIBUTED TO PHILOSOPHERS, FREE-MASONS, AND TO THE ILLUMINATION ON THE REVOLUTION OF FRANCE 108 (1974).

62. See W. DOYLE, *supra* note 61, at 7-40; see also J. McDONALD, ROUSSEAU AND THE FRENCH REVOLUTION 1762-1791, at 9-10 (1965).

III. INTERFLOW OF IDEAS

The impact of European continental philosophers on the American founding fathers raise many controversies. There are those who want to view the American constitutional development as an unprecedented and unique process: one which did not develop from any special historical or intellectual background. But there are also those who claim that the chief spokesmen of the American Revolution were consumers rather than producers of ideas.⁶³ Representatives of the second group usually admit that the American founding fathers drew most fruitfully from antiquity and that despite the colonies' rebellion against their mother country, they respected their British heritage and were dedicated followers of British political thought.⁶⁴ Although Americans stressed that the form of government of the new republic was not imported from the British Constitution, they professed a reverence to the British Constitution and, at least in the beginning of the struggle for independence, they declared that they were defending their liberties and rights under the British law which was viewed as "perfect in human institutions."⁶⁵ However, American political thinkers, although extracting heavily from British political thought and British constitutional experience, were very selective in whose ideas they followed.⁶⁶ Next to John Locke, who was recognized as the theoretical father of the American Revolution, the American political philosophers most often cited Edward Coke, Henry Bolinbroke, William Blackstone, James Harrington, David Hume and Algernon Sidney.⁶⁷

63. P.M. Spurlin quotes William Gladstone's famous remark in his essay on de Tocqueville's *De Démocratie en Amérique* that the American Constitution was "the most wonderful work ever struck off at a given time by the brain and purpose of man," and John Stuart Mill's declaration that "the whole edifice was constructed within the memory of man, upon abstract principles." P.M. SPURLIN, *MONTESQUIEU IN AMERICA 1760-1801*, at 27 (1940). In his observation in *DE LA DÉMOCRATIE EN AMÉRIQUE* (published in 1835-1840) Alexis de Tocqueville remarked that the American Constitution was based "upon a wholly novel theory which may be considered a great discovery in modern political science," quoted in H. TAYLOR, *THE ORIGIN AND GROWTH OF THE AMERICAN CONSTITUTION 21* (1911), C. ROSSITER, *THE POLITICAL THOUGHT OF THE AMERICAN REVOLUTION 65* (1963).

64. See Kirk, *supra* note 2, at 5; see also C. ROSSITER, *supra* note 63, at 10. Harris Taylor observed that the Americans established an "ancient type of a federal league." H. TAYLOR, *supra* note 63, at 10.

65. D. MALONE, *JEFFERSON AND THE RIGHTS OF MAN 356* (1951) (quoting Thomas Jefferson). For opinions on the British roots of the American constitutional ideas, see *id.*; for the claim of anglophilism of John Adams see R.R. PALMER, *THE AGE OF THE DEMOCRATIC REVOLUTION: THE CHALLENGE 275* (1959); H. TAYLOR, *supra* note 63, at 19. It was often claimed that the publication of Tom Paine's *Common Sense* in January 1776 and his criticism of the British Constitution contributed to the exposition of the individual attributes of the American system. J. MILLER, *ORIGINS OF THE AMERICAN REVOLUTION 467-493* (1943).

66. C. ROSSITER, *supra* note 63, at 65.

67. See *id.* at 68-69. On the impact of Locke's ideas, see G. DIETZE, *THE FEDERALIST: A CLASSIC ON FEDERALISM AND FREE GOVERNMENT 324-31* (1960). The careful reader of the *Federalist* will discover that the other great political thinkers like Thomas Hobbes, Jeremy Ben-

The impact of European continental philosophers was not so widely acknowledged. Americans split very frequently among their opinions in regard to the influence of French thought on the founding fathers. As James Breck Perkins wrote,

By French literature the colonists were unaffected, because, with few exceptions, they knew nothing about it. The number who could read French was small, the number who did read French to any extent was smaller [T]he political theories of Montesquieu and of Rousseau, the wit of Voltaire, the infidelity of the encyclopedists, had no influence upon men, the most of whom did not know these writers even by name. Our ancestors' modes of thought were essentially English; the political traditions which they inherited, and the political institutions which they founded, were unaffected by French thought.⁶⁸

Between this extreme statement and the opinions of those who believed that Americans had "taken all their knowledge" from continental European thought, one can easily find a variety of more moderate positions.⁶⁹ For example, even the most militant defenders of the "unique character" of American political thought rarely contested the impact of Montesquieu on the framers of the Constitution of 1787.⁷⁰ The first English translation of Montesquieu's *The Spirit of Laws* was announced for sale in Boston in 1762, and his *Persian Letters* were offered to American readers two years later.⁷¹ The authors of *The Federalist* frequently mentioned Montesquieu directly but not always favorably. Madison, in his tenth, fourteenth and thirty-ninth letters, argued that Montesquieu failed to distinguish a republic from a democracy. Hamilton, in letter nine, maintained that the size of the re-

tham, Robert Filmer and Edmund Burke were almost never directly cited. See C. ROSSITER, *supra* note 63, at 67; G. DIETZE, *supra*, at 319. On the impact of Edmund Burke, see KIRK, *supra* note 2.

68. J. PERKINS, *FRANCE IN THE AMERICAN REVOLUTION* 418-419 (1911). On the influence of Montesquieu and Rousseau, see P. SPURLIN, *ROUSSEAU IN AMERICA 1760-1809* (1969); P. SPURLIN, *MONTESQUIEU IN AMERICA 1760-1801* (1940). Howard Mumford Jones, the author of *AMERICA AND FRENCH CULTURE, 1750-1848* (1927) was of a different opinion. He wrote, "That the great mass of the American people ever learned enough French to read or speak it does not appear. But, among the cultivated classes from the earliest times there were those who were familiar with the language; and it is from these leaders that ideas and attitudes descended to the rank and file in the United States."

Id. at 215. Jones observed that the popularity of French reached its height in the years 1770 to 1797. *Id.*

69. See Laboulaye, *Etude sur L'Esprit des Loix de Montesquieu*, 1 *REVUE DE DROIT INTERNATIONAL ET DE LEGISLATION COMPARÉE* 161, 179 (1869).

70. Francis Newton Thorpe maintained that Montesquieu's *THE SPIRIT OF LAWS* had more influence on eighteenth-century American political thought than any other work on government. See F. THORPE, *THE CONSTITUTIONAL HISTORY OF THE UNITED STATES* 155 (1901); see also C. ROSSITER, *supra* note 63, at 71 ("Every literate colonist could quote [Montesquieu] to advantage").

71. C. MONTESQUIEU, 1 & 2 *THE SPIRIT OF LAWS* (1746) (first English edition translated by T. Nugent, 1750) (first U.S. edition translated by I. Thomas, Jr., 1802). C. MONTESQUIEU, *PERSIAN LETTERS* (1721).

public which the author of *The Spirit of Laws* had in mind would not be applicable to any of the larger states in the American confederation.⁷² Still, the authors of *The Federalist* praised Montesquieu for his examination and popularization of the English system of government. As Madison wrote, "The oracle, who is always consulted and cited on this subject, is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind."⁷³

It must be acknowledged that admiration of the French Enlightenment in America was balanced by criticism of, if not an aversion to the French model of the pre-revolutionary government.⁷⁴ A distaste for French monarchy contributed to the fact that in the great debates over the federal Constitution, France is scarcely mentioned.⁷⁵ Generally speaking, Americans were convinced that their government was the best that ever did exist and were interested in the French affairs primarily because they believed that through the French Revolution their experience could be spread throughout the globe.⁷⁶

The American struggle for independence occurred at the most opportune time, when France's traditional desire to curb British power coincided with the intention to compensate for the losses suffered in the Seven Years War. The American Revolution was also proof that liberal ideas of the Enlightenment had spread all over the world. As James B. Perkins wrote, "to those who pointed out abuses of the old

72. THE FEDERALIST NO. 9, at 126 (A. Hamilton) (B. Wright ed. 1961); see also THE FEDERALIST NO. 10, at 135-36 (J. Madison) (B. Wright ed. 1961); THE FEDERALIST NO. 14, at 150 (J. Madison) (B. Wright ed. 1961); THE FEDERALIST NO. 39, at 280-286 (J. Madison) (B. Wright ed. 1961).

73. THE FEDERALIST NO. 47, at 337 (J. Madison) (B. Wright ed. 1961). The French philosopher was also widely cited by the critics of the Constitution. See Clinton, *The Letters of "Cato,"* in *ESSAYS ON THE CONSTITUTION OF THE UNITED STATES* 247-78 (P. Ford ed. 1892) (seven letters published in the *NEW YORK JOURNAL* between September 27, 1787 and January 3, 1788).

74. For comments on Jefferson's first observations on the government of France, see C. HAZEN, *CONTEMPORARY AMERICAN OPINION OF THE FRENCH REVOLUTION* 6-7 (1964). Jefferson was convinced that politically France was backward. He wrote, "I presume there are not to be found five men in Europe who understand the nature of liberty and the theory of government so well as they are understood by five hundred men in America." *Id.* at 37. In his letter to John Melish of January 13, 1813 he wrote, "[The republican party members] esteem the people of England and France equally, and equally detest the governing powers of both." A. MASON, *FREE GOVERNMENT IN THE MAKING* 384 (3d ed. 1977).

75. Ketchum, *France and American Politics 1763-1793*, 78 *POL. SCI. Q.* 198, 217 (1963).

76. C. Hazen observed that the French Revolution became a more frequent topic to be discussed in state rather than federal papers. C. HAZEN, *supra* note 74, at 246; see also R. MORRIS, *THE EMERGING NATIONS AND THE AMERICAN REVOLUTION* 17 (1970). For Jefferson's opinion that the American model of government is "without comparison the best existing or that ever did exist," see D. MALONE, *JEFFERSON AND THE RIGHTS OF MAN* 160 (1951); see also Letter of Richard Price to Thomas Jefferson (May 4, 1789), reprinted in 15 *THE PAPERS OF THOMAS JEFFERSON* 90-91 (J. Boyd ed. 1958) [hereinafter *JEFFERSON PAPERS*].

regime, the Revolution in America seemed to be [the] best proof that those regimes had to die."⁷⁷

American interests were well-represented in France by Benjamin Franklin, Arthur Lee, and Silas Deane. Franklin's arrival in France in December 1776 was an important event. Since 1772, he had been a member of the French Academy and was preceded by the reputation of philosopher and scientist. He spoke French correctly and his connections with French philosophers were widely known.⁷⁸ To quote Henry S. Commager:

It was France that welcomed the American example — welcomed it, followed it, and even improved upon it. It was in France that the "American party" triumphed, briefly, to be sure; the party made up somewhat loosely of LaFayette, la Rochefoucauld, Brissot, Condorcet, Beaumarchais, Du Pont de Nemours, Helvetius, the Abbes Sieyes, Raynal, and Mably, and miscellany of others—followers of Turgot and converts to his doctrines of Physiocracy and of Progress, members of the Amis des Noirs, of the Club Americans, or the Masonic Lodge of the Nine Sisters. Franklin was the pivotal point, Franklin who was a legend, but a very active one, and who saw to it that the American Constitution and other State Papers, were translated and published in France.⁷⁹

Franklin was very successful in representing the American case. Supported by Pierre A.C. Beaumarchais' efforts, he produced significant financial assistance for the rebellious colonists and successfully conducted negotiations which were concluded with the French alliance and signed with the United States in early 1778. His presence in France encouraged a great number of Europeans (such as marquis La Fayette, Baron Kalb and a Pole, Pulaski) to offer their services to the

77. J. PERKINS, *supra* note 68, at 209.

78. *Id.* at 129. For an examination of intellectual factors regarding the rise of revolutionary spirit in France, see D. MORNET, *LES ORIGINS INTELLECTUELLES DE LA RÉVOLUTION FRANÇAISE 1715-1787* (1933); W. DOYLE, *supra* note 61. For an examination of the contribution of social groups to the emergence of the revolutionary movement, see A. COBBAN, *THE MYTH OF THE REVOLUTION* (1955), as well as his *THE SOCIAL INTERPRETATION OF THE FRENCH REVOLUTION* (1964) and *ASPECTS OF THE FRENCH REVOLUTION* (1968). For a social and economic interpretation of the Revolution, see the following works of G. Lefebvre: *QUATRE-VINGT-NEUF* (1939) (English translation by R.R. Palmer 1947); *ÉTUDES SUR LA RÉVOLUTION FRANÇAISE* (1954); *LA RÉVOLUTION FRANÇAISE* (1930) (with R. Guyot and P. Sagnac) (Lefebvre's chapters are translated into English in E. EVANSON, *THE FRENCH REVOLUTION: FROM ITS ORIGINS TO 1793* (1962)).

79. H. COMMAGER, *THE EMPIRE OF REASON: HOW EUROPE IMAGINED AND AMERICA REALIZED THE ENLIGHTENMENT* 224 (1977), *quoted in* A. BLAUSTEIN, *supra* note 1, at 10. The new legislative texts from America were carefully distributed by Franklin and Jefferson in Paris, and John Adams in London at The Hague. For further detail, see J. GODECHOT, *FRANCE AND THE ATLANTIC REVOLUTION OF THE EIGHTEENTH CENTURY 1770-1799*, at 45 (1965). Some of these texts were published in *Les Affaires de L'Angleterre et de l'Amérique*, the periodical published both in Antwerp and Paris. In 1790, French lawyer Jacques Vincent de la Croix offered a course on the Constitution of the United States at the 'luce de Paris.' The material from the course was published by the popular Paris newspaper *Le Moniteur*. See A. BLAUSTEIN, *supra* note 1, at 16.

new Republic.⁸⁰ The French emotional and financial involvement in the American War was so significant that some of the pamphleteers claimed that it was the American Revolution, its cost and the opinions created by its supporters, which forced the King to call the Estates General.⁸¹

Life in America was romanticized and idealized in a number of books and pamphlets such as *Lettres d'un Cultivateur Américain* (1784) which depicted the charms of a wild but happy and dignified life in the big country, not contaminated by civilization.⁸² The increasing popularity of the American style of life and ideas of the American republic also had critics, led by Jacques Mallet du Pan, editor of the *Mercure de France*, who strongly attacked French involvement abroad.⁸³

IV. AMERICAN CONTRIBUTION TO THE FRENCH DECLARATION OF THE RIGHTS OF MAN AND CITIZEN

In the year before the breakdown of the old Regime, friends of the American cause frequently gathered either in LaFayette's hotel in Paris or in the house occupied by Jefferson, who in 1784 was sent to assist Franklin, and in 1785 replaced Franklin as a minister to France. Jefferson remained in France until 1789.⁸⁴

The French fascination with America reached its highest peak in the several months preceding the adoption of the French Declaration of the Rights of Man and Citizen. During this period, the political work of the American Revolution was most extensively discussed. Before 1789, four editions of the Constitution of the United States had been published. The American state constitutions also inspired a broad interest. The French were most attracted to the constitution of Pennsylvania, which provided for a unicameral legislative system and an executive power entrusted to a president, chosen by the legislature and assisted by a council of twelve. The Pennsylvania Constitution was praised in France as the most democratic constitution adopted

80. For comments on Franklin's stay in France, see C. HAZEN, *supra* note 74, at 1. On Franklin's meeting with Voltaire, see R. MORRIS, *supra* note 76, at 44-45. R. Palmer wrote: "Franklin, Jefferson, and Adams, along with men like Lafayette and Kosciusko, were only the most eminent among thousands who served, in their own persons, as channels of communication between America and Europe." R.R. PALMER, *supra* note 65, at 252.

81. LE COMPTE DE VERGENNES, CAUSE DES ESTATES GENEROUX (1788) *cited in* B. FAY, THE REVOLUTIONARY SPIRIT IN FRANCE AND AMERICA 253 (1927).

82. The author was most probably Hector Saint-Jean de Creveceur. B. FAY, *supra* note 81, at 232-33; *see also* R.R. PALMER, *supra* note 65, at 257-259.

83. J. DU PAN, CONSIDERATIONS ON THE NATURE OF THE FRENCH REVOLUTION (intro. by P. Beik 1974).

84. The most frequent visitors at Jefferson's house were Mounier, Lally, Rabaut, Duport, Lameth and Barnave. B. FAY, *supra* note 81, at 256.

anywhere.⁸⁵ As Albert P. Blaustein argues, "France's first constitution . . . looked more to Pennsylvania than to any other United States source for its governmental structure."⁸⁶ In regard to other American state constitutions, those of Virginia, Massachusetts and Maryland were most widely discussed. It was often raised that the preambles of these constitutions, as well as their prototype — The American Declaration of Independence — strongly influenced the authors of the French Declaration. As Bernard Fay wrote, "A detailed comparison of the French Declaration of Rights with the preambles of these three constitutions brings out a striking resemblance."⁸⁷ This thesis is questioned by French historians who, like Godechot, argue that, "[t]he French Declaration of the Rights of Man and Citizen offers some significant differences from the American Declarations."⁸⁸ Godechot maintains that the American and French Declarations vary in character. The American texts were to be "very specific, very American," while the French Declaration was conceived as a sort of universal manifesto appealing to mankind as a whole.⁸⁹ In Mirabeau's words, the French Declaration was to be "applicable to all ages, all peoples, all moral and geographic latitudes."⁹⁰

85. J. GODECHOT, *supra* note 60, at 35.

86. A. BLAUSTEIN, *supra* note 1, at 8; H. COMMAGER, *supra* note 79, at 224. The idea of a unicameral legislative body was advocated for France by Franklin and Turgot. See H.M. JONES, *supra* note 68, at 528. Gouverneur Morris was of a different opinion. He spoke against the seizure of all political power from the French King and about "the anarchy which would result from giving the wretched constitution of the Pennsylvania legislature to the Kingdom of France." 1 DIARY AND LETTERS OF GOUVERNEUR MORRIS 38 (A. Morris ed. 1888). Although Morris found that "the American example had powerfully affected the attitude of French thought toward liberty, equality and constitutional popular government," he feared that the French, "lacking experience and poise, would seek to apply these new and seductive ideas in an arbitrary way with dangerous disregard of changed conditions." C. HAZEN, *supra* note 74, at 82. The idea of a unicameral legislature, modeled on the Pennsylvania constitution was also criticized by John Adams. See H.M. JONES, *supra* note 68, at 528.

87. B. FAY, *supra* note 81, at 266. Blaustein, supporting this opinion, wrote, "[t]hus, while the famous French Declaration of the Rights of Man and the Citizen of August 1789, was officially the work of LaFayette, Mirabeau, and Jean Joseph Mounier, it also had claim to American parentage." A. BLAUSTEIN, *supra* note 1, at 16.

88. J. GODECHOT, *supra* note 60, at 96.

89. *Id.*

90. *Id.* Careful examination of the debates of the French Constitution Assembly confirms that the deputies believed that they framed a manifesto that was more than a transcription of the ideas of the great philosophers and, in fact, had universal significance. The Declaration of Rights was to proclaim the commonly recognized immortal principles of the new age. For debates on the Declaration, see 8 ARCHIVES PARLEMENTAIRES DE 1787 Á 1860, at 221 (J. Macidal, E. Laurent, eds. 1870). A demand for a universal declaration of rights was also confirmed in many of the *cahiers*, which were widely recognized as guides indicating the sphere of a national consensus. *Cahiers de doléances* were lists of grievances drafted during the elections to the Estates General by the electoral assemblies of the French provinces, separately by each estate. The *cahiers*, although not treated by the Constitutional Assembly as imperative instructions for deputies, had informational and psychological influence. The *cahiers* were studied carefully by the Committee on the Constitution, and an official Summary of the *Cahiers* was presented in the

The dispute concerning the origins of the French Declaration resulted in the polarization of the positions taken by the disputants, who usually either attempted to trivialize or overestimate the reception of the American patterns.⁹¹ In fact, the arguments of both disputing parties are not fully convincing and the truth about the origins of the Declaration lays somewhere in-between. It is unquestionable that there was a constant interflow of ideas between the two countries and that the French were attracted to the American political arrangements. The idea of a bill of rights — which could be used as a preamble to a constitution — was American, and in fact Americans translated it into the idea of a constitution as a single document providing a basic law superior to any legislative act and different from mere statutes. Also, the idea that a constitution should be passed or amended by special conventions or with requirements higher than those expected for ordinary statutes was worked out in America.⁹²

The original draft of the Declaration was prepared by LaFayette and reviewed by Jefferson who sent a copy to Madison for comment.⁹³ The draft was also studied by Governor Morris who was in Paris occasionally on private business.⁹⁴ Before preparing his draft, Lafayette also discussed the subject with Hamilton, Franklin and Paine. However, the first Lafayette draft did not meet with an enthusiastic reception. The draft generated heated disputes during which some deputies

Assembly on July 27, 1789 by the Clermont-Tonnere, Deputy of North Paris. The Summary, which in fact presented an incomplete list of claims and dealt predominantly with constitutional issues, did not mention the declaration. The demand for a declaration was, however, so widely recognized that the Assembly began to work on a list of basic rights on August 4. B. HYSLOP, *A GUIDE TO THE GENERAL CAHIERS OF 1789*, at 104 (1936). For an official summary of the *cahiers*, see 1 *SELECTED DOCUMENTS ILLUSTRATIVE OF THE FRENCH REVOLUTION: THE CONSTITUENT ASSEMBLY 103-04* (L. Leg ed. 1905); see also J. GODECHOT, *supra* note 60, at 95.

91. Overestimating the resemblance of the American and French documents, Richard Morris writes, "The Virginia statesman George Mason might well have instituted an action of plagiarism against the authors of the Declaration of the Rights of Man and the Citizen which the French National Assembly adopted on August 26, 1789. The resemblance to Mason's Bill of Rights which the Virginia Assembly had enacted back in June of 1776 is too close to be coincidental." R. MORRIS, *supra* note 76, at 56.

92. See C. WARREN, *CONGRESS, THE CONSTITUTION AND THE SUPREME COURT*, at 14-16, 87 (1925).

93. See A. BLAUSTEIN, *supra* note 1, at 16. In January, 1789, Jefferson had written Madison that he had contributed to the framing of a declaration of rights and had sent two drafts, including one by Lafayette. 5 *THE WRITINGS OF THOMAS JEFFERSON* 64 (P. Ford ed. 1895). Jefferson also had a copy of a draft submitted by Dr. Richard Gem, a successful English physician and ardent devotee of republican principles. See *Proposition Submitted by Richard Gem* and Jefferson's letters to James Madison (Sept. 6, 1789) and to Richard Gem (Sept. 9, 1789) in *JEFFERSON PAPERS, supra* note 76, at 384-99. In July, before presenting a declaration to the Assembly, Lafayette sent another draft to Jefferson. D. MALONE, *supra* note 76, at 223. Lafayette's draft of a Declaration of Rights is published in *JEFFERSON PAPERS, supra* note 76, at 230-33.

94. Morris arrived in France in February, 1789, and remained in Europe for nine years. He was appointed U.S. Minister to France in 1792.

even proposed not to publish the Declaration until the adoption of the Constitution.⁹⁵ Finally, the Assembly accepted a draft that was a compromise between Lafayette's initial project and drafts of other deputies such as Sieyes, Mirabeau and Mounier, which were most widely discussed and influential. The compromise brought more French tincture to the Declaration.⁹⁶ The literal comparison of the Declaration of the Rights of Man and Citizen with the American Declaration of Independence and the Virginia Bill of Rights brings us to conclusions that urge modification of several popular opinions.

It has often been advanced that the Declaration of the Rights of Man more markedly attached equality to liberty and stressed the importance of this conjunction more than the American Declaration of Independence or Virginia Bill of Rights. In Professor Lefebvre's words, "[b]y bringing the resounding collapse of privileges and feudalism, the popular revolution highlighted equality as the Anglo-Saxons had not done."⁹⁷

Article 1 of the French Declaration proclaims that "men are born free and equal in rights."⁹⁸ Equality is also referred to in several following articles.⁹⁹ The Declaration guarantees equal rights in courts, equal access to governmental positions, and fiscal equality. Even with all these equalitarian provisions, however, one has to admit that equality, although emphasized more firmly than in the Anglo-Saxon doctrine, "holds a lesser place than freedom in the [French]

95. Lafayette's draft was more general than the final text of the Declaration. The draft declared that men are made free and equal by nature. The draft enumerated natural and inalienable rights of man: rights to speak, write, freely communicate ideas, and religious freedom. It stated that natural rights are confirmed by society and that the source of sovereignty resides in the nation. The draft, however, focused on the concept of representative government and the separation of powers, as well as on problems that were only generally mentioned in the final text of the Declaration, but were in fact addressed by the Decree of October 1, 1789, and the Constitution of 1791. On the other hand, the text of the Declaration went further in explaining the ideas of equal freedom, presumption of innocence, personal and property inviolability, due punishment, and maintenance of public force. In neither the draft nor the final text of the Declaration was there room for the concept of trial by jury, which was strongly advocated by Thomas Jefferson. JEFFERSON PAPERS, *supra* note 76, at 232-33.

96. See G. LEFEBVRE, *THE FRENCH REVOLUTION FROM ITS ORIGINS TO 1793*, at 146 (1962). The most exhaustive comparison of the French Declaration and the Virginia Bill of Rights was presented by R.R. Palmer in Appendix IV to *THE AGE OF DEMOCRATIC REVOLUTIONS*, *supra* note 65, at 518-21. The comparison brings Palmer to the conclusion that "there was in fact a remarkable parallelism" between both acts. *Id.* at 487.

97. G. LEFEBVRE, *supra* note 96, at 146.

98. The American Declaration of Independence states that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights." The Virginia Bill of Rights of 1776 declares, "That all men are by nature equally free and independent, and have certain inherent rights." 7 *THE FEDERAL AND STATE CONSTITUTIONS* 3813 (F. Thorpe ed. 1909) [hereinafter *VIRGINIA BILL OF RIGHTS*].

99. Declaration des Droits de l'Homme et du Citoyen, *reprinted in* J. ROBERTS, 1 *FRENCH REVOLUTION DOCUMENTS* 171-73 (1966) [hereinafter *French Declaration*].

Declaration."¹⁰⁰

Liberty is by far the most important right among the fundamental principles of 1789-1791. Men are declared free from arbitrary persecution and free to communicate their opinions, provided they respect the same liberty of others. Liberty, property, security, and resistance to oppression are recognized as fundamental individual rights stemming from the nature of human beings.¹⁰¹ Equality does not figure among these sacred and imprescriptible rights. The French Assembly focused on the condemnation of the unequal position of estates and privileges of minorities, and following Sieyes' argument, decided not to include social equality among the rights protected by the Declaration. Contrary to the second French Constitution of 1793, which stressed the significance of social equality, the majority of the Constitutional Assembly in 1788-1791 was satisfied with the protection of equal freedom, which was defined as the right to do what does not harm another. The right of "equal freedom" was formulated more clearly in the Constitution of 1791 than in the Virginia Bill of Rights. On the other hand, the Virginia Declaration places greater emphasis on freedom and frequency of elections and on jury trial, and was more concrete in its warnings against excessive bail and more explicit in its reference to general warrants, suspending of laws and standing armies.¹⁰²

In further assessing the American and French Declarations, it has often been raised that a number of deputies of the French Assembly, led by Robespierre, were dissatisfied with the insufficient treatment of religious liberty and religious toleration in the French Declaration.

100. J. GODECHOT, *supra* note 60, at 96. On one hand, the idea of equality appealed to an American sense of justice; on the other hand, they feared that in practice it would collide with individual freedom. Generally, they were satisfied with equality before the law and felt uncomfortable with the French attempts to extend equality to social and economic relations. "By the law of nature," wrote John Adams,

all men are men and not angels — men and not lions — men and not whales — men and not eagles — that is, they are all of the same species. And this is the most that the equality of nature amounts to. But man differs by nature from man almost as much as man from beast.

The equality of nature is moral and political only and means that all men are independent.

Quoted in C. HAZEN, *supra* note 74, at 274-75. On the limits of American dedication to the creation of an egalitarian society, see R. MORRIS, *supra* note 76, at 21-22.

101. In 1789, the French Assembly generally showed a greater sensitivity to egalitarian values than did the framers of the American Declaration. Still, it took several years to turn this sensitivity into a fully expressed egalitarian program. Attacks on private property from such socialists as Mably or Morelly, or Rousseau's well known criticism of law as an instrument of exploitation and his accusation of excessive accumulation and unequal distribution of property did not find an endorsement in 1789. The Assembly recognized property as sacred (art. 17) and established a representative system based on a property qualification. For more exhaustive comments, see K. MARTIN, *FRENCH LIBERAL THOUGHT IN THE EIGHTEENTH CENTURY* 220-58 (2d ed. 1954).

102. See R.R. PALMER, *supra* note 65, at 518-20.

The American Declaration of Independence refers to the Creator because Americans were generally known for their attachment to religion. On the other hand, they were dedicated to religious freedom and determined not to grant priority to any religion. The writers who are inclined to expose the different characters of the American and the French Declarations argue that, contrary to the American revolutionary acts, the French Declaration of Rights does not pay sufficient attention to religious liberty and, by placing itself under the auspices of the Supreme Being, the Declaration was intended to preserve the primacy of Catholicism.¹⁰³ The Assembly's satisfaction with the mild reference to religious toleration has been recognized as a failure of the Voltairians during this phase of the Revolution.

These arguments can be accepted only with some reservations. First of all, although religious matters are not discussed in the Declaration of Independence, they are recognized in the states' bills of rights. The Virginia declaration recognizes "the duty which we owe to our Creator." Generally, the Virginia Bill of Rights is more explicit than the French Declaration in reference to Christian and moral virtues.¹⁰⁴ Secondly, in revolutionary France the diffusion of Voltaire's works was enormous and his influence can hardly be overestimated.¹⁰⁵ Soon after the adoption of the Declaration, the French Assembly promulgated a series of acts relating to ecclesiastical reorganization. Recognizing the significance of the principle of religious liberty and equality, the Assembly granted religious liberty to Protestants. The Decree of December 2, 1789 called for the confiscation of Church property. In addition, the most important Civil Constitution of the Clergy, adopted on July 12, 1790, drastically limited the independence of the French Catholic Church from the Pope and tied the clergy through prescribed oaths, salaries and newly-established ecclesiastical districts of the state.¹⁰⁶ These acts, passed by the Assembly, appear to confirm the influence of Voltairian secular rationalism on the minds of the people during the preconstitutional phase of the French Revolution. France remained a predominantly Catholic country. This fact alone prevented the servile adoption of the American models. On the other hand, it must be conceded that, with the development of the French Revolution, Americans were more concerned with "the air of

103. For more details on the disputes in the Assembly, see ARCHIVES PARLEMENTAIRES DE 1787 Á 1860, *supra* note 90, at 221. For the Decree on the Fundamental Principles of Government, see J. STEWART, DOCUMENTARY SURVEY OF THE FRENCH REVOLUTION 115-17 (1951).

104. See R.R. PALMER, *supra* note 65, at 520.

105. Between 1778 and 1935, thirty-four complete editions of his works and numerous incomplete ones were published.

106. J. STEWART, *supra* note 103, at 167-89.

atheism" and French hostility to religion than with the insufficient protection of Protestants. Commenting on this trend, John Adams admitted that the French drew more from their own philosophy than from American experience. In a letter to Dr. Price he concluded, "I own to you I know not what to make of a republic of thirty million atheists" ¹⁰⁷

As is often suggested, the populist character of the French Declaration of Rights is more apparent than real. The American Declaration of Independence states that governments derive "their just powers from the consent of the governed." The French text is more explicitly Rousseauistic by proclaiming that "law is the expression of the general will."¹⁰⁸ In fact, however, both Declarations are Rousseauistic only in these phrases. As manifestos of developing liberalism, they proclaim a victory for individualistic philosophy which recognizes an individual, man, or citizen to be a subject of fundamental rights. Individual autonomy was proclaimed as being worthy of constitutional protection; an individual was declared the best judge of his own well-being, and the interests of the community were recognized as the sum of individual interests. ¹⁰⁹

The framers of both Declarations followed Rousseau's concept of the *general will* only by name. The American Declaration of Independence focuses on the reasons for which the 13 original States of the Union severed their colonial allegiance. The interpretation of the principle of the popular origin of power is left to constitutional regulation which fully recognizes a representative form of government. The French Declaration, which was itself conceived as a preface to the Constitution, more explicitly explains the idea of representation. For most of the deputies, sovereignty was indivisible and inalienable, but the sovereign people could exercise their power through elected representatives. Article 6 of the Declaration reads:

Law is the expression of the general will; all citizens have *the right to concur personally, or through their representatives*, in its formulation; it

107. C. HAZEN, *supra* note 74, at 153. In fact, French religious instability was highly influential on American attitudes. The fluctuations from religious infidelity to the orthodoxy of the Jesuits and ultramontanism of J. D. Maistre scared Americans. "France, instead of being a country to admire and pattern after, was now a nation to pity and dispise." H.M. JONES, *supra* note 68, at 447-48.

108. French Declaration, *supra* note 99, art. 6.

109. The concept of "general will" (*la volonté generale*) was basically anti-individualistic. It was discussed by Montesquieu, Holbach, Diderot, and other philosophers, but Rousseau was recognized as its main proponent. For Rousseau, the general will was indivisible, and inalienable. It embodied the interests of society as a whole. For Rousseau's influence on the French Revolution, see J. McDONALD, *ROUSSEAU AND THE FRENCH REVOLUTION 1762-1791* (1965); J. TALMON, *THE ORIGINS OF TOTALITARIAN DEMOCRACY* (1960); A. MEYNIER, *JEAN-JACQUES ROUSSEAU: REVOLUTIONNAIRE* (1911).

must be the same for all, whether it protects or punishes. All citizens, being equal before it, are equally admissible to all public offices, positions, and employments, according to their capacity and without other distinction than that of virtues and talents.¹¹⁰

Sieyes' opinion that deputies were representatives rather than simply "intermediaries" prevailed in the Assembly. He stressed that the majority of them had the right to decide, and that the will of the majority meant the sum of the individual wills of its members. It was Sieyes who, in his popular pamphlet *Qu'est-ce le Tiers Etat*, argued that "individual wills are the sole elements of the general will" and that, "it is useless to talk reason if, for a single instant, this first principle, that the general will is the opinion of the majority, and not of the minority, is abandoned."¹¹¹

Summarizing, one has to admit that the resemblance between the French and American Declarations is remarkable. Both acts recognize that the organization of a society should be based on principles of liberty, individual autonomy, representative government, and power of majority combined with the rights of minority. With all these similarities, however, both Declarations differ in the emphasis given to particular rights. A literal comparison of the texts does not deprive the Declaration of the Rights of Man and Citizen of its very special French character.

V. THE FRENCH DECLARATION OF THE RIGHTS OF MAN AND CITIZEN AND THE AMERICAN BILL OF RIGHTS

The American Federal Convention adopted the Constitution without a bill of rights prefixed to it. The Convention thereby departed from the format that had previously existed in some states. The motion of George Mason and Elbridge Gerry to preface the Constitution with a bill of rights was opposed by Roger Sherman of Connecticut on the grounds that "[t]he State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient."¹¹² The argument that Congress should be trusted in its intention to preserve the rights of the people was convincing to the delegates of the Convention who unanimously (voting as state units) opposed the motion to form a bill of rights committee.¹¹³

The struggle for the ratification of the Constitution promptly proved that the Federal Convention erred in its evaluation of public

110. French Declaration, *supra* note 99 (emphasis added).

111. Translation and reprint in J. STEWART, *supra* note 103, at 50.

112. R. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS 1776-1791*, at 116 (1955).

113. *Id.*

expectations. The demand for a bill of rights was widespread. The requirement of a bill of rights became a main point in the Antifederalists' attack on the Constitution.¹¹⁴ Jefferson, in his letters from France, argued strongly that the lack of a bill might result in the "elective despotism" of Congress. Madison was generally in favor of a bill, although he did not believe the omission to be a major defect of the Constitution.¹¹⁵ The Constitution was ratified only with the general understanding that "the amendments proposed will soon become a part of the system."¹¹⁶

On May 4, 1789, Madison notified Congress that he intended to introduce the subject of amendments to the Constitution.¹¹⁷ Madison made his statement a day before the French Estates General met for the opening plenary session in the great Salle des Menus Plaisirs. In fact, the record shows that the drafting of the French Declaration and the American Bill took place almost simultaneously. Madison submitted his draft on June 8 and Lafayette presented his proposal to the French Assembly on July 11.¹¹⁸ On August 13, the House in America resolved itself into a Committee of the Whole and discussed the report of the Committee of Eleven to which the subject of the amendments had been referred. A special Committee of Three (Benson, Sherman and Sedgwick) submitted the Report with the Third Draft of the Amendments on August 24-25, two days before the French Assembly adopted the Declaration of the Rights on August 27, 1789.¹¹⁹ The Amendments passed Congress on September 25, 1789.

The American Bill of Rights was ratified on December 15, 1791 but the drafting process was completed before the adoption of the French Declaration. The record shows clearly that the draftsmen of the American Bill could not be influenced directly by the final text of the French Declaration. They could be, however, familiar with its early drafts and inspired by the French constitutional debates. A thor-

114. See Smith, *An Address to the People of the State of New York of 1788*, in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE 1787-1788, at 114 (P. Ford ed. 1988). Antifederalist Whitehill argued in the Pennsylvania Ratifying Convention of 1787 that "he anticipate[d] annihilation of the state governments which would destroy civil liberties." A. MASON, *supra* note 74, at 267-73. For arguments of Antifederalist Lenoir in the North Carolina Ratifying Convention, see *id.* at 275-77.

115. A. MASON, *supra* note 74, at 318-22 (letter from Thomas Jefferson to James Madison (Dec. 20, 1898) and letter from James Madison to Thomas Jefferson (Oct. 17, 1788)); see also C. WARREN, *supra* note 92, at 80-81.

116. A. MASON, *supra* note 74, at 310 (Samuel Adams at Massachusetts Convention).

117. 1 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 247 (J. Gales ed. 1834) [hereinafter 1 ANNALS].

118. *Id.* at 424-49; JEFFERSON PAPERS, *supra* note 76, at 230-31.

119. 1 ANNALS, *supra* note 117, at 72, 88, 778, 779, 913; 2 F. THORPE, *supra* note 70, at 257-59; J. STEWART, *supra* note 103, at 112-15.

ough examination of the record does not confirm this thesis. It is true that the American public was enthusiastic about the French Revolution and the founding fathers were well-informed of the European events. The works on the French Declaration were hailed in America as evidence that Europe had followed the American model. There is, however, no evidence that Americans were ready to draw from the French constitutional thought. In fact, even the idea that France gave America philosophy and America offered the benefit of its experience to France was not popular among American draftsmen, who preferred to believe that their constitutional concept grew out of British seeds.¹²⁰ As F.N. Thorpe wrote, “[t]urning to their sources, the first ten [amendments] are clearly, as Jefferson declared they ought to be, a Declaration of Rights, and each may be said to have emanated from a common source, the State constitutions, or the ‘ancient and undoubted rights’ of Englishmen.”¹²¹

Discussing the historical background of his draft of the Bill of Rights, Madison returned to precedents of the American Declaration of Independence, state Constitutions and state Bills of Rights and Ratifying Conventions; to the British constitutional documents; and to the Magna Carta of 1215, Petition of Rights of 1628 and Bill of Rights of 1689.¹²² Madison admitted that the concept of a bill of rights originated from attempts to limit the power of the British Crown. He claimed, however, that Americans had to work out a more advanced Bill because the British constitution did not secure freedom of press and liberty of conscience¹²³ — rights highly esteemed in America.

120. Hazen claims that some Americans, like Jefferson, believed that “America might well be the teacher of her elder sister [France] in some respects, and these men thought that she might equally well be her pupil in others.” C. HAZEN, *supra* note 74, at 143. It seems that, with the progress of the French Revolution, belief in the possibility of learning from France was clearly fading in America.

121. 2 F. THORPE, *supra* note 70, at 330.

122. 1 ANNALS, *supra* note 117, at 431-42. H. Taylor wrote, “If anything is certain in the history of any country it is that the essence of the English constitutional system as reformed by the Revolutions of 1640 and 1688 and as defined by Blackstone in 1758, passed into our first state constitutions, whose bill of rights set forth, for the same time, in a written and dogmatic form, the entire scheme of civil liberty as it existed in England in 1776.” H. TAYLOR, *supra* note 63, at 361.

123. 1 ANNALS, *supra* note 117, at 436. The British Bill of Rights of 1689 did not proclaim the freedom of speech. It provided only that “the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court . . .” E. WADE & A. BRADLEY, *CONSTITUTIONAL LAW* 7 (7th ed. 1965). The American founding fathers correctly viewed the origins of the bills of rights in the procedures and institutions established to limit the power of government. From this point of view, it is quite understandable that they looked for precedents in the British constitutional traditions rather than in the history of French absolutism. In fact, however, they overlooked the constitutional experience of other European countries which, like Poland, had four-and-a-half century-long traditions of struggle to restrain the king’s power and to create institutions fundamental to a constitutional government. In fact, the Polish nobility had their “Habeas Corpus Act” much earlier than did the nobility of other Euro-

Congress made no reference to the French constitutional experience, with the exception of the consular convention and the letter to the French National Assembly in relation to Franklin's death. France was hardly mentioned during the first year of debates of the first U.S. Congress.

VI. MAIN PRINCIPLES OF THE AMERICAN CONSTITUTION AND THE FRENCH CONSTITUTION OF 1791 COMPARED

The preamble of the American Constitution states that the people of the United States ordained and established the Constitution. In comparison, the Preamble of the French Constitution of 1791 appeals to the National Assembly which wished to establish the French Constitution upon the principles it has just recognized. These principles were deemed to be declared by the Declaration of the Rights of Man and Citizen, which was incorporated into the Constitution. The original text of the Declaration referred to the representatives of the French people, organized in National Assembly. The wording of the preambles of these foremost political documents was recognized as very telling. It was often raised that, contrary to the American Constitution, which was established "by the people," the French act was adopted by the people's representatives. The French National Constituent Assembly had an exclusive *pouvoir constituant*. As R.R. Palmer wrote, "[t]he Constituent Assembly, on finishing its work in 1791, did not submit the new constitution to any form of popular ratification, such as had occurred for the federal and some of the state constitutions in America."¹²⁴ This apparently clear-cut difference should not be exaggerated; indeed, the analysis of the process of adoption and the provisions on the revision or amendment of the constitutions show more similarities than divergences.

The framers of both documents assumed that constitutions should be drafted by special conventions to which the people delegated a constituent power. In America, a draft of the Constitution was produced by the Constitutional Convention and signed by thirty-nine of the fifty-five delegates. It was submitted to the Congress which referred it to conventions in the several states. Through the ratification process, the draft was subject to nationwide discussion of the people. The work of the French National Constituent Assembly was submitted to the king who on September 28 proclaimed the Constitution as the law. In

pean countries and had its due process clause well established at the beginning of the fifteenth century. See Ludwikowski, *supra* note 6, at 121.

124. R.R. PALMER, *supra* note 65, at 501.

fact, however, the direct contribution of the people to the constitution-making process in both countries was comparable.

The average attendance at the meetings of the Philadelphia Convention was only about thirty and its debates were held behind closed doors.¹²⁵ The public was not familiar with the issues and controversies among the members of the Convention and was not given a chance to participate in the constitutional debate before the ratification process. The French Assembly numbered over eleven hundred deputies and the constitutional principles were discussed in every house and club in Paris; "there was no privacy in the chamber, the galleries hooted and applauded as they chose."¹²⁶ There was a general consensus in France that to subject the Constitution to the further public debate in the thousands of local electoral assemblies would mean "anarchy and dissolution."¹²⁷ Consequently, the Constitution was not sent to local constituencies, but its principles were publicly discussed through the period of work of the National Constituent Assembly (28 June 1789 - 3 September 1791). Thus, the people's contribution to the drafting process has to be recognized.

Commenting on the process of amending the Constitution, Madison wrote:

As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived, it seems strictly consonant to the republican theory to recur to the same original authority, not only whenever it may be necessary to enlarge, diminish, or new-model the powers of government, but also whenever any one of the departments may commit encroachments on the chartered authorities of the others.¹²⁸

The United States Constitution provides that the initiation of the amending process would require a vote of two-thirds of both houses of the Congress or the application of the legislatures of two-thirds of the several States. The amendments were to be ratified either by the legislatures or by special conventions of three-fourth of the States.¹²⁹

The French Constitution of 1791 also declares that only "the nation has the imprescriptible right to change its Constitution."¹³⁰ France, however, did not have a federal form of governmental organization; hence, the referral of important decisions to *assemblies*

125. C. SWISHER, *supra* note 9, at 30, 41.

126. R.R. PALMER, *supra* note 65, at 494.

127. *Id.* at 496.

128. THE FEDERALIST NO. 49, at 347-48 (J. Madison) (B. Wright ed. 1961).

129. U.S. CONST. art. V.

130. CONST. OF 1791 tit. VII (Fr.).

primaires seemed unnecessary. The central legislative assembly was deemed to represent the nation. "What is a nation?" Sieyes described it as, "a body of associates living under a common law and represented by the same legislature."¹³¹

To amend the Constitution, the future French National Legislature was expected to turn into an "Assembly of Revision." This Assembly was to be composed of the regular members of the national legislative assembly augmented by one-third through the election of delegates in the departments. An initiative to change the Constitution had to be supported by three consecutive national legislatures. Their decree for the convocation of the Assembly of Revision was not to be subject to the sanction of the king, and the Constitution did not provide for any further ratification of the amendments.

People established constitutions and people were addressees of the constitutional rights, but not all the people equally. The American and French Constitutions were portrayed as democratic in contrast with the non-democratic Polish Constitution of May 3, 1791, but the term "democratic" in reference to both Constitutions requires explanation.

Since the very moment of the adoption of the American Constitution, the American political system was proclaimed the most democratic in the world. The French Constitution retained monarchy but its populist character has not been questioned. The Constitution was adopted in the name of "the third estate," which Sieyes claimed to be "a complete nation."¹³² The Act of 1791 declared that "all powers emanate from the nation."¹³³ The framers of both Constitutions claimed that the documents rested on the solid basis of the *consent of the people*.

The Polish Constitution was adopted four months before the French Act and provided an apparently similar declaration. It proclaimed that "all power in the human community takes its origins in the will of the nation."¹³⁴ Poland was, however, recognized as the Commonwealth of the Nobility and the Constitution did not undermine the nobility's monopoly on political power. It declared that the nobility would be favored "private and public life" and guaranteed all

131. Sieyes, *What is the Third Estate?*, in A DOCUMENTARY SURVEY OF THE FRENCH REVOLUTION 42, 44 (J. Stewart ed. 1951) (emphasis omitted).

132. *Id.* at 43.

133. CONST. OF 1791 tit. III, ch. 2 (Fr.).

134. U. RZADOWA Z DN 3-GO MAJA 1791 (M. Handelsman ed. 1791) [hereinafter POLISH CONST. OF 1791], art. V, TRZY KONSTYTUCJE [Three Constitutions] 4 (1915) (English text published separately by Polish Section of Int'l Ass'n Const. L. in 1985).

its liberties. The Polish Act introduced the burghers into the political arena, but they could work actively only in the Sejm (Polish Legislative Assembly) Commissions; they had "vocem activam" in matters concerning towns and commerce and were "consulted" (vocem consultivam) in other matters. The Polish Constitution was *antiaristocratic* in the sense that it abolished the ranks and degrees of nobility, but it did not abolish hereditary nobility as the French and American Acts did.¹³⁵ Democracy in Poland was traditionally understood as "democracy among nobility." On the one hand, the Polish Constitution was "non-democratic" in the sense that it limited the group of addressees of political rights to a single social estate; on the other hand, in comparison with West-European nations, the Polish nobility was a particularly numerous social group; it constituted ten percent of the whole population.

In fact, although the framers of the American and French Constitutions opposed the "elitist" concept of the nation and did not disenfranchise any single group of property owners, they did not put voters and citizens on the same footing. "Democracy" in both the United States and Western Europe did not mean universal suffrage. In the words of one commentator,

"Democracy" was also termed "pure," "perfect," or "simple" democracy, in order to keep it distinct from a democratic but representative regime. Jefferson called it a "republic" or a "pure republic," and called "government democratic but representative" the parliamentary regime based on universal suffrage. Madison gave "democracy," the common meaning and termed the representative system "republic"; thus the United States was a republic and not a "democracy."¹³⁶

In America, as in Poland, "people" were divided between active voters and passive non-voters, and in theory, it was assumed that voters would represent the interests of all people.¹³⁷ Although the qualifications for voters was left to the states and varied substantially, it could be assumed that only about four-fifths of the adult white males in America possessed the vote.¹³⁸

The French Constitution associated the principles of royalism and antiaristocracy with a representative government. "Individual wills are the sole elements of the general will," wrote Sieyès, and in the

135. POLISH CONST. OF 1791, *supra* note 134, art. II; U.S. CONST. art. I, § 9, cl. 8; CONST. OF 1791 preamble (Fr.); *see also* Decree Abolishing Hereditary Nobility and Titles of June 19, 1790.

136. Salvermini, *The Concepts of Democracy and Liberty in the Eighteenth Century*, in THE CONSTITUTION RECONSIDERED 105, 106 (C. Read ed. 1938).

137. E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 1 (1954).

138. C. WARREN, THE MAKING OF THE FEDERAL CONVENTION 400 (1966).

period of the Constituent Assembly, his opinion prevailed.¹³⁹ The French Constitution proclaimed that the French political system was representative, and that a body of associated individuals was to be represented by the national legislature and the king. Representatives were not to be bound by the instructions of their constituencies. Sieyes wrote, "Since they are the *only* depositaries of the general will, they have no need to consult their constituents"¹⁴⁰

The individuals, who were the subjects of constitutional rights, however, were divided, as in the United States, into "passive citizens" without the vote, and "active citizens," who had the right to vote. "Active citizens" did not elect deputies to the national assembly directly. They voted for "electors," who solely, in fact, were granted full political citizenship. To be an "active citizen" it was necessary to be a Frenchman of at least twenty-five years of age, domiciled in the electoral district and to pay a direct tax equal at least to the value of three days' labor. An "active citizen" could be chosen as elector if he owned a property equal to 200 days' labor or was a tenant of a dwelling equal to the value of 150 days' labor.¹⁴¹ All active citizens could be elected representatives of the nation. It had been determined by the Constituent Assembly that on May 27, 1791 there were 4,298,360 "active citizens" in a population of between 25,000,000 and 26,000,000. "I would judge," R.R. Palmer wrote,

that a quarter of adult males may have been excluded from the vote by reason of poverty One is led to conclude, if the total of men over 25 was about 6,500,000, that almost seventy of them in a hundred had the vote, about fifty in a hundred could serve as electors, and one in a hundred could qualify as a national deputy, before August 1791.¹⁴²

The constitutional systems of the countries that adopted the first constitutions showed the constant tendency to extend voting rights; it took, however, over a century for them to reach a level of universal suffrage. In fact, it has to be admitted that it was Poland that first (of the three countries) equated voters to adult citizens through the enfranchisement of women in 1918. The Nineteenth Amendment enfranchised women in the United States in 1920; the same right was granted by France not before 1944.

The most impressive similarity of the first three constitutions was always viewed in their adoption of the principle of the division of power. The framework for the application of this principle was set by

139. Sieyes, *supra* note 131, at 50.

140. *Id.* at 54.

141. CONST. OF 1791 tit. III, ch. I, § 2, cl. 7 (Fr.).

142. R.R. PALMER, *supra* note 65, at 523, 526.

Articles I, II, and III of the American Constitution, Article V of the Polish Constitution, and Title III of the French Constitution. It was, however, often raised that the doctrine of the division of powers was applied differently by each of these constitutions.

America completed her struggle for independence before the adoption of the Constitution, and liberty of the citizens did not seem to be endangered by the abuses of executive power. Division of powers in America was intended to protect the system established by the Constitution against the domination of any single power. The Constitution emphasized the separation of powers and worked out the elaborate system of protective checks and balances. In fact, however, neither Locke nor Montesquieu believed that the powers should be equal and have no control or even influence over the acts of each other.¹⁴³ The powers in the English model were neither equal nor well separated.

In Poland, the Constitution was adopted by the nobility whose liberties did not require further protection. The Polish concept of the division of powers entailed balancing the excessive freedom of the big magnates and to strengthening the authority of the king. The critics of the Polish Constitution argued frequently that, despite the declaration that the highest authority was vested in the three powers, the whole concept of the distribution, separation and balances of the main "branches" of government was not accomplished. The Constitution departed from the originally-considered "checks and balances" and granted far superior power in the Sejm.

In France, the division of powers was to impose efficient restraints on the executive power and to protect citizens against the absolutism of monarchs. On the other hand, the king already existed as a force that could not be disregarded.¹⁴⁴ The Constitution of 1791 offered a settlement by compromise. It confirmed that the person of the hereditary monarch was inviolable and sacred; he was, however, bound by law and proclaimed to be only a representative of a nation.

The French monarch was not as impotent as the Polish king but far less powerful than the American president. The form of government was declared to be monarchical and the executive power was delegated to the king, and exercised under his authority by ministers and other responsible agents. Contrary to the Polish Constitution, which limited the king's selection of ministers and allowed the Sejm to vote them down, the French Constitution left the choice and dismissal of ministers solely to the king. Distinguishable from the Polish

143. See E. WADE & A. BRADLEY, *supra* note 123, at 25.

144. J. MOURNIER, *CONSIDERATIONS SUR LES GOUVERNEMENTS ET PRINCIPALEMENT SUR CELUI QUI CONVIENT A LA FRANCE* 37-38 (1789).

ministers who had guaranteed seats in the Senate, the French ministers, like the officers of the American executive departments, could not combine executive and legislative functions. On the other hand, Polish as well as French ministers had to countersign the king's resolutions, which otherwise were not executable.

The American and French Constitutions vested in the head of the executive the power to veto the decisions of the legislature. The Polish Constitution vested this right in the Senate, in which the king had only one vote and a second vote in the case of a draw. The Polish Senate's veto could be overruled by the Chamber of Deputies in the second ballot at a subsequent session. The President of the United States' veto can be overruled only by a vote of two-thirds of the members of both houses of Congress. In France, there was a good deal of discussion over whether the king should have an "absolute veto" or a "suspensive veto" with a right to appeal to the people during successive elections. After the king's announcement through Necker that he supported the idea of a "suspensive veto," the Assembly voted down the absolute veto by a margin of 673 to 325.¹⁴⁵ The Constitution provided that when the two legislatures following the one in which the decree was introduced have again successively presented same decree in the same terms, the king shall be deemed to have given his sanction despite the former refusal.¹⁴⁶

The French king, similar to the Polish monarch and the American president, was the supreme head of the army and navy; also akin to the American and Polish systems, the right to declare war was vested in the legislative body. The French Constitution provided that, in the event of imminent or actual hostilities, the king should immediately notify the legislative body and cease hostilities upon the decision of the Assembly. The American and the French Constitutions gave to the heads of government the right to "maintain political relations abroad" with the power to make treaties with "advice and consent of the two thirds of Senate," in America and "subject to ratification by the legislative body" in France.¹⁴⁷ The Polish Constitution emphasized more strongly the control of the legislature over foreign relations. The Polish monarch was prohibited "to conclude definitively any treaty, or any diplomatic act and was only allowed to carry on temporary negotiations with foreign Courts, and facilitate temporary occurrences, always with reference to the Diet."¹⁴⁸ On the other hand, the Polish

145. R.R. PALMER, *supra* note 65, at 497.

146. CONST. OF 1791 tit. III, ch. III, § I, cl. 1 (Fr.).

147. U.S. CONST. art. II, § 2, cl. 2; CONST. OF 1791 tit. III, ch. III, § 1, cl. 1 (Fr.).

148. POLISH CONST. OF 1791, *supra* note 134, art. VII.

monarch was offered a legislative initiative which he exercised together with his ministers (the Council of Guardians); the French king did not have a direct initiative, he could only "invite the legislative body to take a matter under consideration."¹⁴⁹

Unlike the American Congress and the Polish Sejm, the French Assembly became a single house. The lack of federal organization and the fear of "the degrading yoke of aristocracy" in the upper house defeated the bicameral principle.¹⁵⁰

The French Assembly finally voted also in favor of the Sieyès' proposal that the deputies would represent the entire nation and that they could not receive any mandate from their constituencies.¹⁵¹ The similar instructions that normally were given to the deputies by the Polish dietines were abolished by the Constitution of May 3, 1791. The legislative functions were concentrated in the French National Assembly and the functions of the primary and electoral assemblies were limited to election.

All three Constitutions declared that the judiciary constituted a separate branch which was distinguished from the other powers. Actually, the textual similarities of the Polish and the French Acts with regard to the independence of the judiciary are quite striking: both Constitutions proclaim that "the judicial power may not be employed by the legislative body or the King but only by the elective magistrates."¹⁵² The French Constitution incorporated the essentials of the Decree Reorganizing the Judiciary of August 16, 1790. It placed at the peak of the French judicial system a single Court of Cassation which, upon the recognition of the violation of the rules of a proceeding or the law, could quash the judgment and remand the case to the lower courts. A National High Court was established as a court for crimes against the security of the State.¹⁵³

VII. FRENCH REVOLUTIONARY EXPERIENCE AND AMERICAN POLITICS AFTER 1789

The French Constitution of 1791 received favorable attention by the American public. The House praised the constitution for its "wis-

149. CONST. OF 1791, tit. III, ch. III, § 1, cl. 1 (Fr.).

150. J. MOUNIER, MOTIFS PRESENTES DANS LA SEANCE DE L'ASSEMBLEE NATIONALE DU SEPTEMBRE 1789, AU NOM DU COMITE DE CONSTITUTION, SUR DIVERS ARTICLES DU PLAN DU CORPS LEGISLATIF, ET PRINCIPALEMENT SUR LA NECESSITE DE LA SANCTION ROYALE (published separately); quoted in R.R. PALMER, *supra* note 65, at 494.

151. CONST. OF 1791 tit. III, ch. I, § III, cl. 7 (Fr.).

152. POLISH CONST. OF 1791, *supra* note 134, art. VIII; CONST. OF 1791, tit. III, ch. V, § 1 (Fr.).

153. CONST. OF 1791 (Fr.).

dom and magnanimity," but the Senate withdrew "magnanimity" from its statement and simply acknowledged the fact of adoption.¹⁵⁴ This symbolic gesture appeared to begin the process of the polarization of the positions taken by the commentators of the French events who in the next years were to split distinctly into two groups: those coupling and those separating the American and French Revolutions. The first group, led by Paine and Jefferson, assumed and emphasized that the French uprising was an "afterglow" of the American struggle for liberty and had "produced incalculable blessings to [France]" and promoted "interests of thousands."¹⁵⁵ The second faction, which assembled around Hamilton, preferred to believe that the Revolution in Europe was the outbreak of an unruly and ignorant populace. They believed that the French Revolution, particularly in its Jacobinian stage, lacked legality and could endanger the achievement of the American struggle for freedom.¹⁵⁶ Hamiltonians were terrified by the changing teams of the French leaders, general defiance of authority, symptoms of anarchy and violence, and lack of security of property. In their minds, the French Revolution discredited democracy.¹⁵⁷

Although the French Constitution of 1793 was widely criticized by American statesmen, the public was still enthusiastic, mostly due to the activity of the democratic societies which mushroomed all over the country. These democratic clubs, which approved wholeheartedly all that was happening in France, were able to hold for some time a large part of the public opinion in favor of the French Revolution. In fact, the activity of the societies intensified a critical reaction of the Washingtonian leaders and helped the Federalists neutralize pro-French enthusiasm.

In 1793, the French Revolution became a major issue in American politics. It contributed to the crystallization of the line that separated the two emerging parties.¹⁵⁸ In 1793, when France began to seize American ships, war seemed inevitable. In light of Jay's mission to

154. C. HAZEN, *supra* note 74, at 163. For critical comments of Gouverneur Morris, see G. LYCAN, ALEXANDER HAMILTON, AMERICAN FOREIGN POLICY 138 (1970).

155. See A. MASON, *supra* note 74, at 420; D. MALONE, *supra* note 65, at 355-56; G. LYCAN, *supra* note 154, at 132.

156. R.R. PALMER, *supra* note 65, at 525.

157. R. MORRIS, *supra* note 76, at 58, 71; see also J. MILLER, ALEXANDER HAMILTON, PORTRAIT IN PARADOX 451 (1959).

158. J. MILLER, THE FEDERALIST ERA 1789-1801, at 99, 126 (1960). Although the split between Jefferson and Hamilton was caused by a more general conflict of ideas and interests, the process of emergence of the two parties was colored by the foreign policy issue. See D. MALONE, *supra* note 65, at 445. For reaction of the French Ministers in the United States to the changing attitudes toward France, see Letter from Jean Termant to Minister of Foreign Affairs (Jan. 12, 1793), reprinted in 2 CORRESPONDENCE OF THE FRENCH MINISTERS TO THE UNITED STATES 1791-1797, at 166-67 (F. Turner ed. 1904).

England, the Federalists could celebrate at least temporary victory of their anti-French politics. In fact, the contest between the two parties blocked the influence of the French Revolution in America. Although the French Constitution of 1795 was favorably construed as an attempt to return to the patterns set by the American Revolution, the momentum of French influence was lost. The Constitution of 1795 supplemented the Rights of Man with nine paragraphs on the duties of the citizen. However, the subsequent Napoleonic constitutions were more pragmatic, dropping the sections on the Rights of Man along with a great quantity of the ideology that had sanctioned them.¹⁵⁹ As David M. Potter wrote, "After the lapse of a few more years, Napoleon emerged as the supreme power in the land of liberty, equality, and fraternity, and by that time even the most ardent American Jacobin could no longer keep up the pretense that France was merely applying American beliefs in her own distinctively Gallic way."¹⁶⁰

Concluding, it must be admitted that the French Revolution generated a multiplicity of emotions favorable to the search for new foundations of a free government. It focused public attention on the struggle for civil rights and liberties. In spite of the enormous emotional involvement of the American public in French politics, the permanent interflow of opinions between both countries, and the considerable contribution of American political thought to the formation of the French constitutional structures, the influence of the French revolutionary documents on the American constitutional development remained insignificant.

VIII. CONCLUSIONS

The question we are left with: Why and in what circumstances do we make constitutions devaluated in our times? The constitution-making process has become routine and every self-respecting nation has sought to adopt a constitution. However, the answer to this simple question was not self-evident in the beginning of the constitutional era, and the students of constitutional history cannot avoid asking why the first written constitutions were adopted at approximately the same time. Was this timing due to the considerable interflow of ideas be-

159. See Bruun, *The Constitutional Cult in the Early Nineteenth Century*, in *THE CONSTITUTION RECONSIDERED* 263-64 (C. Read ed. 1938). For the texts of the Constitutions of 1795 and 1799, see J. STEWART, *supra* note 103, at 571-612, 768-79.

160. Potter, *People of Plenty*, in A. MASON, *supra* note 74, at 890. Howard M. Jones observed that "afterwards, when the British navy closed the seas, and our only source of information about France was London, the prestige of the French steadily declined, so that from 1800 to 1815 the teaching of French in the United States fell off." H.M. JONES, *supra* note 68, at 216.

tween the countries that created the first constitutions? Is the intellectual background of the framers of these acts at least comparable?

Those who follow the "traumatic" approach to constitutional studies find a relatively easy explanation of the above-mentioned phenomenon. In some dramatic moments of history, they argue, nations have to make constitutional decisions. As Herbert J. Spiro wrote,

In the life of a political system, such fundamental decisions are made at the time of its founding. They are expressed in documents like the Declaration of Independence and the Constitution of the United States. Decisions of highest importance may also be made in the course of a violent or peaceful revolution, or as the result of a war. Many decisions of such basic importance have had to be made all over the world, especially during the last hundred years: recently they have had to be made with increasing frequency.¹⁶¹

Following this approach, it was argued that the emergence of the American Constitution was stimulated by the War of Independence. The French Revolution and the First Partition of Poland accelerated the constitution-making processes in France and Poland. The Spanish Constitution of 1812 was promulgated in the midst of the War of Independence against French domination. The Norwegian Constitution of 1814 was adopted in opposition to the Treaty of Kiel (January 14, 1814), which renounced the sovereignty of Norway in favor of its union with Sweden. We can multiply these examples. The point is that for those who follow this approach, the question about the "timing" of the first constitutional works does not make any sense. The adoption of a constitution is due to local geopolitical circumstances, and the framing of several constitutions at approximately the same time is simply coincidental.

The explanatory value of the 'traumatic' approach is far from satisfactory, and its applicability to historical constitutional studies requires careful verification. The history of every nation is abundant in dramatic events that in some way can be used as all-explanatory instruments. Reviewing the above-mentioned examples, one has to admit that of the first three written constitutions only the French one shows the direct and unquestionable links with dramatic, revolutionary events. The links of the American Constitution with the War of Independence are not doubtful, but are less direct. The constitutional consciousness grew with the rise of the American Union and was more directly effected by the failure of the Confederation and the defects of the Articles of Confederation than by the Declaration of Independence, which was adopted eleven years before the promulgation of the

161. H. SPIRO, *GOVERNMENT BY CONSTITUTION* 5 (1959).

Constitution. The First Partition of Poland (1772) stimulated the efforts of the movement for reform of the Polish political system but, similar to the situation of the United States, this dramatic event occurred nineteen years before the Constitution was adopted. This period was abundant in political, social and intellectual events not less significant for the constitution-making process than the dramatic loss of territory.

As argued many times in this article, the complexity of the constitution-making process can be successfully comprehended only on the basis of sound studies of many correlated factors. While the dramatic political events can enable, speed up, or necessitate the constitutional decisions, they can hardly provide information, knowledge, or experience indispensable for the successful completion of constitutional works. The study of the development of the first constitutions shows convincingly that the first written "basic laws" simply did not emerge during a period of national trauma. While the dissemination of the constitutional experience currently makes possible the quick adoption of well-tested constitutional principles, the successful formation of the first constitutional movements required time, constitutional traditions, and the impressive interflow of political, social and philosophical ideas. It demanded the development of the constitutional consciousness, the set of attitudes, beliefs and feelings about government, distribution of powers, rights and duties of citizens, their relationships to the ruling structures, and particularly, their participation in politics.

Constitutional consciousness can emerge only in the lengthy process of shaping political feelings and attitudes. Knowledge and experiments as well as failures and successes are required to develop institutions and procedures that are able to limit the arbitrariness of power and regulate social and political relations. Even those constitutions that are not adopted, but granted by the rulers, demand some knowledge, maturity, and social pressure. Time is required to reach a necessary social consensus. Although the durability and maturity of constitutional traditions always affect the value of the constitutional structures, one may argue that the time factor has become less important with the growth of a world-wide constitutional experience. Yet, at the commencement of the constitutional era, the maturity of the constitutional traditions was a "condition sine qua non" of the successful constitutional works.

The success of the first constitutional works is largely attributable to the mature intellectual background of the constitutional drafters, and to their ability to draw from the experience of other nations. It required the appropriate channels of information that could facilitate

the exchange of ideas between the nations that began to test the first constitutional structures. The significant interflow of opinions between eighteenth-century Europe and America allowed the drafters of the constitutional acts to rest their constitutional structures on similar principles without depriving the first constitutions of their national tincture; it made the first constitutions distinct but similar.