

# Chapter 1



## CONSTITUTIONAL GOVERNMENT

The Founding Fathers were consummate politicians, but also brilliant political philosophers in their own right. They did not hesitate to draw upon the rich Western tradition of political philosophy as they searched for an ideal model of government. Above all, they wanted a government responsive to the people but also one of balanced and limited powers.

### Constitutional Democracy: The Rule of Law

The Western political heritage has emphasized the importance of democracy and the rule of law. Aristotle's *Politics* stressed the viability of democracy, provided there are sufficient checks upon unlimited popular rule.

The American constitutional tradition reflects the beliefs of many political philosophers. One of the most dominating figures is John Locke. It is not suggested that Locke was read by most of the colonists; but only that his ideas invariably found their way into many writings of eighteenth-century America, most importantly the Declaration of Independence. In a letter to Henry Lee in 1825, Thomas Jefferson wrote:

"When forced . . . to resort to arms for redress, an appeal to the tribunal of the world was deemed proper for our justification. This was the object of the Declaration of Independence. Not to find out new principles, or new arguments, never before thought of, not merely to say things which had never been said before; but to place before mankind the common sense of the subject, in terms so plain and firm as to command their assent, and to justify ourselves in the independent stand we are compelled to take. Neither aiming at originality of principle or sentiment, nor yet copied from any particular and previous writing, it was intended to be an expression of the American mind, and to

give to that expression the proper tone and spirit called for by the occasion. All its authority rests then on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right [such] as Aristotle, Cicero, Locke, Sidney, etc. . . ."

In May 1790, Jefferson wrote: "Locke's little book on government is perfect as far as it goes." Although Jefferson's admiration of Locke was perhaps greater than that of many other colonists, his views did reflect a mood of eighteenth-century America. Locke's *Second Treatise, Of Civil Government* attempted to trace the reasons why people enter into political societies in the first place. The eighteenth century, no less than the twentieth, was an era characterized by attempts to be "scientific" in political formulations. Locke's *Second Treatise*, first published in 1690, reflected the scientific emphasis that was to prevail so widely beginning in the eighteenth century. To Locke, natural law was objectively valid, and therefore once ascertained, governments based upon it would have a superior claim to legitimacy. Locke is notable for his discussions of natural law, from which he derived the "best" form of government. In reading Locke, one should observe how much importance he placed upon property rights and the right of the people to dissolve government once it no longer meets their legitimate expectations.



*John Locke*

## SECOND TREATISE, OF CIVIL GOVERNMENT



### Of the State of Nature

To understand political power aright, and derive it from its original, we must consider what estate all men are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of their possessions and persons as they think fit, within the bounds of the laws of Nature, without asking leave or depending upon the will of any other man.

A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another, there being nothing more evident than that creatures of the same species and rank, promiscuously born to all the same advantages of Nature, and the use of the same faculties, should also be equal one amongst another, without subordination or subjection, unless the lord and master of them all should, by any manifest declaration of his will, set one above another, and confer on him, by an evident and clear appointment, an undoubted right to dominion and sovereignty. . . .

But though this be a state of liberty, yet it is not a state of license; though man in that state have an uncontrollable liberty to dispose of his person or possessions, yet he had not liberty to destroy himself, or so much as any creature in his possession, but where some nobler use than its bare preservation calls for it. The state of Nature has a law of Nature to govern it, which obliges every one, and reason, which is that law, teaches all mankind who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions. . . . And, being furnished with like faculties, sharing all in one community of Nature, there cannot be supposed any such subordination among us that may authorize us to destroy one another, as if we were made for one another's uses, as the inferior ranks of creatures are for ours. Every one as he is bound to preserve himself, and not to quit his station wilfully, so by the like reason, when his own preservation comes not in competition, ought he as much as he can to preserve the rest of mankind, and not unless it be to do justice on an offender, take away or impair the life, or what tends to the preservation of life, the liberty, health, limb, or goods of another.

And that all men may be restrained from invading others' rights, and from doing hurt to one another, and the law of Nature be observed, which willeth the peace and preservation of all mankind, the execution of the law of Nature is in that state put into every man's hands, whereby every one has a right to punish the transgressors of that law to such a degree as may hinder its violation. For the law of Nature would, as all other laws that concern men in this world, be in vain if there were nobody that in the state of Nature had a power to execute that law, and thereby preserve the innocent and restrain offenders; and if any one in the state of Nature may punish another for any evil he has done, every one may do so. For in that state of perfect equality, where naturally there is no superiority or jurisdiction of one over another, what any may do in prosecution of that law, every one must needs have a right to do.

And thus, in the state of Nature, one man comes by a power over another, but yet no absolute or arbitrary power to use a criminal, when he has got him in his hands, according to the passionate heats or boundless extravagancy of his own will, but only to retribute him so far as calm reason and conscience dictate, what is proportionate to his transgression, which is so much as may serve for reparation and restraint. . . .

Every offence that can be committed in the state of Nature may, in the state of Nature, be also punished equally, and as far forth, as it may, in a commonwealth. For—though it would be beside my present purpose to enter here into the particulars of the law of Nature, or its measures of punishment, yet it is certain there is such a law, and that too as intelligible and plain to a rational creature and a studier of that law as the positive laws of commonwealths, nay, possibly plainer; as much as reason is easier to be understood than the fancies and intricate contrivances of men, following contrary and hidden interests put into words. . . .

## Of the Ends of Political Society and Government

If man in the state of Nature be so free as has been said, if he be absolute lord of his own person and possessions, equal to the greatest and subject to nobody, why will he

part with his freedom, this empire, and subject himself to the dominion and control of any other power? To which it is obvious to answer, that though in the state of Nature he hath such a right, yet the enjoyment of it is very uncertain and constantly exposed to the invasion of others; for all being kings as much as he, every man his equal, and the greater part no strict observers of equity and justice, the enjoyment of the property he has in this state is very unsafe, very insecure. This makes him willing to quit this condition which, however free, is full of fears and continual dangers: and it is not without reason that he seeks out and is willing to join in society with others who are already united, or have a mind to unite for the mutual preservation of their lives, liberties, and estates, which I call by the general name—property.

The great end and chief end, therefore, of men uniting into commonwealths, and putting themselves under government, is the preservation of their property; to which in the state of Nature there are many things wanting.

Firstly, there wants an established, settled, known law, received and allowed by common consent to be the standard of right and wrong, and the common measure to decide all controversies between them. For though the law of Nature be plain and intelligible to all rational creatures, yet men, being biased by their interest, as well as ignorant for want of study of it, are not apt to allow of it as a law binding to them in the application of it to their particular cases.

Secondly, in the state of Nature there wants a known and indifferent judge, with authority to determine all differences according to the established law. For every one in that state being both judge and executioner of the law of Nature, men being partial to themselves, passion and revenge is very apt to carry them too far, and with too much heat in their own cases, as well as negligence and unconcernedness, make them too remiss in other men's.

Thirdly, in the state of Nature there often wants power to back and support the sentence when right, and to give it due execution. They who by any injustice offended will seldom fail where they are able by force to make good their injustice. Such resistance many times makes the punishment dangerous, and frequently destructive to those who attempt it.

Thus mankind, notwithstanding all the privileges of the state of Nature, being but in an ill condition while they remain in it are quickly driven into society. Hence it comes to pass, that we seldom find any number of men live any time together in this state. The inconveniences that they are therein exposed to by the irregular and uncertain exercise of the power every man has of punishing the transgressions of others, make them take sanctuary under the established laws of government, and therein seek the preservation of their property. It is this makes them so willingly give up every one his single power of punishing to be exercised by such alone as shall be appointed to it amongst them, and by such rules as the community, or those authorised by them to that purpose, shall agree on. And in this we have the original right and rise of both the legislative and executive power as well as of the governments and societies themselves.

For in the state of Nature to omit the liberty he has of innocent delights, a man has two powers. The first is to do whatsoever he thinks fit for the preservation of himself and others within the permission of the law of Nature; by which law, common to them all, he and all the rest of mankind are one community, make up one society distinct from all other creatures, and were it not for the common and vi-

cioussness of degenerate men, there would be no need for any other, no necessity that men should separate from this great and natural community, and associate into lesser combinations. The other power a man has in the state of Nature is the power to punish the crimes committed against that law. Both these he gives up when he joins in a private, if I may so call it, or particular political society, and incorporates into any commonwealth separate from the rest of mankind.

The first power—viz., of doing whatsoever he thought fit for the preservation of himself and the rest of mankind, he gives up to be regulated by laws made by the society, so far forth as the preservation of himself and the rest of that society shall require; which laws of the society in many things confine the liberty he had by the law of Nature.

Secondly, the power of punishing he wholly gives up, and engages his natural force, which he might before employ in the execution of the law of Nature, by his own single authority, as he thought fit, to assist the executive power of the society as the law thereof shall require. For being now in a new state, wherein he is to enjoy many conveniences from the labor, assistance, and society of others in the same community, as well as protection from its whole strength, he is to part also with as much of his natural liberty, in providing for himself, as the good, prosperity, and safety of the society shall require, which is not only necessary but just, since the other members of the society do the like.

But though men when they enter into society give up the equality, liberty, and executive power they had in the state of Nature into the hands of the society, to be so far disposed of by the legislative as the good of the society shall require, yet it being only with an intention in every one the better to preserve himself, his liberty and property (for no rational creature can be supposed to change his condition with an intention to be worse), the power of the society or legislative constituted by them can never be supposed to extend farther than the common against those three defects above mentioned that made the state of Nature so unsafe and uneasy. And so, whoever has the legislative or supreme power of any commonwealth, is bound to govern by established standing laws, promulgated and known to the people, and not by extemporary decrees, by indifferent and upright judges, who are to decide controversies by those laws; and to employ the force of the community at home only in the execution of such laws, or abroad to prevent or redress foreign injuries and secure the community from inroads and invasion. And all this to be directed to no other end but the peace, safety, and public good of the people. . . .

## Of the Extent of the Legislative Power

The great end of men's entering into society being the enjoyment of their properties in peace and safety, and the great instrument and means of that being the laws established in that society, the first and fundamental positive law of all commonwealths is the establishing of the legislative power, as the first and fundamental natural law, which is to govern even the legislative itself, is the preservation of the society and (as far as will consist with the public good) of every person in it. This legislative is not only the supreme power of the commonwealth, but sacred and unalterable in the hands where the community have once placed it. Nor can any edict



