

I. The Research Program on Constitutional Design Disappeared for more than a thousand years

- A. Romans continued to be educated in Greece for many centuries, and, thus, even after Greece had ceased to be a major economic and political power, it remained a center of teaching and scholarship for several centuries.
- B. But with replacement of the Roman Republic in the first century BCE by the Roman Empire, interest in representative governmental systems waned.
- i. Indeed, one could be executed for writing and insisting on the principle of representation as Cicero was in 43 BCE.
 - ii. Although the degree of centralization within the Empire increased and decreased several times, which suggests that interest in some aspects of constitutional design remained present, there are no famous political works from the Imperial period.
- C. The rise of Catholicism after the Empire collapsed also discouraged further research on constitutional matters, both because the Church redirected intellectual energy toward matters of faith and biblical interpretation, and because they, like the Imperial Romans, were disinclined to support (or allow) research that might question hierarchical rule.
- i. Indeed, most of the books written by Greek scholars were lost or destroyed in accidental and intentional fires.
 - And, so the Greek philosophical approach to constitutional design essentially disappeared from Western Europe.
 - The ideas did not entirely disappear as some Greek philosophy was incorporated into Christian intellectual traditions--especially that of Plato, through the writings and theology of St. Augustine.
 - ii. There are no famous European works on politics or constitutional design until late in the middle ages, with famous pieces written by Machiavelli (The Prince, 1513) and Moore (Utopia, 1516).
 - iii. To the extent that the issues raised by Plato and Aristotle continued to be studied, this scholarship was undertaken at Islamic universities, where Arabic translations of Aristotle and Plato continued to be read.
 - iv. Indeed, Aristotle and Plato were only indirectly reintroduced to Europe as an unintentional consequence of bringing Spain back into Christian Europe.

- D. In 1496, Catholic Spain headed by Queen Isabel and King Ferdinand (who had joined the two northern kingdoms of Spain through marriage) finally drove the Moslems back across the straits of Magellan.
- i. The Christians of that time were not, as tolerant as the Moslems of that time and demanded that all believers in other faiths convert to Catholicism or leave.
 - ii. Among those who refused to convert, were a number of Jewish and Greek Orthodox scholars who had worked in the libraries and universities of Islamic Spain.
 - iii. When they left Spain for other parts of Europe, especially Northern Italy and Constantinople, they took translations of Plato, Aristotle, and Roman Law with them.
 - iv. Indeed, the late renaissance benefited enormously from this scholarly migration.
 - The rediscovery of the Greek texts renewed interest in humanistic (as opposed to theistic) sculpture, art, and science.
 - It eventually lead to renewed interest in legal theory and social science, although this took a bit longer.
 - Life on earth appeared to be a bit more interesting, and susceptible to analysis than had been thought.
- E. Of course, the rediscovery of Plato and Aristotle were not the only important events of 1500, the New World was recognized as such, Guttenburg's printing press was invented (perhaps with a bit of luck from Chinese designs) and Luther penned his famous theses criticizing corruption within the Catholic Church.
- Together, these stimulated a great increase in literacy as books became far cheaper to acquire, and the new Protestants insisted that their members learn to read the bible for themselves.
 - A new wave of university building began, as new universities were founded, while others were expanded.
- F. The success of Luther's and Calvin's theological reinterpretations lead to a great rebellion within the Catholic church as many became interested in reforming the church and church doctrines--and protested against the treatment of Luther and Calvin--while others affirmed the Church as it was.
- i. Indeed, the disagreements were so intense that they, in combination with other political tensions regarding the centralization of power, lead to war.

- ii. Among the more important political consequences of these religious wars was a division of the Church and increased decentralization in the Holy Roman Empire.
 - Essentially, the south remained Catholic, while the North and West broke away from Rome and accepted the revised doctrines--and thus became Protestant.
 - The Holy Roman Empire ceased being Catholic and became more obviously decentralized, as local rulers (princes, barons, counts, etc.) were given the power to determine the religion within their territories.
 - The Dutch Republic seceded from the Hapsburg empire (Spain) in 1575-85, and became a center of both Protestant and liberal thought.
- iii. The Dutch Republic also became a center of republican constitutional experimentation--out of necessity.
 - (Although they invited several kings and queens to assume power, no sovereign power would take them under their wing and bear the expense and risk associated with protecting them from the very powerful Hapsburgs.)

II. The Dutch Republic, the Enlightenment, and Representative Constitutional Theory

- A. In addition to matters of religion, the Dutch was motivated by concerns about arbitrary and excessive taxation and with the loss of local authority.
- B. The Dutch grappled with the problem of forming a new government, nearly a hundred year before the contract theories of Hobbes (1651) and Locke (1689) were published, and without Montesquieu's (1748) advice regarding the balance of power.
- C. In 1579, the northern provinces signed a treaty that was part defense alliance and part constitution for a new federation (the *Union of Utrecht*).

The *Union of Utrecht* created a weak central government that accommodated the long standing Dutch interest in local autonomy by modifying existing Burgundian institutions.

 - i. Article 1 united the seven provinces "as if a single province," but also assured the provinces and cities their historic privileges.
 - ii. Article 2 permanently bound the provinces together in a mutual defense alliance. Article 9 affirmed the core procedures of the Grand Privilege, which had been much contested by the Hapsburgs. It specified that all new taxes and declarations of war and peace required the *unanimous* consent of the provinces. Other national policies would be determined by a majority of provincial votes.

- iii. Article 13 called for religious tolerance in accordance with the pacification of Gent. The provinces were free to regulate religious matters, provided that everyone remained free to exercise their own religion.
 - iv. Articles 9, 16, and 21 specified that the stadhouders were to arbitrate differences among the provinces on matters of general interest and on matters of constitutional law (Barker 1906: 99-100; Rietbergen 2002: 84).
- D. Negotiations with the Spanish continued to be fruitless, and, thus, on July 26, 1581 the States General adopted a declaration of independence (*Act of Abjuration*).

This document is strikingly similar in spirit to the post enlightenment document crafted by Jefferson and his compatriots in Philadelphia two centuries later, the "American Declaration of Independence."

- i. *The Dutch declaration includes a list of grievances, mentions the natural and ancient rights of man, and also suggests a theory of limited government:*

As it is apparent to all that a prince is constituted by God to be ruler of a people, to defend them from oppression and violence as the shepherd his sheep; and whereas **God did not create the people slaves to their prince**, to obey his commands, whether right or wrong, **but rather the prince for the sake of the subjects** (without which he could be no prince), to govern them according to equity, to love and support them as a father his children or a shepherd his flock, and even at the hazard of life to defend and preserve them. **And when he does not behave thus**, but, on the contrary, oppresses them, seeking opportunities to infringe their ancient customs and privileges, exacting from them slavish compliance, **then he is no longer a prince, but a tyrant**, and the subjects are to consider him in no other view...

All these considerations give us more than **sufficient reason to renounce the King of Spain**, and seek some other powerful and more gracious prince to take us under his protection; and, more especially, as these countries have been for these twenty years abandoned to disturbance and oppression by their king, during which time the inhabitants were not treated as subjects, but enemies, enslaved forcibly by their own governors...

So, having no hope of reconciliation, and finding no other remedy, we have, **agreeable to the law of nature** in our own defense, and **for maintaining the rights, privileges, and liberties of our countrymen, wives, and children**, and latest posterity from being enslaved by the Spaniards, been constrained to renounce allegiance to the King of Spain, and pursue such methods as appear to us most likely **to secure our ancient liberties and privileges.**¹

- ii. The second of these three excerpts shows that the Dutch leaders were initially reluctant to form a completely republican government without a Prince or King at the helm.
- But, fortunately for the history of republicanism, no King or Queen accepted the job—most likely because of the military and economic costs associated with doing so, although possibly out of deference to the norms of royalty.
 - The first and third excerpts develop an **early theory of natural rights and limited governance** more than a hundred years before Locke's *First and Second Treatises* were published in 1689.
 - (Note also the theological basis of the argument, which is quite different than Plato and Aristotle's effort to develop a purely secular theory of government.)

III. The Dutch Republic and the Enlightenment: A Haven for Nonconformists and Early Liberals

- A. The Dutch republic prospered as Protestants from the south and from other parts of Europe brought their talents and capital to this relatively free and tolerant nation.
- i. Included among its emigrants were the English Puritans as previously mentioned, but many other Protestants and nonconformists also relocated to the United Provinces from the southern provinces and from other parts of Europe.
 - ii. The population of the north grew rapidly, and commerce expanded as innovators, capitalists, craftsmen, and scholars converged on the Netherlands.
 - Amsterdam became a metropolis, and many other towns became cities.
 - A good deal of the immigration was doubtless motivated by the rapidly expanding Dutch economy, which provided greater economic opportunity for its hardworking immigrants and relatively educated population than available elsewhere in Europe.
- B. However, economic prosperity was not the only reason, or perhaps even the principal reason for the influx of persons and capital into the Netherlands.
- i. If not a liberal democracy, the United Provinces were by the standards of the time a representative federal state and a haven for nonconformist religious and political ideas.
 - ii. The magnitude and breadth of the religious emigration indicates that the conditions within the Dutch republic were relatively tolerant and well known throughout Europe.

- iii. The well-known names of many of its intellectual emigrants demonstrates that the Netherlands also provided a haven for controversial political and philosophical ideas.
- Although, the *Union of Utrecht* called for religious tolerance, as did many of the Republic's early political leaders, it was not widely accepted by provincial and urban governments.
 - However, the decentralized nature of Dutch governance meant that among the many Dutch cities, towns, and villages, most believers, and perhaps a few atheists, could find a congenial place of contemplation.
 - And, if Catholics were not free to worship in all their former places, a blind eye was turned toward their gatherings in “secret” churches, which allowed them to worship in private for three centuries.
- iv. Consequently, not all the nonconforming emigrants to the Netherlands made the trip for religious reasons.
- The controversial French philosopher and mathematician, **René Descartes**, spent more than twenty years living and writing in the Netherlands.
 - Included among its political refugees were Lord Shaftesbury, the organizer of the first political campaign in England (against the accession of James II), and his protégé, **John Locke**, whose natural rights–based social contract theories influenced American and French political thought and action a century later.
- v. In cases, in which the controversial persons themselves did not seek refuge in the Netherlands, their books often were often anonymously published in the Netherlands rather than at home.
- Among well-known political philosophers, **Montesquieu**, **Voltaire**, and **Rousseau** all at one time or another found it necessary to publish their work in the Dutch republic (Dunthorne 2004).
 - **Hobbes**, who chose refuge in France rather than the Netherlands during the English civil war, found on his return to England that several of his last books could only be published at Dutch presses (Macpherson 1985:21-2).
 - The pattern of emigration and publication during the first century or of the Dutch Republic also suggests that the ideas of limited government, tolerance, and natural rights were already present in Dutch institutions and policies well before Locke sought refuge there in 1683.

¹ This translation is taken from Thatcher (1907:189-197) as modified by Jerome S. Arkenberg. It is available on the web at: <http://www.fordham.edu/halsall/mod/1581dutch.html>.

- vi. Locke's radicalization after 1760, and his influential theories of the state, doubtless owe much to his six years in the Netherlands where many of his ideas were already more than speculative theories.
- The first and second treatises were finalized during Locke's exile in the Dutch republic as was his work on tolerance, a long-standing Dutch concern (Dunthorne 2004; Goldie 1997: xii; Schwoerer 1990).
 - At the very least, the refuge provided by the Dutch republic indirectly contributed to Locke's fame after the Glorious Revolution, insofar as his most well-known work only found its way into print *after* his safe return from the Netherlands in 1689, some of it **anonymously**.
- C. However, partly because of the success of the Dutch Republic, which was founded by a contract (the Treaty of Utrecht) and partly for other reasons, the ideas of social contracts were in the "air," although they were not carefully stated until Hobbes.

IV. Two Other Real World Contracts of the Seventeenth Century

- A. Mayflower Compact of 1620, was signed by the Puritan colonists to what became Massachusetts.
- It is one of the clearest examples of a social contract, although in the end a relatively totalitarian one. In some ways, the Plymouth colony could be regarded as a Puritan version of Plato's Republic.
- B. Mayflower Compact (from ThisNation.com)
- i. *Agreement Between the Settlers at New Plymouth, 1620*
- IN THE NAME OF GOD, AMEN. We, whose names are underwritten, the Loyal Subjects of our dread Sovereign Lord King James, by the Grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, &c. Having undertaken for the Glory of God, and Advancement of the Christian Faith, and the Honor of our King and Country, a Voyage to plant the first Colony in the northern Parts of Virginia; Do by these Presents, solemnly and mutually, in the Presence of God and one another, covenant and combine ourselves together into a civil Body Politick, for our better Ordering and Preservation, and Furtherance of the Ends aforesaid:
- And by Virtue hereof do enact, constitute, and frame, such just and equal Laws, Ordinances, Acts, Constitutions, and Officers, from time to time, as shall be thought most meet and convenient for the general Good of the Colony; unto which we promise all due Submission and Obedience.

IN WITNESS whereof we have hereunto subscribed our names at Cape-Cod the eleventh of November, in the Reign of our Sovereign Lord King James, of England, France, and Ireland, the eighteenth, and of Scotland the fifty-fourth, Anno Domini; 1620.

Signatures

- ii. [As you read through the social contract theories of Hobbes, Locke and Rousseau--and fellow travelers Montesquieu and Kant--notice the similarity between this real compact and their theoretical ones.]
- The compact includes a general consensus of all men on board the Mayflower, who signed the compact.
 - It specifies that laws will be adopted for "the general Good of the Colony."
 - It uses the term "civil Body Politic" about three decades before Hobbes' Leviathan adopted similar language, about seven decades before Locke's social contract theory, and well over a century before Rousseau would describe the "general will."
 - Note also, that this compact is not a constitution, it does not describe the subsequent government of the colony.
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- C. In addition to the Mayflower Compact, a group known as the Levelers circulated an "Agreement of the People" throughout England during the first half of the English Civil War, from 1640-1650, which called for, among other things:
- Universal male suffrage
 - Regular elections for parliament
 - The end of trade restrictions within England
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 - Essentially they were in favor of privileges of birth and title.
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 - Their proposed policies were, of course, not adopted for another two centuries.

V. Snippets from Enlightenment Constitutional Theorists

A. **Thomas Hobbes** essentially **reinvents** secular political theory and does so by grounding the theory of government in the an idea about anarchy.

- i. His government is a productive state, as in Plato and Aristotle, but he deepens in some way the meaning of "productive" focusing on peace rather than happiness. (The *Leviathan* was published in 1651 (during the English Civil War, while he was in Paris as a refuge).
- ii. The *Leviathan* deals with a number of philosophical issues before tacking politics around chapter 13.
- iii. Hobbes, on the Equality of Men (ch.13)

NATURE hath made men so equal in the faculties of body and mind as that, though there be found one man sometimes manifestly stronger in body or of quicker mind than another, yet when all is reckoned together the difference between man and man is not so considerable as that one man can thereupon claim to himself any benefit to which another may not pretend as well as he.

For as to the strength of body, the weakest has strength enough to kill the strongest, either by secret machination or by confederacy with others that are in the same danger with himself. And as to the faculties of the mind, setting aside the arts grounded upon words, and especially that skill of proceeding upon general and infallible rules, called science, which very few have and but in few things, as being not a native faculty born with us, nor attained,

as prudence, while we look after somewhat else, I find yet a greater equality amongst men than that of strength. For prudence is but experience, which equal time equally bestows on all men in those things they equally apply themselves unto.

That which may perhaps make such equality incredible is but a vain conceit of one's own wisdom, which almost all men think they have in a greater degree than the vulgar; that is, than all men but themselves, and a few others, whom by fame, or for concurring with themselves, they approve.

iv. On Human Nature and the **Natural State** of War [also from Chapter 13]

So that in the nature of man, we find **three principal causes of quarrel. First, competition; secondly, diffidence; thirdly, glory.** The first maketh men invade for gain; the second, for safety; and the third, for reputation. The first use violence, to make themselves masters of other men's persons, wives, children, and cattle; the second, to defend them; the third, for trifles, as a word, a smile, a different opinion, and any other sign of undervalue, either direct in their persons

or by reflection in their kindred, their friends, their nation, their profession, or their name.

Hereby it is manifest that during the time men live without a common power to keep them all in awe, **they are in that condition which is called war;** and such a war as is of every man against every man.

- For war consisteth not in battle only, or the act of fighting, but in a tract of time, wherein the will to contend by battle is sufficiently known: and therefore the notion of time is to be considered in the nature of war, as it is in the nature of weather. For as the nature of foul weather lieth not in a shower or two of rain, but in an inclination thereto of many days together: so the nature of war consisteth not in actual fighting, but in the known disposition thereto during all the time there is no assurance to the contrary. **All other time is peace.**
- **Whatsoever therefore is consequent to a time of war, where every man is enemy to every man,** the same consequent to the time wherein men live without other security than what their own strength and their own invention shall furnish them withal. **In such condition** there is no place for industry, because the fruit thereof is uncertain: and consequently no culture of the earth; no navigation, nor use of the commodities that may be imported by sea; no commodious building; no instruments of moving and removing such things as require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and **which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short.**

v. On the Origin of Government [End of chapter 13]

The **passions that incline men to peace are:** fear of death; desire of such things as are necessary to commodious living; and a hope by their industry to obtain them.

And **reason** suggesteth convenient **articles of peace upon which men may be drawn to agreement.** These articles are they which otherwise are called **the laws of nature,** whereof I shall speak more particularly in the two following chapters.

[Chapter 14, **unenforceable nature of a covenant** in a state of war]

[.However,] If a covenant be made wherein neither of the parties perform presently, but trust one another, in the condition of mere nature (which is a condition of war of every man against every man) upon any reasonable suspicion, **it is void: but if there be a common power set over them both, with right and force sufficient to compel performance, it is not void.**

For he that performeth first has no assurance the other will perform after, because **the bonds of words are too weak to bridle men's ambition, avarice,**

anger, and other passions, without the fear of some coercive power; which in the condition of mere nature, where all men are equal, and judges of the justness of their own fears, cannot possibly be supposed. And therefore he which performeth first does but betray himself to his enemy, contrary to the right he can never abandon of defending his life and means of living.

But in a civil estate, where there a power set up to constrain those that would otherwise violate their faith, that fear is no more reasonable; and for that cause, he which by the covenant is to perform first is obliged so to do.

- vi. Because the commonwealth arises from a desire for peace, Hobbes deduces an entire legal system based on what he calls **laws of nature**.
- vii. [Nature of Natural Rights, Natural Law, and Contracts] Chapter 14
- viii. **THE right of nature**, which writers commonly call jus naturale, is the liberty each man hath to use his own power as he will himself for the preservation of his own nature; that is to say, of his own life; and consequently, of doing anything which, in his own judgement and reason, he shall conceive to be the aptest means thereunto.
- ix. **By liberty is understood**, according to the proper signification of the word, the absence of external impediments; which impediments may oft take away part of a man's power to do what he would, but cannot hinder him from using the power left him according to his judgement and reason shall dictate to him.
- x. **A law of nature**, lex naturalis, is a precept, or general rule, found out by reason, by which a man is forbidden to do that which is destructive of his life, or taketh away the means of preserving the same, and to omit that by which he thinketh it may be best preserved. For though they that speak of this subject use to confound jus and lex, right and law, yet they ought to be distinguished, because right consisteth in liberty to do, or to forbear; whereas law determineth and bindeth to one of them: so that law and right differ as much as obligation and liberty, which in one and the same matter are inconsistent.
- xi. From this fundamental law of nature, by which men are commanded to endeavour peace, is derived this second law: that a man be willing, when others are so too, as far forth as for peace and defence of himself he shall think it necessary, to **lay down this right to all things**; and be contented with so much liberty against other men as he would allow other men against himself.

xii. [the golden rule] For as long as every man holdeth this right, of doing anything he liketh; so long are all men in the condition of war. But if other men will not lay down their right, as well as he, then there is no reason for anyone to divest himself of his: for that were to expose himself to prey, which no man is bound to, rather than to dispose himself to peace. This is that law of the gospel: **Whatsoever you require that others should do to you, that do ye to them**.

xiii. [self interest in giving up natural liberty] **Whensoever a man transferreth his right, or renounceth it, it is either in consideration of some right reciprocally transferred to himself**, or for some other good he hopeth for thereby. For it is a voluntary act: and of the voluntary acts of every man, **the object is some good to himself**.

xiv. The **mutual transferring of right is that which men call contract**. There is difference between transferring of right to the thing, the thing, and transferring or tradition, that is, delivery of the thing itself. For the thing may be delivered together with the translation of the right, as in buying and selling with ready money, or exchange of goods or lands, and it may be delivered some time after.

xv. [On the Nature of Moral Philosophy, from Ch. 15]

For moral philosophy is nothing else but the science of what is good and evil in the conversation and society of mankind.

Good and evil are names that signify our appetites and aversions, **which in different tempers, customs, and doctrines of men are different**: and diverse men differ not only in their judgment on the senses of what is pleasant and unpleasant to the taste, smell, hearing, touch, and sight; but also of what is conformable or disagreeable to reason in the actions of common life. Nay, the same man, in diverse times, differs from himself; and one time praiseth, that is, calleth good, what another time he dispraiseth, and calleth evil: from whence arise disputes, controversies, and at last war. ...

Now the science of virtue and vice is moral philosophy; and therefore **the true doctrine of the laws of nature is the true moral philosophy**. But the writers of moral philosophy, though they acknowledge the same virtues and vices; yet, not seeing wherein consisted their goodness, nor that they come to be praised as the means of peaceable, sociable, and comfortable living, place them in a mediocrity of passions

xvi. [Origins of a Commonwealth]

THE final cause, end, or design of men (who naturally love liberty, and dominion over others) in the introduction of that restraint upon themselves, in which we see them live in Commonwealths, is the foresight of their own preservation, and of a more contented life thereby.

That is to say, of getting themselves out from that miserable condition of war which is necessarily consequent, as hath been shown, to the natural passions of men when there is no visible power to keep them in awe, and tie them by fear of punishment to the performance of their covenants, and observation of those laws of nature set down in the fourteenth and fifteenth chapters.

For the laws of nature, as justice, equity, modesty, mercy, and, in sum, doing to others as we would be done to, of themselves, without the terror of some power to cause them to be observed, **are contrary to our natural passions,** that carry us to partiality, pride, revenge, and the like.

[Notice this refinement and extension of Plato's argument concerning just and unjust behavior.]

xvii. [Leviathan as a Mutual Defense Agreement that cannot be revoked, Chapter 15.]

xviii. Secondly, that in a condition of war, wherein every man to every man, for want of a common power to keep them all in awe, is an enemy, there is **no man can hope by his own strength, or wit, to himself from destruction without the help of confederates;** where every one expects the same defence by the confederation that any one else does: and therefore he which declares he thinks it reason to deceive those that help him can in reason expect no other means of safety than what can be had from his own single power.

xix. **He,** therefore, **that breaketh his covenant,** and consequently declareth that he thinks he may with reason do so, **cannot be received into any society that unite themselves for peace and defence but by the error of them that receive him;** nor when he is received be retained in it without seeing the danger of their error; which errors a man cannot reasonably reckon upon as the means of his security: and therefore if he be left, or **cast out of society,** he perisheth; and if he live in society, it is by the errors of other men, which he could not foresee nor reckon upon, and consequently against the reason of his preservation; and so, as **all men that contribute not to his destruction forbear him only out of ignorance of what is good for themselves.**

xx. As for the instance of gaining the secure and perpetual felicity of heaven by any way, it is frivolous; **there being but one way imaginable, and that is not breaking, but keeping of covenant.** And for the other instance of attaining sovereignty by rebellion; it is manifest that, though the event follow, yet because it cannot reasonably be expected, but rather the contrary, and because by gaining it so, others are taught to gain the same in like manner, the attempt thereof is against reason.

xxi. [On the nature of Justice and injustice, chapter 15]

xxii. But when a covenant is made, then to break it is unjust and the definition of injustice is no other than the not performance of covenant. And whatsoever is not unjust is just. But because covenants of mutual trust, where there is a fear of not performance on either part (as hath been said in the former chapter), are invalid, though the **original of justice be the making of covenants,** yet injustice actually there can be none till the cause of such fear be taken away; which, while men are in the natural condition of war, cannot be done.

xxiii. Therefore **before the names of just and unjust can have place, there must be some coercive power to compel men equally to the performance of their covenants,** by the terror of some punishment greater than the benefit they expect by the breach of their covenant, and to make good that propriety which by mutual contract men acquire in recompense of the universal right they abandon: and such power there is none before the erection of a Commonwealth.

xxiv. [The "oath" taken to conclude a Social Contract, from ch. 17]

- **I authorize and give up my right of governing myself to this man, or to this assembly of men, on this condition;** that thou give up, thy right to him, and authorize all his actions in like manner.
- This done, the multitude so united in one person is called a COMMONWEALTH; in Latin, CIVITAS.

This is the generation of that great LEVIATHAN, or rather, to speak more reverently, of that mortal god to which we owe, under the immortal God, our peace and defense. For by this authority, given him by every particular man in the Commonwealth, he hath the use of so much power and strength conferred on him that, by terror thereof, he is enabled to form the wills of them all, to **peace at home,** and mutual aid against their enemies abroad. ..

Leviathan may use the strength and means of them all as he shall think expedient for their peace and common defense.

xxv. The Rights associated with the *Institution of a Sovereign* [Ch 18]

A COMMONWEALTH is said to be instituted when a multitude of men do agree, and covenant, every one with every one, that **to whatsoever man, or assembly of men**, shall be given by the major part the right to present the person of them all, that is to say, to **be their representative**; every one, as well he that voted for it as he that voted against it, shall authorize all the actions and judgments of that man, or assembly of men, in the same manner as if they were his own, **to the end to live peaceably amongst themselves**, and be protected against other men.

From this institution of a Commonwealth are derived all the rights and faculties of him, or them, on whom the sovereign power is conferred by the consent of the people assembled.

xxvi. Once a commonwealth is created, it can not be cast off, nor can the sovereign (whether a single man or representative assembly) be bound by a covenant.

First, because they covenant, it is to be understood they are not obliged by former covenant to anything repugnant hereunto. And consequently they that have already instituted a Commonwealth, being thereby bound by covenant to own the actions and judgments of one, cannot lawfully make a new covenant amongst themselves to be obedient to any other, in anything whatsoever, without his permission.

And therefore, they that are subjects to a monarch cannot without his leave cast off monarchy and return to the confusion of a disunited multitude; nor transfer their person from him that beareth it to another man, other assembly of men: for they are bound, every man to every man, to own and be reputed author of all that already is their sovereign shall do and judge fit to be done; so that any one man dissenting, all the rest should break their covenant made to that man, which is injustice: and they have also every man given the sovereignty to him that beareth their person; and therefore if they depose him, they take from him that which is his own, and so again it is injustice.

xxvii. Of the Three Kinds of Commonwealth, and the impossibility of "divided government" (Ch 19)

THE difference of Commonwealths consisteth in the difference of the sovereign, or the person representative of all and every one of the multitude. And because **the sovereignty is either in one man, or in an assembly of more than one**; and into that assembly either every man hath right to enter, or not every one, but certain men distinguished from the rest; it is manifest there can be but three kinds of Commonwealth. For the representative must needs be one man, or more; and if more, then it is the assembly of all, or but of a part. When

the representative is one man, then is the Commonwealth a monarchy; when an assembly of all that will come together, then it is a democracy, or popular Commonwealth; when an assembly of a part only, then it is called an aristocracy.

[Now Hobbes challenges Aristotle, who he has read and mentioned in the text, and implicitly Plato as well as many others.]

Other kind of Commonwealth there can be none: for either one, or more, or all, must have the sovereign power (which I have shown to be indivisible) entire. There be other names of government in the histories and books of policy; as tyranny and oligarchy; but they are not the names of other forms of government, but of the same forms misliked. **For they that are discontented under monarchy call it tyranny**; and they that are displeased with aristocracy call it oligarchy: so also, they which find themselves grieved under a democracy call it anarchy, which signifies want of government; and yet I think no man believes that want of government is any new kind of government:

nor by the same reason ought they to believe that the government is of one kind when they like it, and another when they dislike it or are oppressed by the governors.

It is manifest that men who are in absolute liberty may, if they please, give authority to one man to represent them every one, as well as give such authority to any assembly of men whatsoever; and consequently may subject themselves, if they think good, to a monarch as absolutely as to other representative.

- [Impossibility of divided sovereignty] Therefore, where there is already erected a sovereign power, there can be no other representative of the same people, but only to certain particular ends, by the sovereign limited.

For that were to erect two sovereigns; and every man to have his person represented by two actors that, by opposing one another, **must needs divide that power, which (if men will live in peace) is indivisible; and thereby reduce the multitude into the condition of war, contrary to the end for which all sovereignty is instituted.**

And therefore as it is **absurd** to think that a sovereign assembly, inviting the people of their dominion to send up their deputies with power to make known their advice or desires should therefore hold such deputies, rather than themselves, for the absolute representative of the people; so it is absurd also to think the same in a monarchy.

B. John Lockes' *First and Second Treatises on Government*

- i. Locke continued interest in British politics and association with Dutch republicans during his six year exile in the Netherlands, but also became influenced by the Dutch republicans which is evident in the preface to his *Two Treatises of Government* printed in 1689:

“Reader, thou hast here the beginning and end of a discourse concerning government; what fate has otherwise disposed of the papers that should have filled up the middle, and were more than all the rest, it is not worth while to tell thee.

These, which remain, I hope are sufficient to establish the throne of our great restorer, our present King William; to make good his title, **in the consent of the people**, which being the only one of all lawful governments, he has more fully and clearly, than any prince in Christendom; and to justify to the world the people of England, whose **love of their just and natural rights**, with their resolution to preserve them, saved the nation when it was on the very brink of slavery and ruin.”

[Note the similarity between Locke’s line of reasoning in his preface and the first and third excerpts from the Dutch declaration of independence (Act of Abjuration, 1581) quoted above.]

- ii. John Locke, provides **the first clear statement of the origins and nature of a liberal civic society**, one based on the rule of law and limited government, and one that insists that a productive state emerges from an agreement.

[The idea of a liberal or civil state, which had long been lost in practice--with the possible exception of the Dutch republic, and whether through Locke or other voices--**sweeps through the intellectual circles in Western Europe and North America in the next hundred years or so**. Such a work would probably have been unexceptional in Athens during the time of Aristotle and Plato.]

- iii. Of Civil-Government (from the *Second Treatise*, pg. 309-11)

[*Note the narrower purpose of the state than developed by Plato and Aristotle. It also differs from the one (peace) noted by Hobbes although it is not so far from Hobbes visions. Plato, Aristotle, Hobbes and Locke all agree that governments emerge out of necessity, to advance individual aims. Note also Locke's points of agreement with Hobbes on the state of nature and on the concept of "natural law.". Note, also the use of a hypothetical "rational man" to understand what a social contract can entail.*]

- 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 no body, why will he give up 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 has 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 a condition which however free is full of fears and continual dangers. [*a clear echo of Hobbes*].

- The great and chief end therefore of men uniting into a commonwealth is the preservation of their property. To which in the state of nature there are many things wanting.

Thus mankind, notwithstanding all of the privileges of the state of nature, being but in an ill condition, while they remain in it are quickly drawn into society...

- It is this makes them willing to **give up every one of his single power of punishing**, to be exercised by such alone as shall be appointed to it among them, and by such rules as the community, or those authorized 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 the governments and societies themselves...
- The first **power**, viz. of doing whatsoever be thought for the preservation of himself, and the rest of mankind, **he gives up** to be regulated by laws made by society so far forth as the preservation of himself and the rest of the society shall require which laws of the society in many things confined the liberty that he had by the **law of nature**.

- iv. On the **limits of government** and the rule of law (pg. 310):

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 everyone 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 good**; but is obliged to secure every one's property, by providing against those three defects above mentioned that make the state of nature so unsafe and uneasy.

v. On the forms of a Commonwealth (Chapter 10) [*A theory of popular sovereignty*]

*[The use of majority rule to elect a government, whether a king for life a legislature or a mixed form of government, implies popular sovereignty. Locke doesn't suggest a particular ideal form of government, only that all such forms would be the result of majority rule, e.g. be rooted in popular sovereignty. This is often taken to be an attack on Sir Robert Filmer's Patriarcha, which develops the theory of **the divine right of kings**.]*

The majority having, as has been shown, upon a men's first uniting into society, the whole power of the community naturally in them, may employ all that power in making laws for the community from time to time and executing those laws by officers of their own appointing;

and **then the form of the government is a perfect democracy**, or else into the hands of one man, and **then it is a monarchy**, if to him and his heirs it is an hereditary monarchy, and if only for life, but upon his death the power of nominating a successor to return to them, and elective monarchy.

And so, according of these the community may make compounded and mixed forms of government as they think good. [This is a point of disagreement between Locke and Hobbes.]

And if the legislative power be at first given by the majority to one or more persons only for their lives, or any limited time, and **then the supreme power to revert to them again. When it is so reverted, the community may dispose of it again anew into what hands they please, and to constitute a new form of government.**

... By commonwealth, I must be understood to mean, not a democracy or any form of government, but any independent community...

vi. [*Locke may have hesitated to recommend a particular form of government because he could be sentenced to death for treason if he argued in favor of anything other than the existing English system. Indeed, he was hunted by English agents during his time in the Netherlands. This is why much of his work was published anonymously. It is interesting to note how much freer Athens in 360 BCE was relative to Europe in seventeenth and eighteenth centuries.*]

C. Charles de Montesquieu the *Spirit of the Laws* (1748)

- i. Montesquieu can be regarded as Aristotle's successor in political science.
- ii. He combined a far reaching interest in political ideas with an empiricist's interest in evidence from the real world. I include a somewhat disproportionate collection of snippets below, in large part because he probes so much deeper into the various connections between the laws, human nature, and constitutional design than other theorists from this period.
- iii. Like Locke, beings with an apology for possibly offending the king in what follows (from the preface)

IF amidst the infinite number of subjects contained in this book there is anything which, contrary to my expectation, may possibly offend, I can at least assure the public that it was not inserted with an ill intention: for I am not naturally of a captious temper. Plato thanked the gods that he was born in the same age with Socrates: and for my part I give thanks to the Supreme that I was born a subject of that government under which I live; and that it is His pleasure I should obey those whom He has made me love.

iv. On the law and natural law (book 1)

Man, as a physical being, is like other bodies governed by invariable laws.

As an intelligent being, he incessantly transgresses the laws established by God, and changes those of his own instituting. He is left to his private direction, though a limited being, and subject, like all finite intelligences, to ignorance and error: even his imperfect knowledge he loses; and as a sensible creature, he is hurried away by a thousand impetuous passions.

Such a being might every instant forget his Creator; God has therefore reminded him of his duty by the laws of religion. Such a being is liable every moment to forget himself; philosophy has provided against this by the laws of morality.

Formed to live in society, he might forget his fellow-creatures; legislators have therefore by political and civil laws confined him to his duty.

- Antecedent to the above-mentioned laws are those of nature, so called, because they derive their force entirely from our frame and existence. **In order to have a perfect knowledge of these laws, we must consider man before the establishment of society: the laws received in such a state would be those of nature.**
- v. [Natural laws: fear implies peace, need sustenance, desire for mutual protection may lead to association as also would desire for sex.]

Man in a state of nature would have the faculty of knowing, before he had acquired any knowledge. Plain it is that his first ideas would not be of a speculative nature; he would think of the preservation of his being, before he would investigate its origin. Such a man would feel nothing in himself at first but impotency and weakness; his fears and apprehensions would be excessive; as appears from instances (were there any necessity of proving it) of savages found in forests,[2] trembling at the motion of a leaf, and flying from every shadow.

In this state every man, instead of being sensible of his equality, would fancy himself inferior. There would therefore be no danger of their attacking one another; **peace would be the first law of nature.**

[Note that Montesquieu has accepted Hobbes point about fear being an important passion, but used it to reach a conclusion quite different from Hobbes, although he will in the end reformulate Hobbes's idea into a theory of war between societies, rather than individuals.]

Hobbes[3] inquires, "For what reason go men armed, and have locks and keys to fasten their doors, if they be not naturally in a state of war?" But is it not obvious that he attributes to mankind before the establishment of society what can happen but in consequence of this establishment, which furnishes them with motives for hostile attacks and self-defense?

Next to a sense of his weakness man would soon find that of his wants. Hence **another law of nature would prompt him to seek for nourishment.**

Fear, I have observed, would induce men to shun one another; but the marks of **this fear being reciprocal, would soon engage them to associate.** Besides, this association would quickly follow from the very pleasure one animal feels at the approach of another of the same species. Again, the attraction arising from the difference of sexes would enhance this pleasure, and the natural inclination they have for each other would form **a third law.**

vi. Man made laws

As soon as man enters into a state of society he loses the sense of his weakness; equality ceases, and **then commences the state of war.** [Tribal warfare]

Each particular society begins to feel its strength, whence arises a state of war between different nations. The individuals likewise of each society become sensible of their force; hence the principal advantages of this society they endeavor to convert to their own emolument, which constitutes a state of war between individuals.

These two different kinds of states [peace and war] give rise to human laws.

vii. The three kinds of laws: international, political, and civil

Considered as inhabitants of so great a planet, which necessarily contains a variety of nations, they have laws relating to their mutual intercourse, which is what we call the **law of nations**. [RDC: *Perhaps International Law would be a better term or translation.*]

As members of a society that must be properly supported, they have laws relating to the governors and the governed, and this we distinguish by the name of **politic law**. They have also another sort of law, as they stand in relation to each other; by which is understood the **civil law**.

viii. International law of peace and war

The **law of nations is naturally founded on this principle, that different nations ought in time of peace to do one another all the good they can, and in time of war as little injury as possible**, without prejudicing their real interests.

The object of war is victory; that of victory is conquest; and that of conquest preservation. From this and the preceding principle all those rules are derived which constitute the law of nations.

All countries have a law of nations, not excepting the Iroquois themselves, though they devour their prisoners: for they send and receive ambassadors, and understand the rights of war and peace. The mischief is that their law of nations is not founded on true principles.

ix. Political law

Besides the law of nations relating to all societies, **there is a polity or civil constitution for each particularly considered**. No society can subsist without a form of government. "The united strength of individuals," as Gravina[4] well observes, "constitutes what we call the body politic."

The general strength may be in the hands of a single person, or of many. Some think that nature having established paternal authority, the most natural government was that of a single person. But the example of paternal authority proves nothing. For if the power of a father relates to a single government, that of brothers after the death of a father, and that of cousins-german after the decease of brothers, refer to a government of many. The political power necessarily comprehends the union of several families.

Better is it to say, that **the government most conformable to nature is that which best agrees with the humor and disposition of the people in whose favor it is established**.

The strength of individuals cannot be united without a conjunction of all their wills. "The conjunction of those wills," as Gravina again very justly observes, "is what we call **the civil state**."

x. All laws should reflect the people and circumstances

Law in general is human reason, inasmuch as it governs all the inhabitants of the earth: the political and civil laws of each nation ought to be only the particular cases in which human reason is applied. **They should be adapted in such a manner to the people for whom they are framed** that it should be a great chance if those of one nation suit another.

They should be **in relation to the nature and principle of each government**; whether they form it, as may be said of politic laws; or whether they support it, as in the case of civil institutions.

They should be in relation to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives, whether husbandmen, huntsmen, or shepherds: they should have relation to the degree of liberty which the constitution will bear; to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs. In fine, they have relations to each other, as also to their origin, to the intent of the legislator, and to the order of things on which they are established; in all of which different lights they ought to be considered.

This is what I have undertaken to perform in the following work. These relations I shall examine, since all these together constitute what I call the Spirit of Laws.

xi. Book III. Of the Principles of the Three Kinds of Government

It is the nature of a **republican government** that either the collective body of the people, or particular families, should be possessed of the supreme power; of a monarchy, that the prince should have this power, but in the execution of it should be directed by established laws;

of a **despotic government**, that a single person should rule according to his own will and caprice. This enables me to discover their three principles; which are thence naturally derived.

There is no great share of probity necessary to support a monarchical or despotic government. The force of laws in one, and the prince's arm in the other, are sufficient to direct and maintain the whole.

xii. But in a popular state, one spring more is necessary, namely, virtue.

For it is clear that in a monarchy, where he who commands the execution of the laws generally thinks himself above them, there is **less need of virtue** than in a popular government, where the person entrusted with the execution of the laws is sensible of his being subject to their direction.

Clear is it also that a monarch who, through bad advice or indolence, ceases to enforce the execution of the laws, may easily repair the evil; he has only to follow other advice; or to shake off this indolence.

But when, in a popular government, there is a suspension of the laws, as this can proceed only from the corruption of the republic, the state is certainly undone.

[On the failure of the English Civil War to establish democracy]. As they who had a share in the direction of public affairs were **void of virtue**; as their ambition was inflamed by the success of the most daring of their members;

- [2] as the prevailing parties were successively animated by the spirit of faction, the government was continually changing: the people, amazed at so many revolutions, in vain attempted to erect a commonwealth.
- At length, when the country had undergone the most violent shocks, they were obliged to have recourse to the very government which they had so wantonly proscribed.

When Sylla thought of restoring Rome to her liberty, this unhappy city was incapable of receiving that blessing.

- She had only the feeble remains of virtue, which were continually diminishing. Instead of being roused from her lethargy by C^æsar, Tiberius, Caius Claudius, Nero, and Domitian, she riveted every day her chains; if she struck some blows, her aim was at the tyrant, not at the tyranny.

The politic Greeks, who lived under a popular government, knew no other support than virtue.

- The modern inhabitants of that country are entirely taken up with manufacture, commerce, finances, opulence, and luxury.
- When virtue is banished, ambition invades the minds of those who are disposed to receive it, and avarice possesses the whole community.

The objects of their desires are changed; what they were fond of before has become indifferent; **they were free while under the restraint of laws, but they would fain now be free to act against law;**

- Frugality, and not the thirst of gain, now passes for avarice.
- Formerly the wealth of individuals constituted the public treasure; but now this has become the patrimony of private persons.

- The members of the commonwealth riot on the public spoils, and its strength is only the power of a few, and the license of many.

xiii. Virtue is also a prerequisite for Aristocracy (ch 6)

As virtue is necessary in a popular government, it is requisite also in an aristocracy. True it is that in the latter it is not so absolutely requisite.

The people, who in respect to the nobility are the same as the subjects with regard to a monarch, **are restrained by their laws**. They have, therefore, less occasion for virtue than the people in a democracy. **But how are the nobility to be restrained?** They who are to execute the laws against their colleagues will immediately perceive that they are acting against themselves. **Virtue is therefore necessary in this body, from the very nature of the constitution.**

An aristocratic government has an inherent vigor, unknown to democracy. The nobles form a body, who by their prerogative, and for their own particular interest, restrain the people; it is sufficient that there are laws in being to see them executed. But **easy as it may be for the body of the nobles to restrain the people, it is difficult to restrain themselves.**

xiv. On the corruption of democracies (book 8)

Of the Corruption of the Principles of Democracy. **The principle of democracy is corrupted not only when the spirit of equality is extinct, but likewise when they fall into a spirit of extreme equality**, and when each citizen would fain be upon a level with those whom he has chosen to command him. Then the people, incapable of bearing the very power they have delegated, want to manage everything themselves, to debate for the senate, to execute for the magistrate, and to decide for the judges.

xv. On the feasible size of a republic [perhaps with the Dutch republic in mind]

It is natural for a republic to have only a small territory; otherwise it cannot long subsist. In an extensive republic there are men of large fortunes, and consequently of less moderation; there are trusts too considerable to be placed in any single subject; he has interests of his own; he soon begins to think that he may be happy and glorious, by oppressing his fellow-citizens; and that he may raise himself to grandeur on the ruins of his country.

In an extensive republic the public good is sacrificed to a thousand private views; it is subordinate to exceptions, and depends on accidents. In a small one, the interest of the public is more obvious, better understood, and more within the reach of every citizen; abuses have less extent, and of course are less protected.

xvi. Federalism as a method of avoiding Tyranny (book 9)

If a republic be small, it is destroyed by a foreign force; if it be large, it is ruined by an internal imperfection.

To this twofold inconvenience democracies and aristocracies are equally liable, whether they be good or bad. The evil is in the very thing itself, and no form can redress it.

It is, therefore, very probable that mankind would have been, at length, obliged to live constantly under the government of a single person, had they not contrived a kind of constitution that has all the internal advantages of a republican, together with the external force of a monarchical, government. I mean a confederate republic.

This form of government is a convention by which several petty states agree to become **members of a larger one**, which they intend to establish. It is a kind of assemblage of societies, that constitute a new one, capable of increasing by means of further associations, till they arrive at such a degree of power as to be able to provide for the security of the whole body.

It was these associations that so long contributed to the prosperity of Greece. By these the Romans attacked the whole globe, and by these alone the whole globe withstood them; for when Rome had arrived at her highest pitch of grandeur, it was the associations beyond the Danube and the Rhine -- associations formed by the terror of her arms -- that enabled the barbarians to resist her.

Hence it proceeds that Holland,[1] Germany, and the Swiss cantons are considered in Europe as perpetual republics.

A republic of this kind, able to withstand an external force, may support itself without any internal corruption; the form of this society prevents all manner of inconveniences.

[RDC: Note that a confederation has divided sovereignty, and hence this argument runs with Locke against Hobbes and Rousseau who postulate a necessity of undivided sovereignty.]

A confederate Government ought to be composed of States of the same Nature, especially of the republican Kind. The Canaanites were destroyed by reason that they were petty monarchies, that had no union or confederacy for their common defense; and, indeed, a confederacy is not agreeable to the nature of petty monarchies.

Other Requisites in a confederate Republic: **In the republic of Holland one province cannot conclude an alliance without the consent of the others. This law, which is an excellent one**, and even necessary in a confederate republic, is wanting in the Germanic constitution, where it would prevent the misfortunes that may happen to the whole confederacy, through the imprudence, ambition, or

avarice of a single member. A republic united by a political confederacy has given itself entirely up, and has nothing more to resign.

xvii. **On the Nature of Liberty (Book 11)**

I make a distinction between the laws that establish political liberty, as it relates to the constitution, and those by which it is established, as it relates to the citizen. The former shall be the subject of this book; the latter I shall examine in the next.

- There is no word that admits of more various significations, and has made more varied impressions on the human mind, than that of liberty.
 - Some have taken it as a means of deposing a person on whom they had conferred a tyrannical authority; others for the power of choosing a superior whom they are obliged to obey; others for the right of bearing arms, and of being thereby enabled to use violence; others, in fine, for the privilege of being governed by a native of their own country, or by their own laws.[1]
 - A certain nation for a long time thought liberty consisted in the privilege of wearing a long beard.[2]
 - Some have annexed this name to one form of government exclusive of others: those who had a republican taste applied it to this species of polity; those who liked a monarchical state gave it to monarchy.[3]
- Thus they have all applied the name of liberty to the government most suitable to their own customs and inclinations:
 - and as in republics the people have not so constant and so present a view of the causes of their misery, and as the magistrates seem to act only in conformity to the laws, **hence liberty is generally said to reside in republics, and to be banished from monarchies.**

In fine, as in democracies the people seem to act almost as they please, this sort of government has been deemed the most free, and the power of the people has been confounded with their liberty.

- **In what Liberty consists.**
- It is true that in democracies the people seem to act as they please; but political liberty does not consist in an unlimited freedom. In governments, that is, **in societies directed by laws, liberty can consist only in the power of doing what we ought to will**, and in not being constrained to do what we ought not to will.

We must have continually present to our minds the **difference between independence and liberty**. Liberty is a right of doing whatever the laws permit, and if a citizen could do what they forbid he would be no longer possessed of liberty, because all his fellow-citizens would have the same power.

- **Political liberty is to be found only in moderate governments;** and even in these it is not always found. It is there only when there is no abuse of power.

But constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go.

Is it not strange, though true, to say that **virtue itself has need of limits.**

xviii. **Institutions for preserving liberty,** (book 11, a case for divided government)

- To prevent this abuse, it is necessary from the very nature of things **that power should be a check to power.**

A government may be so constituted, as no man shall be compelled to do things to which the law does not oblige him, nor forced to abstain from things which the law permits.

Though all governments have the same general end, which is that of **preservation,** yet each has another particular object.

Increase of dominion was the object of Rome; war, that of Sparta; religion, that of the Jewish laws; commerce, that of Marseilles; public tranquillity, that of the laws of China:[4] navigation, that of the laws of Rhodes; natural liberty, that of the policy of the Savages; in general, the pleasures of the prince, that of despotic states; that of monarchies, the prince's and the kingdom's glory; the independence of individuals is the end aimed at by the laws of Poland, thence results the oppression of the whole.[5]

- **One nation there is also in the world that has for the direct end of its constitution political liberty.**

We shall presently examine the principles on which this liberty is founded; if they are sound, liberty will appear in its highest perfection.

- Of the Constitution of England.

In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law.

By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted.

By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions.

By the third, he punishes criminals, or determines the disputes that arise between individuals. *The latter we shall call the judiciary power, and the other simply the executive power of the state.*

The political liberty of the subject is a tranquillity of mind arising from the opinion each person has of his safety. **In order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another.**

- When the legislative and executive powers are united in the same person, or in the same body of magistrates, there **can be no liberty;** because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
- Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.
- There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.

Most kingdoms in Europe enjoy a moderate government because the prince who is invested with the two first powers leaves the third to his subjects. In Turkey, where these three powers are united in the Sultan's person, the subjects groan under the most dreadful oppression.

In the republics of Italy, where these three powers are united, there is less liberty than in our monarchies. Hence their government is obliged to have recourse to as violent methods for its support as even that of the Turks; witness the state inquisitors,[6] and the lion's mouth into which every informer may at all hours throw his written accusations.

At Venice the legislative power is in the council, the executive in the *pregadi*, and the judiciary in the *quarantia*. But the mischief is, that these different tribunals are composed of magistrates all belonging to the same body; which constitutes almost one and the same power.

- The judiciary power ought not to be given to a standing senate; it should be exercised **by persons taken from the body of the people**[7] at certain times of the year, and consistently with a form and manner prescribed by law, in order to erect a tribunal that should last only so long as necessity requires. [e.g. trial by jury]

The other two powers may be given rather to magistrates or permanent bodies, because they are not exercised on any private subject; one being no more than the general will of the state, and the other the execution of that **general will.**

- But though the tribunals ought not to be fixed, the judgments ought; and to such a degree as to be ever conformable to the letter of the law.

Were they to be the private opinion of the judge, people would then live in society, without exactly knowing the nature of their obligations.

- As in a country of liberty, every man who is supposed a free agent ought to be his own governor; the **legislative power should reside in the whole body of the people.**
- But since this is impossible in large states, and in small ones is subject to many inconveniences, it is fit the people should transact by their representatives what they cannot transact by themselves.

The inhabitants of a particular town are much better acquainted with its wants and interests than with those of other places; and are better judges of the capacity of their neighbors than of that of the rest of their countrymen. The members, therefore, of the legislature should not be chosen from the general body of the nation; **but it is proper that in every considerable place a representative should be elected by the inhabitants.**[8] [Decentralization?]

- The great advantage of representatives is, their capacity of discussing public affairs. For this the people collectively are extremely unfit, which is one of the chief inconveniences of a democracy.

It is not at all necessary that the representatives who have received a general instruction from their constituents should wait to be directed on each particular affair, **as is practiced in the diets of Germany.** True it is that by this way of proceeding the speeches of the deputies might with greater propriety be called the voice of the nation; but, on the other hand, this would occasion infinite delays; would give each deputy a power of controlling the assembly; and, on the most urgent and pressing occasions, the wheels of government might be stopped by the caprice of a single person.

When the deputies, as Mr. Sidney well observes, represent a body of people, as in Holland, **they ought to be accountable to their constituents;** but it is a different thing in England, where they are deputed by boroughs.

- **All the inhabitants of the several districts ought to have a right of voting at the election of a representative, except such as are in so mean a situation as to be deemed to have no will of their own. [Universal Suffrage]**

One great fault there was in most of the ancient republics, that the people had a right to active resolutions, such as require some execution, a thing of which they are absolutely incapable. They ought to have no share in the government but for the choosing of representatives, which is within their reach.

For though few can tell the exact degree of men's capacities, yet there are none but are capable of knowing in general whether the person they choose is better qualified than most of his neighbors.

- Neither ought the representative body to be chosen for the executive part of government, for which it is not so fit; but for the enacting of laws, or to see whether the laws in being are duly executed, a thing suited to their abilities, and which none indeed but themselves can properly perform.

In such a state there are always persons distinguished by their birth, riches, or honors: but were they to be confounded with the common people, and to have only the weight of a single vote like the rest, the common liberty would be their slavery, and they would have no interest in supporting it, as most of the popular resolutions would be against them. The share they have, therefore, in the legislature ought to be proportioned to their other advantages in the state; which happens only when they form a body that has a right to check the licentiousness of the people, as the people have a right to oppose any encroachment of theirs.

- The legislative power is therefore committed to the body of the nobles, and to that which represents the people, each having their assemblies and deliberations apart, each their separate views and interests. [British Bicameralism]

But as a hereditary power might be tempted to pursue its own particular interests, and forget those of the people, it is proper that where a singular advantage may be gained by corrupting the nobility, as in the laws relating to the supplies, they should have no other share in the legislation than the power of rejecting, and not that of resolving.

By the power of resolving I mean the right of ordaining by their own authority, or of amending what has been ordained by others.

By the power of rejecting I would be understood to mean the right of annulling a resolution taken by another; which was the power of the tribunes at Rome. And though the person possessed of the privilege of rejecting may likewise have the right of approving, yet this approbation passes for no more than a declaration that he intends to make no use of his privilege of rejecting, and is derived from that very privilege.

- The executive power ought to be in the hands of a monarch, because this branch of government, having need of dispatch, is better administered by one than by many: on the other hand, whatever depends on the legislative power is oftentimes better regulated by many than by a single person.

But if there were no monarch, and the executive power should be committed to a certain number of persons selected from the legislative body, there would be an end then of liberty; by reason the two powers would be united, as the same persons would sometimes possess, and would be always able to possess, a share in both. [opposition to present PM systems of parliamentary rule]

- Were the legislative body to be a considerable time without meeting, this would likewise put an end to liberty. For of two things one would naturally follow: either

that there would be no longer any legislative resolutions, and then the state would fall into anarchy; or that these resolutions would be taken by the executive power, which would render it absolute. [Regular elections and sessions of parliament]

- **The legislative body should not meet of itself.**

For a body is supposed to have no will but when it is met; and besides, were it not to meet unanimously, it would be impossible to determine which was really the legislative body; the part assembled, or the other.

And if it had a right to prorogue itself, it might happen never to be prorogued; which would be extremely dangerous, in case it should ever attempt to encroach on the executive power. Besides, there are seasons, some more proper than others, for assembling the legislative body: it is fit, therefore, that the executive power should regulate the time of meeting, as well as the duration of those assemblies, according to the circumstances and exigencies of a state known to itself.

Were the executive power not to have a right of restraining the encroachments of the legislative body, the latter would become despotic; for as it might arrogate to itself what authority it pleased, it would soon destroy all the other powers.

- But it is not proper, on the other hand, that the legislative power should have a right to stay the executive. For as the execution has its natural limits, it is useless to confine it; besides, the executive power is generally employed in momentary operations. The power, therefore, of the Roman tribunes was faulty, as it put a stop not only to the legislation, but likewise to the executive part of government; which was attended with infinite mischief.

But if the legislative power in a free state has no right to stay the executive, it has a right and ought to have the means of examining in what manner its laws have been executed; an advantage which this government has over that of Crete and Sparta, where the Cosmi[9] and the Ephori[10] gave no account of their administration.

- But whatever may be the issue of that examination, the legislative body ought not to have a power of arraigning the person, nor, of course, the conduct, of him who is entrusted with the executive power. **His person should be sacred**, because as it is necessary for the good of the state to prevent the legislative body from rendering themselves arbitrary, the moment he is accused or tried there is an end of liberty.

In this case the state would be no longer a monarchy, but a kind of republic, though not a free government.

- Though, in general, the judiciary power ought not to be united with any part of the legislative, yet this is liable to **three exceptions**, founded on the particular interest of the party accused.

[1] The great are always obnoxious to popular envy; and were they to be judged by the people, they might be in danger from their judges, and would, moreover, be deprived of the privilege which the meanest subject is possessed of in a free state, of being tried by his peers. The nobility, for this reason, ought not to be cited before the ordinary courts of judicature, but before that part of the legislature which is composed of their own body.

[2] It is possible that the law, which is clear-sighted in one sense, and blind in another, might, in some cases, be too severe. But as we have already observed, the national judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigor. That part, therefore, of the legislative body, which we have just now observed to be a necessary tribunal on another occasion, is also a necessary tribunal in this; it belongs to its supreme authority to moderate the law in favor of the law itself, by mitigating the sentence.

[3] It might also happen that a subject entrusted with the administration of public affairs may infringe the rights of the people, and be guilty of crimes which the ordinary magistrates either could not or would not punish.

Here is an advantage which this government has over most of the ancient republics, where this abuse prevailed, that the people were at the same time both judge and accuser.

- The executive power, pursuant of what has been already said, ought to have a share in the legislature by the power of rejecting, otherwise it would soon be stripped of its prerogative. But should the legislative power usurp a share of the executive, the latter would be equally undone.
- Here then is the fundamental constitution of the government we are treating of.
- The legislative body being composed of two parts, they check one another by the mutual privilege of rejecting. They are both restrained by the executive power, as the executive is by the legislative.
- These three powers should naturally form a state of repose or inaction. But as there is a necessity for movement in the course of human affairs, they are forced to move, but still in concert.
- As the executive power has no other part in the legislative than the privilege of rejecting, it can have no share in the public debates. It is not even necessary that it should propose, because as it may always disapprove of the resolutions that shall be taken, it may likewise reject the decisions on those proposals which were made against its will.

Were the executive power to determine the raising of public money, otherwise than by giving its consent, liberty would be at an end; because it would become legislative in the most important point of legislation.

If the legislative power was to settle the subsidies, not from year to year, but for ever, it would run the risk of losing its liberty, because the executive power would be no longer dependent; and when once it was possessed of such a perpetual right, it would be a matter of indifference whether it held it of itself or of another. The same may be said if it should come to a resolution of entrusting, not an annual, but a perpetual command of the fleets and armies to the executive power.

- To prevent the executive power from being able to oppress, it is requisite that the armies with which it is entrusted should consist of the people, and have the same spirit as the people, as was the case at Rome till the time of Marius.

To obtain this end, there are only two ways, either that the persons employed in the army should have sufficient property to answer for their conduct to their fellow-subjects, and **be enlisted only for a year**, as was customary at Rome: or if there should be a standing army, composed chiefly of the most despicable part of the nation, the **legislative power should have a right to disband** them as soon as it pleased; the soldiers should live in common with the rest of the people; and no separate camp, barracks, or fortress should be suffered.

Holland, for instance, is still safer than Venice; she might drown or starve the revolted troops; for as they are not quartered in towns capable of furnishing them with necessary subsistence, this subsistence is of course precarious.

In perusing the admirable treatise of Tacitus On the Manners of the Germans,[13] we find it is from that nation the English have borrowed the idea of their political government. **This beautiful system was invented first in the woods.**

As all human things have an end, the state we are speaking of will lose its liberty, will perish. Have not Rome, Sparta, and Carthage perished? It will perish when the legislative power shall be more corrupt than the executive.

It is not my business to examine whether the English actually enjoy this liberty or not. Sufficient it is for my purpose to observe that it is established by their laws; and I inquire no further.

Harrington, in his Oceana, has also inquired into the utmost degree of liberty to which the constitution of a state may be carried. But of him indeed it may be said that for want of knowing the nature of real liberty he busied himself in pursuit of an imaginary one; and that he built a Chalcedon, though he had a Byzantium before his eyes.

Of the Monarchies we are acquainted with. The monarchies we are acquainted with have not, like that we have been speaking of, liberty for their direct view: the only aim is the glory of the subject, of the state, and of the sovereign. But hence there results a spirit of liberty, which in those states is capable of achieving as great things, and of contributing as much perhaps to happiness as liberty itself.

Here the three powers are not distributed and founded on the model of the constitution above-mentioned; they have each a particular distribution, according to which they border more or less on political liberty; and if they did not border upon it, monarchy would degenerate into despotic government.

xix. Why the Ancients had not a clear Idea of Monarchy.

- The ancients had no notion of a government founded on a body of nobles, and much less on a legislative body composed of the representatives of the people.
- The republics of Greece and Italy were cities that had each their own form of government, and convened their subjects within their walls.
- Before Rome had swallowed up all the other republics, there was scarcely anywhere a king to be found, no, not in Italy, Gaul, Spain, or Germany; they were all petty states or republics.
- Even Africa itself was subject to a great commonwealth: and Asia Minor was occupied by Greek colonies.
- There was, therefore, no instance of deputies of towns or assemblies of the states; one must have gone as far as Persia to find a monarchy.
- I am not ignorant that there were confederate republics; in which several towns sent deputies to an assembly. But I affirm there was no monarchy on that model.

xx. On the effects of climate, a digression on marital laws

Other Effects of the Climate. Our ancestors, the ancient Germans, lived in a climate where the passions were extremely calm. Their laws decided only in such cases where the injury was visible to the eye, and went no further. And as they judged of the outrages done to men from the greatness of the wound, they acted with no other delicacy in respect to the injuries done to women.

The law of the Alemans[25] on this subject is very extraordinary. If a person **uncovers a woman's head**, he pays a fine of fifty sous; if he uncovers her leg up to the knee, he pays the same; and double from the knee upwards. One would think that the law measured the insults offered to women as we measure a figure in geometry; it did not punish the crime of the imagination, but that of the eye.

But upon the migration of a German nation into Spain, the climate soon found a necessity for different laws. The law of the Visigoths inhibited the surgeons to bleed a free woman, except either her father, mother, brother, son, or uncle was present. As the imagination of the people grew warm, so did that of the legislators; the law suspected everything when the people had become suspicious.

These laws had, therefore, a particular regard for the two sexes. But in their punishments they seem rather to humor the revengeful temper of private persons than to administer public justice.

Thus, in most cases, they **reduced both the criminals to be slaves** to the offended relatives or to the injured husband; a free-born woman[26] who had yielded to the embraces of a married man was delivered up to his wife to dispose of her as she pleased.

They obliged the slaves,[27] if they found their master's wife in adultery, to bind her and carry her to her husband; they even permitted her children[28] to be her accusers, and her slaves to be tortured in order to convict her.

Thus their laws were far better adapted to refine, even to excess, a certain point of honor than to form a good civil administration.

- D. We must not, therefore, be surprised if Count Julian was of opinion that an affront of that kind ought to be expiated by the ruin of his king and country: we must not be surprised if the Moors, with such a conformity of manners, found it so easy to settle and to maintain themselves in Spain, and to retard the fall of their empire.

Jean Jacque Rousseau: The Social Contract (1762)

i. [Some attacks on Hobbes' theory of the social contract, as effectively a theory of slavery]

Even if each man could alienate himself, **he could not alienate his children:** they are born men and free; their liberty belongs to them, and no one but they has the right to dispose of it. ...

To renounce liberty is to renounce being a man, to surrender the rights of humanity and even its duties. For him who renounces everything no indemnity is possible. Such a renunciation is incompatible with man's nature; to remove all liberty from his will is to remove all morality from his acts.

Finally, it is an empty and contradictory convention that sets up, on the one side, absolute authority, and, on the other, unlimited obedience.

Does not this condition alone, in the absence of equivalence or exchange, in itself involve the nullity of the act? For what right can my slave have against me, when all that he has belongs to me, and, his right being mine, this right of mine against myself is a phrase devoid of meaning? ...

Men, from the mere fact that, while they are living in their primitive independence, they have no mutual relations stable enough to constitute either the state of peace or the state of war, cannot be naturally enemies. War is constituted by a relation between things, and not between persons; and, as the state of war cannot arise out of simple personal relations, but only out of real relations, private war, or war of man with man, can exist neither in the state of nature, where there is no constant property, nor in the social state, where everything is under the authority of the laws. [RDC: is this really an empirical question?]

ii. The purpose and nature of the social contract (ch. 6)

I SUPPOSE men to have reached the point at which the obstacles in the way of their preservation in the state of nature show their power of resistance to be greater than the resources at the disposal of each individual for his maintenance in that state. **That primitive condition can then subsist no longer; and the human race would perish unless it changed its manner of existence.**

But, as men cannot engender new forces, but only unite and direct existing ones, they have no other means of preserving themselves than the formation, by aggregation, of a sum of forces great enough to overcome the resistance. **These they have to bring into play by means of a single motive power, and cause to act in concert.** This sum of forces can arise only where several persons come together:

but, as the force and liberty of each man are the chief instruments of his self-preservation, how can he pledge them without harming his own interests, and neglecting the care he owes to himself? This difficulty, in its bearing on my present subject, may be stated in the following terms:

"The problem is to find a form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain as free as before."

If then we discard from the social compact what is not of its essence, we shall find that it reduces itself to the following terms:

"Each of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole."

[RDC: So in the end, this is not really so different from Hobbes, after all! See the sentence in which the word *Leviathan* is used. However, we now have an abstract "general will" rather than a concrete king or assembly.]

iii. The Sovereign (Ch. 7)

THIS formula shows us that the act of association comprises a mutual undertaking between the public and the individuals, and that each individual, in making a contract, as we may say, with himself, is bound in a double capacity; as a member of the Sovereign he is bound to the individuals, and as a member of the State to the Sovereign.

But **the maxim of civil right, that no one is bound by undertakings made to himself, does not apply in this case;** for there is a great difference between incurring an obligation to yourself and incurring one to a whole of which you form a part.

Attention must further be called to the fact that public deliberation, while **competent to bind all the subjects to the Sovereign,** because of the two different capacities in which each of them may be regarded, cannot, for the opposite reason, **bind the Sovereign to itself;** and that it is consequently against the nature of the body politic for the Sovereign to impose on itself a law which it cannot infringe.

[RDC: Again not so far from Hobbes.]

iv. Civilizing nature of the state (under a social contract, ch 8)

THE passage from the state of nature to the civil state produces a very remarkable change in man, by substituting justice for instinct in his conduct, and giving his actions the morality they had formerly lacked. Then only, when the

voice of duty takes the place of physical impulses and right of appetite, does man, who so far had considered only himself, find that he is forced to act on different principles, and to consult his reason before listening to his inclinations.

v. On the Nature and Measurement of an Ideal Government (Book 3, ch 9--*population growth as an index of the quality of governance*)

THE question "**What absolutely is the best government?**" is **unanswerable** as well as indeterminate; or rather, there are as many good answers as there are possible combinations in the absolute and relative situations of all nations.

But if it is asked by what sign we may know that a given people is well or ill governed, that is another matter, and the question, being one of fact, admits of an answer. ...

As moral qualities do not admit of exact measurement, **agreement about the mark does not mean agreement about the valuation.** For my part, I am continually astonished that a mark so simple is not recognized, or that men are of so bad faith as not to admit it.

What is the end of political association? The preservation and prosperity of its members.

And what is the surest mark of their preservation and prosperity? Their numbers and population.

Seek then nowhere else this mark that is in dispute. The rest being equal, the government under which, without external aids, without naturalization or colonies, the citizens increase and multiply most, is beyond question the best. The government under which a people wanes and diminishes is the worst. Calculators, it is left for you to count, to measure, to compare.²⁷

vi. The end of the social contract (ch 9--the tension between the general interest and specific individual interests)

AS the particular will acts constantly in opposition to the general will, the government continually exerts itself against the Sovereignty.

The greater this exertion becomes, the more the constitution changes; and, as there is in this case no other corporate will to create an equilibrium by resisting the will of the prince, sooner or later **the prince must inevitably suppress the Sovereign and break the social treaty.** This is the unavoidable and inherent defect which, from the very birth of the body politic, tends ceaselessly to destroy it, as age and death end by destroying the human body.

vii. (Right of rebellion)

So that **the moment the government usurps the Sovereignty, the social compact is broken, and all private citizens recover by right their natural liberty, and are forced, but not bound, to obey.**

viii. In the end, Rousseau links "sovereignty" (by which he means the general will) to direct democracy (Ch. 12)

THE Sovereign, having no force other than the legislative power, acts only by means of the laws; and the laws being solely the authentic acts of the general will, **the Sovereign cannot act save when the people is assembled.**

The people in assembly, I shall be told, is a mere chimera. It is so today, but two thousand years ago it was not so.

Has man's nature changed? The bounds of possibility, in moral matters, are less narrow than we imagine: it is our weaknesses, our vices and our prejudices that confine them. Base souls have no belief in great men; vile slaves smile in mockery at the name of liberty. ...

THE **moment the people is legitimately assembled as a sovereign body, the jurisdiction of the government wholly lapses,** the executive power is suspended, and the person of the meanest citizen is as sacred and inviolable as that of the first magistrate; for in the presence of the person represented, representatives no longer exist.

(from ch. 15) **The better the constitution of a State** is, the more do public affairs encroach on private in the minds of the citizens. Private affairs are even of much less importance, because the aggregate of the common happiness furnishes a greater proportion of that of each individual, so that there is less for him to seek in particular cares.

Sovereignty, for the same reason as makes it inalienable, cannot be represented; it lies essentially in the general will, and will does not admit of representation: it is either the same, or other; there is no intermediate possibility.

The deputies of the people, therefore, are not and cannot be its representatives: they are merely its stewards, and can carry through no definitive acts. **Every law the people has not ratified in person is null and void ù is, in fact, not a law.**

[RDC: Perhaps, then, governmental types can be ranked after all, without reference to population growth statistics. Perhaps Rousseau's hesitation to conclude this, as in Locke and Hobbes, partly reflects the illiberal states in which they wrote.]

ix. (Ch 18) Government as a law, passed by a constitutional convention

WHAT we have just said confirms Chapter 16, and makes it clear that the **institution of government is not a contract, but a law.**

The depositaries of the executive power are not the people's masters, but its officers; that it can set them up and pull them down when it likes; that for them there is no question of contract, but of obedience and that in taking charge of the functions the State imposes on them they are doing no more than fulfilling their duty as citizens, without having the remotest right to argue about the conditions.

When therefore the people sets up **an hereditary government**, whether it be monarchical and confined to one family, or aristocratic and confined to a class, what it enters into is not an undertaking; **the administration is given a provisional form, until the people chooses to order it otherwise.**

E. The US Declaration of Independence (1776)

The **Unanimous Declaration of the Thirteen United States of America**

When, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain **unalienable rights, that among these are life, liberty and the pursuit of happiness.** That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.

That whenever any form of government becomes destructive to these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.

Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes; and accordingly all experience hath shown that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed.

But when a long train of abuses and usurpations, pursuing invariably the same object evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security. -- Such has been the patient sufferance of these colonies; and such is now the necessity which constrains them to alter their former systems of government.

The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states. To prove this, let facts be submitted to a candid world.

[Note the influence of social contract theory, the parallels with the earlier Dutch declaration of independence, and the return to Plato and Aristotle's "happiness seeking society" as opposed to peace (Hobbes), property (Locke), or the General Will (Rousseau)]

F. **Immanuel Kant** (1793) "On the Relationship of Theory to Practice in Political Right (Against Hobbes)"

- i. Among all the contracts by which a large group of men unites to form a society, **the contract establishing a civil constitution is of an exceptional nature**. For while, so far as its execution is concerned, it has much in common with all others that are likewise directed towards a chosen end to be pursued by joint effort, it is essentially different from all others in the principle of its constitution. In all social contracts, we find a union of many individuals for some common end which they all share. But a union as an end in itself which they all ought to share and which is thus an absolute and primary duty in all external relationships whatsoever among human beings (who cannot avoid mutually influencing one another), is only found in a society insofar as it constitutes a civil state, i. e. a commonwealth.
- ii. Since every restriction of freedom through the arbitrary will of another party is termed coercion, it follows that a civil constitution is a relationship among free men who are subject to coercive laws, while they retain their freedom within the general union with their fellows.
- iii. Men have **different views on the empirical end of happiness** and what it consists of, so that as far as happiness is concerned their will cannot be brought under any common principle nor thus under any external law harmonizing with the freedom of everyone.
[Note the contrast with Aristotle and Plato on this point.]
- iv. The civil state, regarded purely as a lawful state, is based on the following a priori principles:
 - **The freedom of every member of society as a human being.**
 - **The equality of each with all the others as a subject.**
 - **The independence of each member of a commonwealth as a citizen.**
- v. Man's *freedom* as a human being, as a principle for the constitution of a commonwealth can be expressed in the following formula.
No one can compel me to be happy in accordance with his conception of the welfare of others, for each may seek happiness in whatever way he sees fit, so long as he does not infringe upon the freedom of others to pursue a similar end which can be reconciled with the freedom of everyone else within a workable general law--i.e. he must accord to others the same right as he enjoys himself.

[Note that Kant, thus, accepts Plato and Aristotle's assessment that happiness is a measure of the effectiveness of a constitution, but rejects Plato's effort to design a "happy society" by imposing specific rules and Aristotle's specific ideas about virtue.]

- vi. Man's *equality* as a subject might be formulated as follows. Each member of the commonwealth has rights of coercion in relation to all the others, except in relation to the head of state. For he along is not a member of the commonwealth, but its creator or preserver, and he alone is authorized to coerce others without being subject to any coercive law himself. ... This uniform equality of human beings as subjects of a state is, however, perfectly consistent with the utmost inequality of the mass in the degree of its possessions ... Nevertheless, they are all equal before the law which, as he pronouncement of the general will, can only be single in relations to which i possess rights.
- vii. The independence of a member of the commonwealth as a citizen, i. e. as a co-legislator *[very similar to Aristotle's definition of a citizen]*, may be defined as follows.
In the question of actual legislation, all who are free and equal under existing public laws may be considered equal, **but not** as regards the right to make these laws.
Those who are not entitled to this right are nonetheless obliged, as members of the commonwealth, to comply with these laws, and they thus likewise **enjoy their protection** (not as citizens but as co-beneficiaries of this protection). For all rights depend on laws.
But a public law ... must not therefore itself be able to do an injustice to any one.
- viii. *[Voting rights for all males except laborers and poor]*

Any one who has the right to vote on this legislation is a citizen, i.e. citizen of a state, not bourgeois or citizen of a town.

[Again Kant uses the term citizen used as in Aristotle, but now he is going to suggest an extension of the franchise.]

The only qualification required by a citizen (apart, of course, of being an adult male) is that he must be his own master (*sui iuris*) and must have some property (which can include any skill, trade, fine art or science) to support himself.

In cases where he must earn his living from others, he must earn it only by selling that which is his, and not by allowing others to make use of him; for he must in the true sense of the word serve no one but the commonwealth.

In this sense, artisans and large or small landowners are all equal, and **each is entitled to one vote only**. ... the number of those entitled to vote on matters of legislation must be calculated purely from the number of property owners not from the size of their properties.

- ix. [Historical note: Kant's notion of the franchise seems "illiberal" to modern democratic sensibilities, but remember that most places in Europe did not advance the franchise so far for another hundred years. And many places around the world have still not done so.]
- x. [Is Kant calling for direct democracy? Not quite, a constitutional convention, as the most plausible interpretation of Rousseau.]
- xi. [Legitimacy of majority rule and representative democracy requires unanimity and a social contract.]

Those who possess this right to vote must agree unanimously to the law of public justice, or else a legal contention would arise between those who agree and those who disagree, and it would require yet another hither legal principle to resolve it.

An entire people cannot, however, be expected to reach unanimity, but only to show a majority of votes (and not even of direct votes, but simply of the votes of those delegated in a large nation to represent the people).

Thus the actual principle of being content with majority decisions must be accepted unanimously and embodied in a contract; and this itself must be the ultimate basis on which a civil constitution is established.

- xii. [Unanimity as a (limited) principle for evaluating laws] This is the test of the rightfulness of every public law.

For if the law is such that a whole people could not possibly agree to it (for example, if it stated that a certain class of subjects must be privileged as a hereditary ruling class) it is unjust; but if it is at least possible that a people could agree to it, it is our duty to consider the law as just, even if the people is at present in such a position or attitude of mind that it would probably refuse its consent if it were consulted.

But this restriction obviously applies only to the judgment of the legislator, not that of a subject.

- xiii. Thus, if a people, under some existing legislation, were asked to make a judgment which in all probability would prejudice its happiness what should it do? ... The only possible answer is that they can do nothing but **obey**.

- xiv. [This returns to Hobbes theory in which there is no right of revolt. However, the previous logic seems to run in the opposite direction, it makes one wonder whether there would have been a legal penalty for saying otherwise and inciting a revolt?]

VI. *Other Notables of the late Eighteenth Century*

- i. **Thomas Paine** [1792] *The Rights of Man* (A reply to Burke's criticism of the French Revolution)
 - Thomas Paine was perhaps the most important popularizer in the age of the American and French revolution. He was sentenced to death in both England and in France for his roles in those revolutions, in the latter case for opposing the execution of Louis the XIV, and narrowly escaped the sentence each time to retire in America (where his aethiest-diest views were not approved of).
 - Note his acceptance of contract theory as a norm, but rejection of it as a device for legitimizing existing governments.

(From the Introduction) **To understand the nature and quantity of government proper for man, it is necessary to attend to his character.** As Nature created him for social life, she fitted him for the station she intended. In all cases she made his natural wants greater than his individual powers. No one man is capable, without the aid of society, of supplying his own wants, and those wants, acting upon every individual, impel the whole of them into society, as naturally as gravitation acts to a centre.

But she has gone further. She has not only forced man into society by a diversity of wants which the reciprocal aid of each other can supply, but she has implanted in him a system of social affections, which, though not necessary to his existence, are essential to his happiness. There is no period in life when this love for society ceases to act. It begins and ends with our being.

If we examine with attention into the composition and constitution of man, the diversity of his wants, and the diversity of talents in different men for reciprocally accommodating the wants of each other, his propensity to society, and consequently to preserve the advantages resulting from it, we shall easily discover, that a great part of what is called government is mere imposition.

Government is no farther necessary than to supply the few cases to which society and civilisation are not conveniently competent; and instances are not wanting to show, that everything which government can usefully add thereto, has been performed by the common consent of society, without government.

So far is it from being true, as has been pretended, that the abolition of any formal government is the dissolution of society, that it acts by a contrary impulse, and brings the latter the closer together. All that part of its organisation which it had committed to its government, devolves again upon itself, and acts through its medium. When men, as well from natural instinct as from reciprocal benefits, have habituated themselves to social and civilised life, there is always enough of its principles in practice to carry them through any changes they may find

necessary or convenient to make in their government. In short, man is so naturally a creature of society that it is almost impossible to put him out of it.

Formal government makes but a small part of civilised life; and when even the best that human wisdom can devise is established, it is a thing more in name and idea than in fact. It is to the great and fundamental principles of society and civilisation — **to the common usage universally consented to**, and mutually and reciprocally maintained- to the unceasing circulation of interest, which, passing through its million channels, invigorates the whole mass of civilised man- it is to these things, infinitely more than to anything which even the best instituted government can perform, that the safety and prosperity of the individual and of the whole depends.

The more perfect civilisation is, the less occasion has it for government, because the more does it regulate its own affairs, and govern itself; but so contrary is the practice of old governments to the reason of the case, that the expenses of them increase in the proportion they ought to diminish. It is but few general laws that civilised life requires, and those of such common usefulness, that whether they are enforced by the forms of government or not, the effect will be nearly the same. If we consider what the principles are that first condense men into society, and what are the motives that regulate their mutual intercourse afterwards, we shall find, by the time we arrive at what is called government, that nearly the whole of the business is performed by the natural operation of the parts upon each other.

Applying Principle to Practice, Chapter 2 — Of the Origin of the Present Old Governments.

It is impossible that such governments as have hitherto existed in the world, could have commenced by any other means than a total violation of every principle sacred and moral. The obscurity in which the origin of all the present old governments is buried, implies the iniquity and disgrace with which they began. The origin of the present government of America and France will ever be remembered, because it is honourable to record it; but with respect to the rest, even Flattery has consigned them to the tomb of time, without an inscription.

It could have been no difficult thing in the early and solitary ages of the world, while the chief employment of men was that of attending flocks and herds, for a banditti of ruffians to overrun a country, and lay it under contributions. Their power being thus established, the chief of the band contrived to lose the name of Robber in that of Monarch; and hence the origin of Monarchy and Kings.

ii. **Benjamin Franklin** (1787) [Speech at end of constitutional convention in Philadelphia Sept. 17, 1787]]

Mr. President

I confess that there are several parts of this constitution which I do not at present approve, but I am not sure I shall never approve them: For having lived long, I have experienced many instances of being obliged by better information, or fuller consideration, to change opinions even on important subjects, which I once thought right, but found to be otherwise. It is therefore that the older I grow, the more apt I am to doubt my own judgment, and to pay more respect to the judgment of others. Most men indeed as well as most sects in Religion, think themselves in possession of all truth, and that wherever others differ from them it is so far error. Steele a Protestant in a Dedication tells the Pope, that the only difference between our Churches in their opinions of the certainty of their doctrines is, the Church of Rome is infallible and the Church of England is never in the wrong. But though many private persons think almost as highly of their own infallibility as of that of their sect, few express it so naturally as a certain french lady, who in a dispute with her sister, said "I don't know how it happens, Sister but I meet with no body but myself, that's always in the right-Il n'y a que moi qui a toujours raison."

In these sentiments, Sir, I agree to this Constitution with all its faults, if they are such; because **I think a general Government necessary for us, and there is no form of Government but what may be a blessing to the people if well administered, and believe farther that this is likely to be well administered for a course of years, and can only end in Despotism**, as other forms have done before it, when the people shall become so corrupted as to need despotic Government, being incapable of any other. I doubt too whether any other Convention we can obtain, may be able to make a better Constitution. **For when you assemble a number of men to have the advantage of their joint wisdom, you inevitably assemble with those men, all their prejudices, their passions, their errors of opinion, their local interests, and their selfish views.**

From such an assembly can a perfect production be expected? It therefore astonishes me, Sir, to find this system approaching so near to perfection as it does; and I think it will astonish our enemies, who are waiting with confidence to hear that our councils are confounded like those of the Builders of Babel; and that our States are on the point of separation, only to meet hereafter for the purpose of cutting one another's throats. Thus I consent, Sir, to this Constitution because I expect no better, and because I am not sure, that it is not the best. The opinions I have had of its errors, I sacrifice to the public good. I have never whispered a syllable of them abroad. Within these walls they were born, and here they shall die.

If every one of us in returning to our Constituents were to report the objections he has had to it, and endeavor to gain partizans in support of them, we might prevent its being generally received, and thereby lose all the salutary effects & great advantages resulting naturally in our favor among foreign Nations as well as among ourselves, from our real or apparent unanimity. Much of the strength & efficiency of any Government in procuring and securing happiness to the people, depends, on opinion, on the general opinion of the goodness of the Government, as well as well as of the wisdom and integrity of its Governors. I hope therefore that for our own sakes as a part of the people, and for the sake of posterity, we shall act heartily and unanimously in recommending this Constitution (if approved by Congress & confirmed by the Conventions) wherever our influence may extend, and turn our future thoughts & endeavors to the means of having it well administred.

On the whole, Sir, I can not help expressing a wish that every member of the Convention who may still have objections to it, would with me, on this occasion doubt a little of his own infallibility, and to make manifest our unanimity, put his name to this instrument.

iii. **James Madison** (1788, *Federalist Paper 48*)

[Madison is given more space than most below, because he played such an important role in designing the American Constitution, which continues to the present day from its ratification in 1789. Note the influence, but also his extensions of Montesquieu's argument concerning the division of powers]

IT WAS shown in the last paper that the political apothegm there examined does not require that the legislative, executive, and judiciary departments should be **wholly unconnected with each other**.

I shall undertake, in the next place, to show that unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.

It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident, that none of them ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each, against the invasion of the others.

What this security ought to be, is the great problem to be solved.

Will it be sufficient to mark, with precision, the boundaries of these departments, in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power?

This is the security which appears to have been principally relied on by the compilers of most of the American constitutions.

But experience assures us, that the efficacy of the provision has been greatly overrated; and that some more adequate defense is indispensably necessary for the more feeble, against the more powerful, members of the government. The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.

The founders of our republics have so much merit for the wisdom which they have displayed, that no task can be less pleasing than that of pointing out the errors into which they have fallen. A respect for truth, however, obliges us to remark, that they seem never for a moment to have turned their eyes from the danger to liberty from the overgrown and all-grasping prerogative of an

hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority.

They seem never to have recollected the danger from legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations. In a government where numerous and extensive prerogatives are placed in the hands of an hereditary monarch, the executive department is very justly regarded as the source of danger, and watched with all the jealousy which a zeal for liberty ought to inspire.

In a democracy, where a multitude of people exercise in person the legislative functions, and are continually exposed, by their incapacity for regular deliberation and concerted measures, to the ambitious intrigues of their executive magistrates, tyranny may well be apprehended, on some favorable emergency, to start up in the same quarter.

But in a representative republic, where the executive magistracy is carefully limited; both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired, by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.

The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments. It is not unfrequently a question of real nicety in legislative bodies, whether the operation of a particular measure will, or will not, extend beyond the legislative sphere.

On the other side, the executive power being restrained within a narrower compass, and being more simple in its nature, and the judiciary being described by landmarks still less uncertain, projects of usurpation by either of these departments would immediately betray and defeat themselves. Nor is this all: as the legislative department alone has access to the pockets of the people, and has in some constitutions full discretion, and in all a prevailing influence, over the pecuniary rewards of those who fill the other departments, a dependence is thus created in the latter, which gives still greater facility to encroachments of the former.

I have appealed to our own experience for the truth of what I advance on this subject. Were it necessary to verify this experience by particular proofs, they

might be multiplied without end. I might find a witness in every citizen who has shared in, or been attentive to, the course of public administrations. I might collect vouchers in abundance from the records and archives of every State in the Union. But as a more concise, and at the same time equally satisfactory, evidence, I will refer to the example of two States, attested by two unexceptionable authorities.

The **first example is that of Virginia**, a State which, as we have seen, has expressly declared in its constitution, that the three great departments ought not to be intermixed. The authority in support of it is Mr. Jefferson, who, besides his other advantages for remarking the operation of the government, was himself the chief magistrate of it. In order to convey fully the ideas with which his experience had impressed him on this subject, it will be necessary to quote a passage of some length from his very interesting "Notes on the State of Virginia," p. 195. "All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands, is precisely the definition of despotic government. It will be no alleviation, that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one. Let those who doubt it, turn their eyes on the republic of Venice. As little will it avail us, that they are chosen by ourselves. An ELECTIVE DESPOTISM was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others. For this reason, that convention which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive, and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time. BUT NO BARRIER WAS PROVIDED BETWEEN THESE SEVERAL POWERS. The judiciary and the executive members were left dependent on the legislative for their subsistence in office, and some of them for their continuance in it. If, therefore, the legislature assumes executive and judiciary powers, no opposition is likely to be made; nor, if made, can be effectual; because in that case they may put their proceedings into the form of acts of Assembly, which will render them obligatory on the other branches. They have accordingly, IN MANY instances, DECIDED RIGHTS which should have been left to JUDICIARY CONTROVERSY, and THE DIRECTION OF THE EXECUTIVE, DURING THE WHOLE TIME OF THEIR SESSION, IS BECOMING HABITUAL AND FAMILIAR.

The **other State which I shall take for an example is Pennsylvania**; and the other authority, the Council of Censors, which assembled in the years 1783 and 1784. A part of the duty of this body, as marked out by the constitution, was "to inquire whether the constitution had been preserved inviolate in every part; and

whether the legislative and executive branches of government had performed their duty as guardians of the people, or assumed to themselves, or exercised, other or greater powers than they are entitled to by the constitution. "

In the execution of this trust, the council were necessarily led to a comparison of both the legislative and executive proceedings, with the constitutional powers of these departments; and from the facts enumerated, and to the truth of most of which both sides in the council subscribed, it appears that the constitution had been flagrantly violated by the legislature in a variety of important instances. A great number of laws had been passed, violating, without any apparent necessity, the rule requiring that all bills of a public nature shall be previously printed for the consideration of the people; although this is one of the precautions chiefly relied on by the constitution against improper acts of legislature.

The constitutional trial by jury had been violated, and powers assumed which had not been delegated by the constitution. Executive powers had been usurped. The salaries of the judges, which the constitution expressly requires to be fixed, had been occasionally varied; and cases belonging to the judiciary department frequently drawn within legislative cognizance and determination. Those who wish to see the several particulars falling under each of these heads, may consult the journals of the council, which are in print. Some of them, it will be found, may be imputable to peculiar circumstances connected with the war; but the greater part of them may be considered as the spontaneous shoots of an ill-constituted government.

It appears, also, that the executive department had not been innocent of frequent breaches of the constitution.

There are three observations, however, which ought to be made on this head: **FIRST**, a great proportion of the instances were either immediately produced by the necessities of the war, or recommended by Congress or the commander-in-chief; **SECONDLY**, in most of the other instances, they conformed either to the declared or the known sentiments of the legislative department; **THIRDLY**, the executive department of Pennsylvania is distinguished from that of the other States by the number of members composing it. In this respect, it has as much affinity to a legislative assembly as to an executive council. And being at once exempt from the restraint of an individual responsibility for the acts of the body, and deriving confidence from mutual example and joint influence, unauthorized measures would, of course, be more freely hazarded, than where the executive department is administered by a single hand, or by a few hands.

The conclusion which I am warranted in drawing from these observations is, that a mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments

which lead to a tyrannical concentration of all the powers of government in the same hands.

iv. **Von Humboldt** (1792) *The Limits of State Action*

A State, then, has one of two ends in view; it designs either to promote happiness, or simply to prevent evil; and in this latter case, the evil which arises from natural causes, or that which springs from man's disregard for his neighbour's rights.

If it restricts its solicitude to the second of these objects, it aims merely at security; and I would here oppose this term security to every other possible end of State agency, and comprise these last under the general head of Positive Welfare.

Further, the various means adopted by a State, as subservient to its purposes, affect in very different measure the extension of its activity. It may endeavour, for instance, to secure the accomplishment of these immediately, either with the aid of coercion or by the inducements of example and exhortation; or it may combine all these sources of influence in the attempt to shape the citizen's outward life in accordance with its ends, and forestall actions contrary to its intention; or, lastly, it may try to exercise a sway over his thoughts and feelings, so as to bring his inclinations, even, into conformity with its wishes.

- It will be evident, that it is single actions only that come under political supervision in the first of these cases; that this is extended in the second to the general conduct of life; and that, in the last instance we have supposed, it is the very character of the citizen, his views, and modes of thought, which are brought under the influence of State control.
- The actual working of this restrictive agency, moreover, is clearly least considerable in the first of these cases, more so in the second, and is most effective and apparent in the last; either because, in this, it reaches the most copious sources of action, or that the very possibility of such an influence presupposes a greater multiplicity of institutions.

But however seemingly different the departments of political action to which they respectively belong, we shall scarcely find any one institution which is not more or less intimately interwoven, in its objects or its consequences, with several of these. We have but to notice, by way of illustration, the close interdependence that exists between the promotion of welfare and the maintenance of security; and further, to remember that when any influence affecting single actions only, engenders a habit through the force of repetition, it comes ultimately to modify the character itself.

Hence, in view of this interdependence of political institutions, it becomes very difficult to discover a systematic division of the whole subject before us, sufficiently correspondent to the course of our present inquiry. But, in any case, it will be most immediately conducive to our design, to examine in the outset whether the State should extend its solicitude to the positive welfare of the nation, or content itself with provisions for its security; and, confining our view of institutions to what is strictly essential either in their objects or consequences, to ascertain next, as regards both of these aims, the nature of the means that may be safely left open to the State for accomplishing them. ...

But to continue: the evil results of a too extended solicitude on the part of the State, are still more strikingly manifested in the suppression of all active energy, and the necessary deterioration of the moral character.

- We scarcely need to substantiate this position by rigorous deductions. The man who frequently submits the conduct of his actions to foreign guidance and control, becomes gradually disposed to a willing sacrifice of the little spontaneity that remains to him.
- He fancies himself released from an anxiety which he sees transferred to other hands, and seems to himself to do enough when he looks for their leading, and follows the course to which it directs him. Thus, his notions of right and wrong, of praise and blame, become confounded.
- The idea of the first inspires him no longer; and the painful consciousness of the last assails him less frequently and violently, since he can more easily ascribe his shortcomings to his peculiar position, and leave them to the responsibility of those who have shaped it for him. If we add to this, that he may not, possibly, regard the designs of the State as perfectly pure in their objects or execution—should he find grounds to suspect that not his own advantage only, but along with it some other bye-scheme is intended, then, not only the force and energy, but the purity and excellence of his moral nature is brought to suffer.
- He now conceives himself not only irresponsible for the performance of any duty which the State has not expressly imposed upon him, but exonerated at the same time from every personal effort to ameliorate his own condition; nay, even shrinks from such an effort, as if it were likely to open out new opportunities, of which the State might not be slow to avail itself.
- And as for the laws actually enjoined, he labours, as much as possible, to escape their operation, considering every such evasion as a positive gain. If now we reflect that, as regards a large portion of the nation, its laws and political institutions have the effect of circumscribing the grounds of morality, it cannot but appear a melancholy spectacle to see at once the most sacred duties, and mere trivial and arbitrary enactments, proclaimed from the same authoritative source, and to witness the infraction of both visited with the same measure of punishment ...

If even to behold a people breaking their fetters asunder, in the full consciousness of their rights as men and citizens, is a beautiful and ennobling spectacle:

it must be still more fair, and full of uplifting hope, to witness a prince himself unloosing the bonds of thralldom and granting freedom to his people,—nor this as the mere bounty of his gracious condescension, but as the discharge of his first and most indispensable duty; for it is nobler to see an object effected through a reverent regard for law and order, than conceded to the imperious demands of absolute necessity; and the more so, when we consider that the freedom which a nation strives to attain through the overthrow of existing institutions, is but as hope to enjoyment, as preparation to perfection, when compared with that which a State, once constituted, can bestow.

If we cast a glance at the history of political organizations, we shall find it difficult to decide, in the case of any one of them, the exact limits to which its activity was conformed, because we discover in none the systematic working out of any deliberate scheme, grounded on a certain basis of principle.

We shall observe, that the freedom of the citizen has been limited from two points of view; that is, either from the necessity of organizing or securing the constitution, or from the expediency of providing for the moral and physical condition of the nation. These considerations have prevailed alternately, according as the constitution, in itself powerful, has required additional support, or as the views of the legislators have been more or less expanded. Often indeed both of these causes may be found operating conjointly.

In the ancient States, almost all the institutions relating to the private life of the citizens were of a strictly political character. Possessed, as it was, of but little absolute authority, the constitution was mainly dependent for its duration on the will of the nation, and hence it was necessary to discover or propose means by which due harmony might be preserved between the character of established institutions and this tendency of national feeling.

The same policy is still observable in small republican States; and if we were to regard it in the light of these circumstances alone, we might accept it as true, that the freedom of private life always increases in exact proportion as public freedom declines; whereas security always keeps pace with the latter.

It is true the ancient legislators very often, and the **ancient philosophers** invariably, directed their attention to the inner life of the individual; and, in their eyes, the moral worth of human nature seemed to deserve the highest regard: of this we have an illustration in Plato's Republic, of which Rousseau has very truly observed that it has more the character of an educational than a political treatise.

v. **Jeremy Bentham** (1776) *Fragment on Government* (His comments on Blackstone's *Commentaries*.)

[Betham, essentially **rejects the usefulness of social contract theory** even as a philosophical construct for the purpose of analyzing the merits of alternative governments. He insists on (returning) to the happiness concepts present in Plato and Aristotle, although like Kant, he seems to reject the possibility of state provided happiness. His utilitarian calculus provided and continues to provide an alternative to the contract based theories of constitutional design.]

[Introduction] Correspondent to discovery and improvement in the natural world, is reformation in the moral; if that which seems a common notion be, indeed, a true one, that in the moral world there no longer remains any matter for discovery. Perhaps, however, this may not be the case: perhaps among such observations as would be best calculated to serve as grounds for reformation, are some which, being observations of matters of fact hitherto either incompletely noticed, or not at all would, when produced, appear capable of bearing the name of discoveries: with so little method and precision have the consequences of this fundamental axiom, it is the greatest happiness of the greatest number that is the measure of right and wrong, been as yet developed.

2. Conversing with Lawyers, I found them full of the virtues of their Original Contract, as a recipe of sovereign efficacy for reconciling the accidental necessity of resistance with the general duty of submission. This drug of theirs they administered to me to calm my scruples. But my unpractised stomach revolted against their opiate. I bid them open to me that page of history in which the solemnization of this important contract was recorded. They shrunk from this challenge; nor could they, when thus pressed, do otherwise than our Author has done, confess the whole to be a fiction.

[By inference rejects the value of social contract based analysis of the law and constitutions, preferring the happiness concept, as per Plato and Aristotle.]

[Regarding Aristotle, in Fnt 19.] Let this be taken for a truth upon the authority of Aristotle I mean by those, who like the authority of Aristotle better than that of their own experience. , says that philosopher, μ , , . (understand) .Arise. Eth. ad Nic. L. I. c. 1.

19. [Attack on the idea of a Law of Nature, as per the contractarians of the Enlightenment] The propriety of this dangerous maxim, so far as the Divine Law is concerned, is what I must refer to a future occasion for more particular consideration.(85) As to the LAW of Nature, if (as I trust it will appear) it be nothing but a phrase;(86) if there be no other medium for proving any act to be an offence against it, than the mischievous tendency of such act; if there be no other medium for proving a law of the state to be contrary to it, than the inexpediency of such law, unless the bare unfounded disapprobation of any one

who thinks of it be called a proof; if a test for distinguishing such laws as would be contrary to the LAW of Nature from such as, without being contrary to it, are simply inexpedient, be that which neither our Author, nor any man else, so much as pretended ever to give; if, in a word, there be scarce an law whatever but what those who have not liked it have found, on some account or another, to be repugnant to some text of scripture, I see no remedy but that the natural tendency of such doctrine is to impel a man, by the force of conscience, to rise up in arms against any law whatever that he happens not to like. What sort of government it is that can consist with such a disposition, I must leave to our Author to inform us.

20. It is the principle of utility, accurately apprehended and steadily applied, that affords the only clue to guide a man through these straits. It is for that, if any, and for that alone to furnish a decision which neither party shall dare in theory to disavow. It is something to reconcile men even in theory. They are at least, something nearer to an effectual union, than when at variance as well in respect of theory as of practice.

41. Let it be said, that part at least of this promise was to govern in subservience to Law: that hereby a more precise rule was laid down for his conduct, by means of this supposal of a promise, than that other loose and general rule to govern in subservience to the happiness of his people: and that, by this means, it is the letter of the Law that forms the tenor of the rule.

Now true it is, that the governing in opposition to Law, is one way of governing in opposition to the happiness of the people: the natural effect of such a contempt of the Law being, if not actually to destroy, at least to threaten with destruction, all those rights and privileges that are founded on it: rights and privileges on the enjoyment of which that happiness depends. But still it is not this that can be safely taken for the entire purport of the promise here in question: and that for several reasons.

First, Because the most mischievous, and under certain constitutions the most feasible, method of governing in opposition to the happiness of the people, is, by setting the Law itself in opposition to their happiness. [Bad law]

Secondly, Because it is a case very conceivable, that a King may, to a great degree, impair the happiness of his people without violating the letter of any single Law.

Thirdly, Because extraordinary occasions may now and then occur, in which the happiness of the people may be better promoted by acting, for the moment, in opposition to the Law, than in subservience to it.

Fourthly, Because it is not any single violation of the Law, as such, that can properly be taken for a breach of his part of the contract, so as to be understood

to have released the people from the obligation of performing theirs. [fiction of a social contract]

For, to quit the fiction, and resume the language of plain truth, it is scarce ever any single violation of the Law that, by being submitted to, can produce so much mischief as shall surpass the probable mischief of resisting it.

If every single instance whatever of such a violation were to be deemed an entire dissolution of the contract, a man who reflects at all would scarce find any-where, I believe, under the sun, that Government which he could allow to subsist for twenty years together. It is plain, therefore, that to pass any sound decision upon the question which the inventors of this fiction substituted instead of the true one, the latter was still necessary to be decided. All they gained by their contrivance was, the convenience of deciding it obliquely, as it were, and by a side wind that is, in a crude and hasty way, without any direct and steady examination.