

30-2007

~~30-2007-27~~

**THE CONSTITUTION:
OUR WRITTEN LEGACY**

Joseph A. Melusky
Department of History and Political Science
Saint Francis College
Loretto, Pennsylvania



KRIEGER PUBLISHING COMPANY
MALABAR, FLORIDA

Original Edition 1991

Printed and Published by
KRIEGER PUBLISHING COMPANY
KRIEGER DRIVE
MALABAR, FLORIDA 32950

Copyright © 1991 by Krieger Publishing Company

All rights reserved. No part of this book may be reproduced in any form or by any means, electronic or mechanical, including information storage and retrieval systems without permission in writing from the publisher.

No liability is assumed with respect to the use of the information contained herein.
Printed in the United States of America

Library of Congress Cataloging-in-Publication Data

Melusky, Joseph Anthony.

The Constitution : our legacy / Joseph A. Melusky.

p. cm.

Includes Bibliographical references.

ISBN 0-89464-334-7 (Cloth) (alk. paper)

ISBN 0-89464-550-1 (Paper)

I. United States--Constitutional history. I. Title.

KF4541.M43 1990

342.73'029--dc20

[347.30229]

89-19963

CIP

For my son, Mike

May you be as durable and resilient as the Constitution has been.

10 9 8 7 6 5 4

time, as shall be thought to be 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 ... 1620.

Discussion Points:

1. It was noted above that the Mayflower Compact was a social contract reflecting seventeenth century political thought. Consider this claim while reading excerpts from the works of Thomas Hobbes and John Locke. In what ways were the signers of the Mayflower Compact adopting a social contract?

CHAPTER 3

THOMAS HOBBS, LEVIATHAN (1651)

The Framers of the United States Constitution were influenced by the writings of the "social contract" theorists. In general terms, these theorists posited that once men lived in a state of nature where they were selfish, competitive, and insecure. Conflicts were common. These natural men were, however, capable of reason. To live more secure lives, they drafted a social contract in which they agreed to enter into civil society. They agreed to establish a government and to give it the power to make and enforce laws that limited individual liberty. This government was designed to promote security and its authority came from the consent of the governed. Civil men would retain certain of their "natural" rights against the government. If the government violated these rights, the contract would be abridged and consent could be withdrawn. In this way, the social contract theorists explained the origins of governmental authority and challenged the doctrine of the divine right of kings.

Thomas Hobbes (1588-1679) was one of the most prominent of these theorists. He argued that there was no sense of community in the state of nature; men were unconnected and alone. Natural man was exclusively self-interested, concerned only with satisfying his own desires. The Hobbesian natural state was a place of absolute liberty. Man had an absolute right to everything, including the right to kill others. As such, the Hobbesian natural man was in constant fear for his very life. No man could feel safe and secure. In Hobbes's own words, the life of the natural man was "solitary, poor, nasty, brutish, and short."

Hobbes, however, believed that natural men were capable of using reason to alleviate their perpetual fear and anxiety. All men share the basic right of self-preservation. On this basis, Hobbes maintained that men agreed to create an artificial entity to advance at least this minimal objective. They agreed to create a tremendously powerful state—a "Leviathan"—to protect them from one another. In the process, they exchanged the extreme liberty of the state of nature for the security of civil society. Civil man retained one right: the right to life. Since the

state was created to protect the lives of the contractors, the contract would be violated if the state failed to do so and consent could be withdrawn.

Hobbes's advocacy of a powerful state stemmed from his perception of the degree of conflict present in the state of nature. He saw the natural state as a place of intolerable insecurity. As such, he thought that the contractors would be so desperate that they would be willing to sacrifice almost all of their natural rights to the Leviathan they created.)

* * * * *

Nature has made men so equal in the facilities 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 man may not pretend as well as he. For as to the strength of the body, the weakest has strength enough to kill the strongest, either by secret machinations, or by confederacy with others that are in the same danger with himself.

And as to the faculties of the mind . . . I find yet a greater equality among 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. . . .

From this equality or ability arises equality of hope in the attaining of our ends. And therefore if any two men desire the same thing, which nevertheless they cannot both enjoy, they become enemies . . . and . . . endeavor to destroy or subdue one another. . . .

. . . [M]en have no pleasure, but on the contrary a great deal of grief, in keeping company where there is no power able to over-awe them all. . . .

So that in the nature of man we find three principal causes of quarrel: First, competition; secondly, diffidence; thirdly, glory.

The first makes men invade for gain; the second, for safety; and the third, for reputation. . . .

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. . . .

. . . 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 the worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short. . . .

For this war of every man against every man this also is consequent; that nothing can be unjust. The notions of right and wrong, justice and injustice, have there no place. Where there is no common power, there is no law; where no law, no injustice. Force and fraud are in war the two cardinal virtues. . . .

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 suggests convenient articles of peace, upon which men may be drawn to agreement. . . .

The right of nature, which writers commonly call *jus naturale*, is the liberty each man has to use his own power as he will himself for the preservation of . . . his own life, and consequently of doing anything which in his own judgment and reason he shall conceive to be the aptest means thereunto.

By *liberty* is understood . . . the absence of external impediments, which impediments may often take away part of a man's power to do what he would, but cannot hinder him from using the power left him, according as his judgment and reason shall dictate to him.

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 takes away the means of preserving the same, and to omit that by which he thinks it may be best preserved. . . .

And because the condition of man, as has been declared in the precedent chapter, is a condition of war of everyone against everyone, in which case everyone is governed by his own reason, and there is nothing he can make use of that may not be a help unto him in preserving his life against his enemies; it follows that in such a condition every man has a right to everything, even to one another's body. And therefore, as long as this natural right of every man to everything endures, there can be no security to any man, how strong or wise soever he be, of living out the time which nature ordinarily allows men to live. And consequently it is a precept or general rule of reason that every man ought to endeavor peace, as far as he has hope of obtaining it, and, when he cannot obtain it, that he may seek, and use, all helps and advantages of war. The first branch of which rule contains the first, and fundamental law of nature, which is to seek peace and follow it. The second, the sum of the right of nature, which is, by all means we can, to defend ourselves.

From this fundamental law of nature by which men are commanded to endeavor 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. For as long as every man holds this right of doing anything he likes, 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. . . .

Whensoever a man transfers his right or renounces it, it is either in consideration of some right reciprocally transferred to himself, or for some other good he hopes for thereby. For it is a voluntary act; and of the voluntary acts of every man the object is some *good to himself*. And therefore there be some rights which no man can be understood . . . to have abandoned or transferred. As first a man cannot lay down the right of resisting them that assault him by force to take away his life, because he cannot be understood to aim thereby at any good to himself. . . . And lastly, the motive and end for which this renouncing and transferring of right is introduced, is nothing else but the security of a man's person in his life and in the means of so preserving life as not to be weary of it. . . . The mutual transferring of right is that which men call *contract*.

The only way to erect such a common power, as may be able to defend them from the invasion of foreigners and the injuries of one another . . . is to confer all their power and strength upon one man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, unto one will. . . . This is more than consent or concord; it is a real unity of them all, in one and the same person, made by covenant of every man with every man, in such manner as if every man should say to every man, 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 has 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. And in him consists the essence of the commonwealth; which, to define it, is one person of whose acts a great multitude, by mutual covenants one with another, have made themselves every one the author, to the end he may use the strength and means of them all, as he shall think expedient, for their peace and common defense.

And he that carries this person is called Sovereign, and said to have *sovereign power*; and every one besides, his subject. . . .

The difference of commonwealths consists in the difference of the sovereign. . . . 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. . . .

Discussion Points:

1. Review the Mayflower Compact in light of Hobbes's views on the social contract.
2. Review the Preamble to the United States Constitution in light of Hobbes's views on the social contract.
There is one ground for revolution in the Hobbesian civil society. What is it? List examples of developments that could justify a decision by citizens to withdraw their consent from the state.
- 3
- 4 Reflect upon Hobbes's idea that unlimited liberty—as men enjoyed in the state of nature—produces anxiety and insecurity. Do you agree that there is such a thing as too much freedom? Explain.

CHAPTER 4

JOHN LOCKE, *SECOND TREATISE, OF CIVIL GOVERNMENT* (1690)

John Locke (1632-1704), another social contract theorist, had a profound influence on the American Revolution. Like Hobbes, he used the state of nature as a starting point in his analysis of the origins and limits of governmental power. Unlike Hobbes, whose state of nature was little more than a perilous jungle, Locke presented a relatively more optimistic view of the natural state.

Locke saw natural men as largely free and equal, but all possessed God-given natural rights. All were subject to the laws of God and all were required to respect His natural laws. Such early shared agreement about fundamental values was absent from the Hobbesian natural state. Locke thought natural men were somewhat interconnected. They lived as members of a primitive community in which they were capable of treating one another with some degree of empathy and respect. The universal, natural laws of God bound natural men to respect the lives of their fellows. They lived in a community of mankind with God as their sovereign.

But Lockean natural men were still primarily interested in satisfying their selfish interests. When several desired the same thing, conflict inevitably followed. Man's passionately selfish side made him unable to live in complete accordance with natural laws. Further, it was not always clear to conflicting parties how natural law applied to their immediate dispute; they were blinded by self-interest. They needed an impartial third party to adjudicate these disputes and to resolve conflicts peaceably. At this point, they employed reason.

Locke's natural men formed a social contract in which they exchanged some of their natural freedom for increased security and convenience. They established a state and empowered it to draft liberty-limiting laws that could be used to resolve disputes. But they insisted on retaining certain natural rights even after entering into civil society. They retained the rights to life, liberty, and property. A broad

area of individual conduct would be beyond the control of the state. (If the state violated the contract by abridging such rights, consent could be withdrawn.)

As noted, Hobbes saw the state of nature as a place of extreme peril and intolerable insecurity. As such, his contractors were so desperate to live more secure lives that they relinquished almost all of their natural rights when entering into civil society. They retained only the right to life as they abided by the laws of their Leviathan. The Lockean state of nature, by contrast, was relatively less perilous; it was a place of inconvenient insecurity. For this reason, Locke's contractors retained more rights against their more limited state. In short, grounds for revolution are more varied in a Lockean civil society than in a Hobbesian one.

[The state of nature is] a state of perfect freedom ... [and] ... also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another. ...

But though this be a state of liberty, yet it is not a state of license. ... The state of nature has a law of nature to govern it, which obliges every one, and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions: for men being all the workmanship of one omnipotent, and infinitely wise maker ... sharing all in one community of nature, there cannot be supposed any such subordination among us, that may authorize us to destroy one another, as if we were made for one another's uses. ...

... [T]he execution of the law of nature is, in that state, put into every man's hands, whereby every one has a right to punish the transgressors of that law to such a degree, as may hinder its violation. ... [E]ach transgression may be punished to that degree, and with so much severity, as will suffice to make it an ill bargain for the offender, give him cause to repent, and terrify others from doing the like. ...

... [In] political society ... the community comes to be umpire, by settled standing rules; indifferent, and the same to all parties. And by men having authority from the community for the execution of those rules, decides all the differences that may happen between any members of that society concerning any matter of right, and punishes those offenses which any member hath committed against the society with such penalties as the law has established. ...

Wherever, therefore, any number of men are so united into one soci-

ety as to quit every one his executive power of the law of nature, and to resign it to the public, there and there only is a political or civil society. ... For hereby he authorizes the society ... to make laws for him as the public good of the society shall require. ... And this puts men out of a state of nature into that of a commonwealth, by setting up a judge on earth with authority to determine all the controversies and redress the injuries that may happen to any member of the commonwealth.

If man in the state of nature be so free ... [to] be absolute lord of his own person and possessions; equal to the greatest and subject to no body, why will he part with his freedom ... and subject himself to the dominion and control of any other power? To which 'tis obvious to answer, that though in the state of nature he hath such a right, yet the enjoyment of it is very uncertain and constantly exposed to the invasion of others ... the enjoyment of the property he has in this state is very unsafe, very insecure. This makes him willing to quit this condition which, however free, is full of fears and continual dangers; and 'tis not without reason that he seeks out and is willing to join in society with others who are already united, or have a mind to unite for the mutual preservation of their lives, liberties, and estates, which I call by the general name property.

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

First, There wants an established, settled, known law, received and allowed by common consent to be the standard of right and wrong, and the common measure to decide all controversies between them. ...

Secondly, In the state of nature there wants a known and indifferent judge, with authority to determine all differences according to the established law. ...

Thirdly, In the state of nature there often wants power to back and support the sentence when right, and to give it due execution. ...

Thus mankind, notwithstanding all the privileges of the state of nature, being but in an ill condition while they remain it, are quickly driven into society. Hence it comes to pass, that we seldom find any number of men live any time together in this state. The inconveniences that they are therein exposed to by the irregular and uncertain exercise of the power every man has of punishing the transgressions of others, make them take sanctuary under the established laws of government, and therein seek the preservation of their property. ... And in this we

have the original right and rise of both the legislative and executive power as well as of the governments and societies themselves.

The reason why men enter into society is the preservation of their property; and the end why they choose and authorize a legislative is that there may be laws made, and rules set, as guards and fences to the properties of all the members of the society to limit the powers and moderate the dominion of every part and member of the society. For since it can never be supposed to be the will of the society that the legislative should have a power to destroy that which everyone designs secure by entering into society, and for which, the people submitted themselves to legislators of their own making; whenever the legislators endeavor to take away and destroy the property of the people, or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people, who are thereupon absolved from any further obedience, and are left to the common refuge which God hath provided for all men against force and violence. Whensoever, therefore, the legislative shall transgress this fundamental rule of society, and ... endeavor to grasp themselves or put into the hands of any other an absolute power over the lives, liberties, and estates of the people, by this breach of trust they forfeit the power the people had put into their hands for quite contrary ends, and it devolves to the people; who have a right to resume their original liberty, and by the establishment of a new legislative (such as they shall think fit), provide for their own safety and security....

But 'twill be said, this hypothesis lays a ferment for frequent rebellion. To which I answer:

First, No more than any other hypothesis. For when the people are ... generally ill treated ... [they] will be ready upon any occasion to ease themselves of a burden that sits heavy upon them.

Secondly, I answer such revolutions happen not upon every little mismanagement in public affairs ... [but in response to] a long train of abuses, prevarications, and artifices....

The end of government is the good of mankind; and which is best for mankind, that the people should be always exposed to the boundless will of tyranny, or that the rulers should be sometimes liable to be opposed when they grow exorbitant in the use of their power? ...

Discussion Points:

1. Review the Mayflower Compact in light of Locke's views on the social contract.

2. Review the Preamble to the ~~Constitution~~ in light of Locke's views on ~~the social contract~~.

3. A social contract is a device through which people consent to establish and empower a government. At the same time, the contract may limit governmental power by describing the rights of citizens. Review the United States Constitution. Is it sensible to call it an American social contract? Why or why not? List examples of constitutional provisions that empower governmental institutions. List examples of provisions that limit governmental power or guarantee individual rights.

4. Locke envisioned multiple grounds for revolution. What are they? List examples of developments that could justify a decision by citizens to withdraw their consent from the state.

5. Compare and contrast Hobbes and Locke regarding the state of nature and the powers of the state.