

Why America is Great:

The Rule of Law

Volume II

THE RULE OF LAW

*“This country’s planted thick with laws from coast to coast...and if you cut them down...d’you really think you could stand upright in the winds that would blow then?”*¹

—A Man for All Seasons, Act I

*“There is no country in the world where the law speaks a language as absolute as in America...”*²

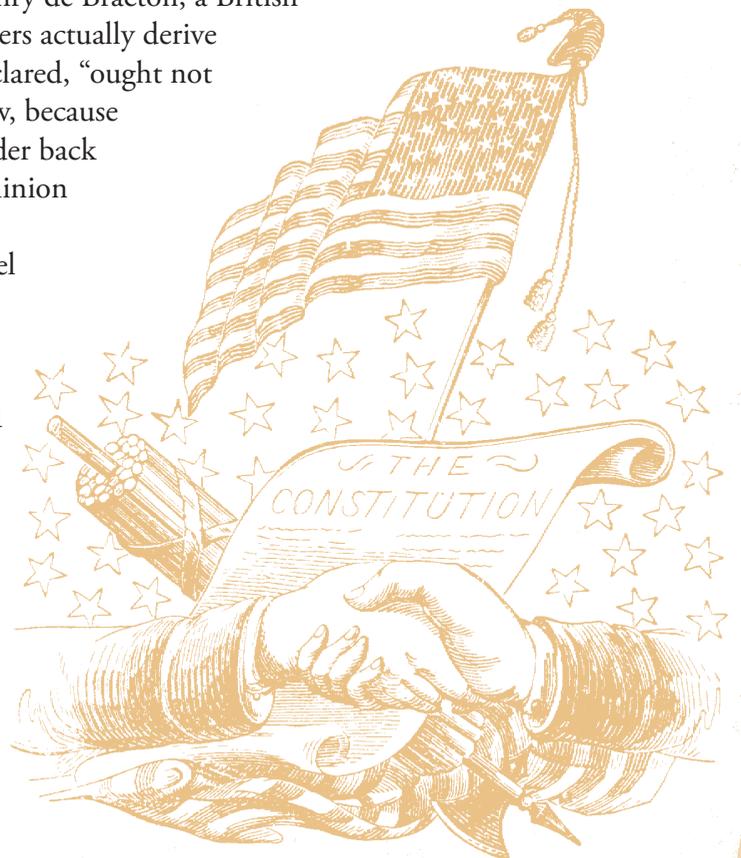
—Alexis de Tocqueville

The movements we see sweeping the country today have taken up many of the slogans and battle cries used during the American Revolution—“No taxation without representation!” “Give me liberty or give me death!” “Dump the tea into the sea!” (At least that’s what the reenactors say in Boston Harbor today.) But what was the first grave offense that inspired the colonists to rise up against their mother country—a country that had given them so much? If the answer can be narrowed down into a single phrase, it would be this: the violation of the *rule of law*.

The rule of law was a concept that had been passed down to the American colonists from their English forefathers, who, in turn, had built the principle into their culture over many generations. From the ancient tradition of the common law, to the signing of the Magna Carta in 1215, to the epic struggle between king and church throughout English history, the idea of the rule of law went hand in hand with other fundamental principles of freedom, such as the consent of the governed.

By the 1760s, Americans had learned—both from this rich heritage and from their own difficult experiences in settling the wilderness of the New World—that if a people are to be free, they *must* have law. And if the law is to be supreme, then all people—kings and parliaments included—must be subservient to that law. The alternative to the rule of law is the rule of man; and any ruler unchecked by the law becomes a tyrant. In fact, Henry de Bracton, a British legal scholar of the 13th century, posited that all rulers actually derive their power *from* the law. “The king himself,” he declared, “ought not to be under man but under God, and under the Law, because the Law makes the king. Therefore, let the king render back to the Law what the Law gives to him, namely, dominion and power; for there is no king where will, and not Law, wields dominion.”³ In the 17th century, Samuel Rutherford, a Scottish theologian, wrote *Lex Rex*, refuting the ideas of “the divine right of kings” and that the king was law—ideas that had persisted in Europe for generations. Rutherford affirmed instead that the *law* is king, and he laid out the principles of limited government and constitutionalism that would influence John Locke and, through Locke, the Founders.

This matter of the rule of law versus the rule of man—or the rule of a king and a parliament—would be the spark that would ignite the American Revolution.



In 1764, America—once the haven of ragtag religious refugees—boasted the most autonomous society in the world. While the mighty British Empire reigned sovereign over the 13 colonies, the colonists managed almost all of their own affairs through colonial legislatures. These elected assemblies were responsible for collecting taxes, raising militias, and maintaining courts of justice. On matters of foreign relations and international trade, they worked with Parliament to formulate policy. Americans bought, sold, and developed property; they cultivated trade and enjoyed a booming economy. This New World—with its vast, untamed lands, rich natural resources, and growing population—promised great wealth to its mother country. The American colonies were quickly becoming the jewel in King George’s crown.

However, there was a problem: England was chest-deep in debt.

Britain was only just recovering from fighting the French and Indian War (1754–1763),⁴ an epic struggle with France over control of the North American continent that spread from the American frontier to the battlefields of Europe. Britain won, but her victory came with a hefty price tag. The conflict catapulted the nation’s debt from 60 million pounds to 133 million.⁵ And now that Britain had actually “conquered” the New World, she faced the daunting task of managing an empire more vast than almost any in history.⁶ Governing such an empire required money—money that Britain did not have. So Parliament set to work looking for a revenue source. It didn’t take long for the assembly to devise a solution: Since Britain had gone into debt defending America, why not require the colonists to help pay off that debt? After all, the colonists had always paid far less in taxes than native Britons, and at this time they were shouldering only a fraction of the public debt.⁷ So on September 29, 1764, Parliament took a revolutionary step and passed the Sugar Act.

The Sugar Act—titled the “American Revenue Act” in England—was a tax aimed at enforcing steep import customs on sugar, wine, fabrics, and other products.⁸ This was not the first time Britain had imposed duties on the colonies, but all previous regulations had been instituted for the purpose of protecting Britain’s commercial interests. The Sugar Act was the first duty established *for the express purpose of raising money.*⁹ The point was not lost on the colonists, and they were outraged. One of the fundamental rights enshrined in English common law and custom was the right to be taxed by *consent*. Since the American colonists had no representative in Parliament, they had always been represented—from the earliest days of their royal-charter settlements—by their *own* elected assemblies. The Sugar Act, therefore, stepped over decades of custom and went straight for the colonists’ pocketbooks, marking a dramatic departure from traditional Anglo-American policy.

Several colonial assemblies appealed to Parliament for redress, but their petitions went unanswered. The British government—far removed physically and culturally from their American colonies—was by this time pretty out of touch with its subjects in the New World. The refined gentlemen serving in Parliament knew very little about the rough-hewn American people.¹⁰ Few if any of these statesmen had ever even been to the colonies; they were unacquainted with American customs and the colonial way of life. They didn’t realize how different the English in America were from the English in England. They reasoned,



“Shouldn’t these colonists simply be grateful for the honor of belonging to the greatest empire on earth?”

Indeed, most Americans were very proud of their English heritage and traditions and counted it a privilege to be subjects of Britain. In fact, it had never occurred to them that they were anything *but* British subjects, invested with all the same rights and privileges enjoyed by those who actually lived in England. So why, then, were they being taxed without representation—a clear violation of the rights of true-born Englishmen?

The Sugar Act was offensive, but things grew worse. In 1765, Parliament passed the Stamp Act, requiring every colonial document to be stamped with a seal purchased from a royal stamp office. The act itself was over 13,000 words long, detailing more than 50 different types of duties on items such as paper, almanacs, newspapers, pamphlets, licenses, and playing cards.

The colonists had several grievances against this bill. First, it enforced a direct, internal tax on the colonies—something Parliament had never before imposed on Americans.¹¹ Second, it authorized a royal court of admiralty to try all alleged evasions of the tax. Courts of admiralty were not required to call juries, and therefore deprived defendants of a trial by jury (a sacred common law right). In addition, the court of admiralty for the colonies was located, of all places, in Nova Scotia; thus, every colonist summoned before the court would not be tried in the vicinity of his alleged crime (another sacred common law right).¹²

Third, Parliament voted to send 20,000 British troops to the colonies to “supervise” implementation of the Stamp Act. Adding insult to injury, the colonists were ordered to quarter these troops in their homes at their own expense. This insolent gesture indicated to the colonists that Parliament not only doubted their loyalty as subjects, but also recognized the offensive nature of the Stamp Act. Benjamin Franklin emphasized this point in a letter to the editor of a London newspaper. Americans could forgive the Stamp Act, wrote Franklin, if they felt Parliament had passed it in ignorance of their feelings. However, the decision to send troops implied that Parliament was *very* well aware that the act would be distasteful to the colonists.¹³ “[A] new kind of loyalty seems to be required of us,” he wrote, “a loyalty to Parliament; a loyalty that is to extend, it seems, to a surrender of all our properties, whenever a House of Commons, in which there is not a single Member of our chusing, shall think fit to grant them away without our consent, and to a patient suffering the loss of our privileges, as Englishmen, if we cannot submit to make such surrender.”¹⁴

But even as the colonists protested that the British were overturning centuries of precedent, the British government responded, in effect, by saying that it was time then to establish a new precedent—“the *right* of Parliament to lay an internal tax on the colonies,” as one British official put it (emphasis added).¹⁵ So, the law was the rule until Parliament decided to overrule the law. And



thus, *Parliament* was the law. Its actions undermined the entire concept of the law as king.

In light of the seriousness of this inferred claim, many Americans began to realize that this disagreement with Britain was not going to be resolved easily. Franklin, in his letter to the London newspaper, hinted ominously at the conflict to come:

We were separated too far from Britain by the ocean, but we were united strongly to it by respect and love, so that we could at any time freely have spent our lives and little fortunes in its cause; but this unhappy new system of politics tends to dissolve those bands of union, and to sever us for ever. Woe to the man that first adopted it! Both countries will long have cause to execrate his memory.¹⁶

What's Wrong with the Rule of Man?

Why were the American colonists so firm in their conviction of the rule of law? Because they believed strongly—indeed, had learned from history—that there is a very short road between the rule of man and tyranny.

No government or business or organization can be formed apart from a certain understanding about the human race. And that government, or business, or organization, will reflect the beliefs of its founders and members regarding the human race—it is impossible for it not to. And the American government is no different—in numerous ways, it reflects the Founding generation's convictions about mankind. And one conviction that influenced the Founders' political actions perhaps more than any other was the underlying certainty that *human nature is inherently corrupt*. Man, they believed, was incapable of sustained good. This belief was rooted in the Judeo-Christian account of creation, and of man's fall and rebellion against God in the Garden of Eden. For most of the Founders, and the Founding generation, this was not just a quaint personal or religious belief—it was a rarely disputed, deeply real concept to them. This principle had been firmly entrenched in American culture from the days of the first Puritan settlers. Consequently, Americans had always been highly suspicious of "Utopian speculations" or of any theory that relied exclusively upon man's goodness.¹⁷

This belief greatly influenced not only America's entry into the Revolution, but also the later formulation of the Constitution. The Founders' belief in human fallibility made them very cautious in designing a model of government. Many of the Founders, for instance, were skeptical of the very idea of a confederacy (that is, a political or societal network formed of many states), let alone a government grounded in one. Does anyone really believe, asked Alexander Hamilton in one of the essays that would later compose the *Federalist Papers*, that 13 sovereign states can dwell together peacefully? To do so "would be to forget that men are ambitious, vindictive and rapacious. To look for a continuation of harmony between a number of independent unconnected sovereignties... would be to disregard the uniform course of human events, and to set at defiance the accumulated experience of ages."¹⁸ Since men cannot be trusted to act justly toward one another,



men must be governed by laws. And since men cannot be trusted to consistently and willingly follow a society's laws, a civil authority or government is required to hold them accountable. Thus, government is a good thing—it upholds and enforces the law and maintains order in society, enabling men to exercise their freedoms responsibly.

Governments are reflections of the people who run them. If the people are corrupt, the government will be corrupt. And when tempted by power, rulers can have a capacity for greater evil than ordinary men: armed with the power of the state, they can easily abuse and violate the liberties of their subjects.

The unfailing tendency of rulers and governments to become corrupt has attracted the interest of writers and thinkers in every age, notably in the era preceding the European Enlightenment. As the philosophers and essayists of the 17th and 18th centuries grew increasingly disgusted with European monarchies, they began to seek an ideal form of government that honored individual rights. Thomas Hobbes (1588–1679), a 17th-century British philosopher, was very skeptical of man's ability to exercise freedom properly. In his treatise *The Leviathan* (1660), Hobbes portrayed government as a necessary evil, preferable only to the evil of an unrestrained human race. Men are motivated only by selfish interests, Hobbes wrote, and if left to their own devices they will wrong and eventually kill each other. The only power strong enough to restrain man's wickedness is fear. Therefore, the only type of government able to maintain an orderly society is an absolute government.¹⁹



Later theorists were more optimistic about the human race. John Locke (1632–1704), a British academic whose work influenced the Founders' thinking, believed that man was capable of exercising his freedoms responsibly. He attempted to refute Hobbes in his *Two Treatises of Government* (1690), arguing that man must fully appreciate his own inherent liberties before he can discover a superior form of government. "To understand Political Power right, and derive it from its Original," wrote Locke, "we must consider what State all Men are naturally in, and that is, a State of perfect Freedom to order their Actions, and dispose of their Possessions and Persons, as they think fit, within the bounds of the Law of Nature...."²⁰

However, Locke emphasized that this "State of Liberty" did not equal a "State of License." Man's right to life, liberty, and property never entitle him to violate the rights of another. In order to ensure the equal protection of all, wrote Locke, men come together in mutual agreement to form a community; they form just associations grounded in inherent rights and laws in order to protect those rights. However, the privilege of belonging to such a community comes with a price: each individual must surrender his personal sovereignty to the sovereignty of the people as a whole. This sacrificial action transforms a group of individuals into a "civil society." The individual, said Locke, "authorizes the Society, or which is all one, the Legislative thereof, to make Laws for him as the publick good of the Society shall require; to the Execution whereof, his own assistance (as to his own Decrees) is due."²¹ The voluntary quality of this pact is significant: no man is constrained to join the community, but once he has chosen to enter it he is bound to support and serve that society.

The Founding Fathers appreciated Locke's regard for natural law, individual rights, and popular sovereignty. But while Locke's theory proved useful to them on an intellectual level, it lacked both the spirituality and practicality so characteristic of American thought. First, Locke's model bound together a community merely on the basis of self-interest. Though the Founders fully comprehended the power of self-interest upon a person's actions, they recognized that it did not always lead him to do what was *right*. A truly free society, they believed, must engage an individual's *moral* interest as well as his more fleshly aspirations.

Second, Locke's theory was of limited practicality because it failed to explain how a people could trust themselves to govern justly and treat every citizen equally. The Founders were right to be concerned: by the time they were drafting the Constitution near the close of the 18th century, a revolution was developing in France that, despite its cry of "Liberty, Equality, Fraternity," would lead to tremendous slaughter among its own people. The French lower classes, oppressed for many years under a corrupt monarchy, eagerly seized upon Enlightenment theories that advocated equality and individual rights. However, the French suffered the misconception that only *certain types of authority*, rather than human beings, were evil. They were convinced that, by simply transferring power from the king to the people, they could solve all social ills and restore justice to the land.²² The bloody aftermath of the French Revolution soon proved their error and demonstrated that *all* temporal power, not the power of the king only, must be restricted. This same misconception—that some people can be trusted to govern rightly—was what originally gave kings permission to exercise absolute power over their subjects. The French Revolution simply turned this on its head, and the result was open chaos that left deep scars on that nation's history.

In America, we were spared much of the turmoil that has gripped other post-revolutionary nations like France. While we continue to have our fair share of difficulties, we have continued to prosper and thrive as a free society. What has set us apart from the other young republics? We are a *nation*



of laws, and we have a *government* of laws. This is an essential element of what has made America great, and at our own peril do we lightly dismiss the rule of law. The issue that ultimately led to the American Revolution is the same issue that has spared the United States instability, violence, chaos, and the despotic cycle that has plagued so many other new nations and movements: a respect for the rule of *law* over the rule of man.²³ This is why our revolution was unique, and this is why the nation it produced has lasted.

Endnotes

1. Robert Bolt, *A Man for All Seasons* (New York: Scholastic Book Services, 1960), 38.
2. Alexis de Tocqueville, *Democracy in America*, trans. and ed. Harvey C. Mansfield and Delba Winthrop (Chicago: University of Chicago Press, 2000), 67-68.
3. Henry de Bracton, quoted in Russell Kirk, *The Roots of American Order* (Washington, DC: Regnery Gateway, 1991), 190.
4. In Europe, this conflict was known as the Seven Years' War.
5. Paul Johnson, *A History of the American People* (New York: HarperPerennial, 1997), 132
6. *Ibid.*, 127.
7. *Ibid.*, 132.
8. Arthur M. Schlesinger, Jr., ed. *The Almanac of American History* (New York: G.P. Putman's Sons, 1983), 99.
9. *Ibid.*
10. Catherine Drinker Bowen, *John Adams and the American Revolution* (Boston: Little, Brown and Company, 1950), 211.
11. Samuel Eliot Morison. *The Oxford History of the American People* (New York: Oxford University Press, 1965), 185.
12. Schlesinger, 101.
13. Franklin, Benjamin. Before 1768. "Causes of American Discontents." *Writings*. Benjamin Franklin (New York: Library of America, 1987), 609.
14. Franklin, Benjamin. Before 1768. "Causes of American Discontents." *The Writings of Benjamin Franklin, London: 1757-1777*; The History Carper, <http://www.historycarper.com/resources/twobf3/disconte.htm>.
15. British official Thomas Whately, quoted in M. Stanton Evans, *The Theme Is Freedom: Religion, Politics, and the American Tradition* (Washington, D.C.: Regnery Publishing, 1994), 218.
16. Franklin, Benjamin. "Causes of American Discontents." <http://www.historycarper.com/resources/twobf3/disconte.htm>.
17. Alexander Hamilton, Federalist No. 6, *Federalist Papers* (New York: Bantam Books, 1982), 21.
18. *Ibid.*, 22
19. Kirk, *Roots of American Order*, 270
20. John Locke, *Two Treatises of Government*, ed. Peter Laslett (New York: Cambridge University, 1960), 309.
21. *Ibid.*, 368, 369.
22. Evans, 253.
23. *Ibid.*, 206-207.



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