

## **Revisiting “Do We Ever Really Get Out of Anarchy?”**

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Three decades ago, I published “Do We Ever Really Get Out of Anarchy?”<sup>1</sup> The answer I offered to the eponymous question is that we do not, that government only substitutes one kind of anarchy for another. Here I revisit the subject, drawing on Hobbes, Locke, and Rousseau, as well as contemporary scholars, for support.

First, though, a word about the meaning attached to key terms.

Paraphrasing Locke, I define **political authority** as “the *right* of making laws with penalties of death, and consequently all less penalties . . . and of employing

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<sup>1</sup> Alfred G. Cuzán, “Do We Ever Really Get Out of Anarchy?,” *Journal of Libertarian Studies*, 3 (2), 1979, pp. 151-158. The essay has been widely cited in the libertarian or anarchist blogosphere. There is a reference to it in an entry on “anarchismus” in the German-language Wikipedia, and it has made its way into at least one college syllabus (at LSU).

the force of the community, in the execution of such laws . . . .”<sup>2</sup> Following Hobbes, I define **political power** as the “means” to compel obedience to the laws, i.e., “the sword.”<sup>3</sup> The **state** is a political entity claiming sovereignty (exclusive political authority) over the people residing within a specified territory. **Government** is the set of state institutions, local, regional, and national, each more inclusive in area and usually asserting greater power and possessing greater power than the last, sharing sovereignty. A **legitimate** government is one whose claim to authority is freely granted or accepted by the vast majority of the population under its rule. Such acceptance is behaviorally manifested in contested elections and referenda, other such expressions of consent, and plumbed with public opinion polls. **Regime** is the nature of the government, its form and substance, democracy (parliamentary or presidential) or dictatorship (oligarchy or tyranny).<sup>4</sup> **Politics** encompasses those activities by which

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<sup>2</sup> John Locke, *Second Treatise on Government* (Indianapolis: Hackett Publishing Company, Inc., 1980. Originally published in 1690), p. 8. Locke says “the power” instead of “the right” of making laws.

<sup>3</sup> Thomas Hobbes, *Leviathan*. Edited, with Introduction and Notes by Edwin Curley (Indianapolis/Cambridge: Hackett Publishing Company, 1994. Originally published in 1651), p. 50 and p. 106.

<sup>4</sup> In *Democracy and Development*, Przeworski et al. dichotomize regimes into democracies and dictatorships. A “democracy . . . is a regime in which those who govern are selected through contested elections.” At a minimum, the office

government makes and implements decisions, as well as those engaged in by people outside government aiming to influence it. **Natural anarchy** is absence of government, i.e., a stateless society, whereas **political anarchy** denotes absence of a governing person or body of persons *within* government. The former describes what Hobbes, Locke, and Rousseau all took to be “the state of nature.” To demonstrate that the latter is a feature of all polities, and to explore its implications, is the purpose of this essay.

### **The Unavoidability of Anarchy**

The reasoning that led me to conclude that a complete escape from anarchy is illusory goes like this. At best, the establishment of even a legitimate government like that of the United States does no more than to abolish natural anarchy. In their relations with one another, everyone in his private capacity, including those making governmental decisions, has recourse to Locke’s “known and indifferent judge,”<sup>5</sup> one endowed with the authority and power to settle disputes and punish offenders according to promulgated laws. In other words,

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of the chief executive and seats in the national legislature are filled by direct or indirect elections, there are no fewer than two parties vying for votes, and there is alternation in office. Adam Przeworski, Michael E. Alvarez, José Antonio Cheibub and Fernando Limongi, *Democracy and Development. Political Institutions and Well-Being in the World, 1950-1990* (Cambridge University Press, 2000), p. 15.

<sup>5</sup> Locke, *Second Treatise*, p. 66.

government acts as a “third party,” external to the people involved in all transactions regulated by the civil and criminal law. As well as administering justice and providing goods and services, to a greater or lesser degree government regulates the entire spectrum of human relations, from the most intimate, like marriage and family life, to the most public, such as buying and selling in an open-air market.

However, a moment’s thought makes it clear that in their strictly political capacity, those who share in the exercise of governmental authority are themselves lacking in precisely this feature. In making, interpreting, adjudicating and enforcing of the laws, i.e., in the practice of politics, office-holders have no one to appeal to who at once legislates, judges, and compels obedience on *them*. To the ancient question, “Quis custodiet ipsos custodes”?, the answer is, “no one but themselves.” Lacking a third party to govern them in turn, those who constitute the government are self-regulating. In other words, they operate in what I have called a political anarchy.

Locke himself appears to have recognized this. In Chapter 14 of the *Second Treatise*, where he discussed the executive power of prerogative, he noted that traditionally one element of that power was that of “calling parliaments,” that is, the convocation of the legislature at a “precise time, place, and duration.”<sup>6</sup> His response to “the old question” of “*who shall be judge* when this power is made a

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<sup>6</sup> Locke, *Second Treatise*, p. 87.

right use of?” he answered, “between an executive power in being, with such a prerogative, and a legislative that depends upon his will for their convening, there can be no *judge on earth*. . . .”<sup>7</sup>

Furthermore, when discussing where “the supreme power” of the commonwealth lies (i.e., who exercises sovereignty), Locke suggests that it is shared by three different actors. First he tells us that

there can be but *one supreme power*, which is *the legislative*, to which all the rest are and must be subordinate, yet the legislative being only a fiduciary power to act for certain ends, there remains still *in the people a supreme power to remove or alter the legislative*, when they find the *legislative* act contrary to the trust reposed in them . . . . And thus the *community* perpetually *retains a supreme power* of saving themselves from the attempt and designs of any body . . . . And thus the *community* may be said in this respect to be *always the supreme power*, but not as considered under any form of government, because this power of the people can never take place till the government be dissolved.<sup>8</sup>

However, “In some common-wealths, where the *legislative* is not always in being, and the *executive* is vested in a single person, who has also a share in the legislative; there that single person in a very tolerable sense may also be called *supreme*: not that he has in himself all the supreme power, which is that of law-

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<sup>7</sup> Ibid. Unless otherwise note, all emphases are found in the original.

<sup>8</sup> Ibid., pp. 77-78.

making; but because he has in him the *supreme execution*, from whom all inferior magistrates derive all their several subordinate powers, or at least the greatest part of them . . . .”<sup>9</sup> Note that Locke says that in such a regime the executive does not have “all” the supreme power, implying that he wields a part of it, which means that sovereignty is divided.

Even within the legislative department itself, which in normal times is vested with most of the “supreme power,” there is no third party. Take the American example. Article I, Section 5 of the Constitution stipulates that “Each House [of the Congress] shall be the Judge of the Elections, Returns and Qualifications of its own Members,” “may determine the Rules of its Proceedings, punish its members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.” Within each chamber, as well as between them, there is no central authority to arbitrate and enforce settlements in disputes over legislation or the distribution of resources between parties or party members whose influence waxes and wanes in response to shifting majorities. These matters have to be settled by handshake agreements without recourse to a “third party” to enforce them.<sup>10</sup>

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<sup>9</sup> Ibid., p. 78.

<sup>10</sup> Significantly, in *The Evolution of Cooperation* (New York: Basic Books 1984), Robert Axelrod uses the U.S. Senate to illustrate how norms of reciprocity emerge to regulate relations among individuals “without a central authority to force them to cooperate with each other” (p. 6).

Taking up the most extreme case, Locke concluded that only an “appeal to heaven” can settle an intractable dispute between the executive and the legislature. Extending his analysis beyond executive-legislative relations, he concluded that

there can be [no earthly judge] between the legislative and the people, should either the executive, or the legislative, when they have got the power in their hands, design, or go about to enslave or destroy them. The people have no other remedy in this, as in all other cases where they have no judge on earth, but to *appeal to heaven* . . . . And therefore, though the *people cannot be judge*, so as to have, by the constitution of that society, any superior power, to determine and give effective sentence in the case; yet they have, by a law antecedent and paramount to all positive laws of men, reserved that ultimate determination to themselves which belongs to all mankind, where there lies no appeal on earth, viz. to judge, whether they have just cause to make their appeal to heaven. . . . <sup>11</sup>

In sum, Locke conceives of a polity where sovereignty is shared, which is to say, divided, between the legislative, the executive, and the people. Whenever there is a clash between any two of them, or all three, there is no judge on earth to resolve the conflict, which, in its most extreme form, degenerates into civil war.

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<sup>11</sup> Locke, *Second Treatise*, pp. 87-88.

For that very reason Hobbes thought it was more advantageous for sovereignty to reside in one man rather than an assembly, for “a monarch cannot disagree with himself out of envy or interest; but an assembly may; and that to such a height as may produce a civil war.”<sup>12</sup> More to the point, dividing power between two separate or independently chosen representatives of the people, e.g., a monarch and an assembly, would only worsen the problem, as this would be “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 . . . .”<sup>13</sup> “For what is it to divide the power of a commonwealth, but to dissolve it; for powers divided mutually destroy each other.”<sup>14</sup>

Hobbes takes it further still, rejecting the doctrine that the sovereign is a party to the covenant instituting the commonwealth, because “if any one (or more) of them [the subjects] pretend a breach of the covenant made by the sovereign at his institution, and others (or one other) of his subjects (or himself alone) pretend there was no such breach, there is in this case no judge to decide the controversy; it returns therefore to the sword again; and every man recovereth the right of protecting himself by his own strength, contrary to the

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<sup>12</sup> Hobbes, *Leviathan*, p. 121.

<sup>13</sup> Ibid, pp. 119.

<sup>14</sup> Ibid, pp. 213-214.

design they had in the institution. It is therefore vain to grant sovereignty by way of precedent covenant.”<sup>15</sup> By the same token, the sovereign is not subject to the laws, for

to be subject to laws is to be subject to the commonwealth, that is, to the sovereign representative, that is, to himself; which is not subjection, but freedom from the laws. Which error, because it setteth the laws above the sovereign, setteth also a judge above him, and a power to punish him , which is to make a new sovereign; and again for the same reason a third, to punish the second; and so continually without end, to the confusion and dissolution of the commonwealth.<sup>16</sup>

In other words, Hobbes rightly concluded that to divide sovereignty, or to subject the government to the laws, or to recognize the right of the people to determine for themselves whether the government has performed its fiduciary duties, as Locke would have it, was to throw one or more parts of the government, or parties within government and among the people, into a condition of political anarchy.

But not even placing sovereignty in the hands of a single despot abolishes anarchy. For, as Locke argued,

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<sup>15</sup> Hobbes, *Leviathan*, p. 111-112.

<sup>16</sup> *Ibid*, XXIX, 9, p. 213.

*absolute monarchy*, which by some men is counted the only government in the world, is indeed *inconsistent with civil society*, and so can be no form of civil-government at all: for the *end of civil society*, being to avoid, and remedy those inconveniences of the state of nature, which necessarily follow from every man's being judge in his own case, by setting up a known authority, to which every one of that society may appeal upon any injury received, or controversy that may arise, and which every one of the society ought to obey; where-ever any persons are, who have not such an authority to appeal to, for the decision of any difference between them, there those persons are still *in the state of nature*; and so is every *absolute prince*, in respect of those who are under his *dominion*.<sup>17</sup>

On this point, Rousseau concurs:

[W]herever despotism . . . reigns, it tolerates no other master. As soon as it speaks, there is neither probity nor duty to consult, and the blindest obedience is the only virtue remaining for slaves. . . . And since subjects no longer have any law other than the master's will, nor the master any rule other than his passions, the notions of good and the principles of justice again vanish. Here everything is returned to the law of the strongest, and consequently to a new state of nature different from the one with which we began, in that the one was the state of nature in its purity, and the last one is

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<sup>17</sup> Locke, *Second Treatise*, p. 48.

the fruit of an excess of corruption. Moreover . . . the despot is master only as long as he is the strongest; and as soon as he can be ousted, he has no cause to protest against violence. . . . Force alone maintained him; force alone brings him down. . . .<sup>18</sup>

In sum, government does not abolish anarchy; it only reduces its domain, at the limit to a single man, the autocrat. Under a legitimate government, everyone in his private capacity, including the office holders, is subject to the civil and criminal law.<sup>19</sup> However, those occupying positions of authority, which in a democracy includes the electorate, as it is they who decide who the legislators will be, engage in politics without reference to a third party, i.e., a governing man or body with the authority and the power to enforce judgments on them all. Regardless of whether sovereignty is divided, as in a separation of powers framework, or monopolized by an autocrat, those who exercise it remain in

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<sup>18</sup> Jean-Jacques Rousseau, *Discourse on the Origin of Inequality* (Indianapolis, Indiana: Hackett Publishing Company, Inc., 1992. Originally published in 1755), pp. 68-69.

<sup>19</sup> This is not to deny that those in government often grant themselves dispensations from laws and regulations everyone else is subject to, although this tendency is of course less pronounced in democracies, where the practice is more likely to come under public scrutiny and, hence, criticism and ultimately electoral sanction, than in dictatorships.

anarchy among themselves or relative to the people whom they govern, who in turn remain in anarchy vis-à-vis their governors. This is illustrated in Figure 1, which is copied from the original essay. There I explained the illustration thus:

The circle on the left shows a state of true or market or natural anarchy,<sup>20</sup> in which all members of society relate to each other in strictly bilateral transactions without third party intervention. The circle on the right shows the situation prevalent under government. In the higher compartment we see individuals whose relations among each other are no longer bilateral. All relations are legally “triangular,” in that all members of society are forced to accept the rule of government in their transactions. However, in the lower compartment, inside the “government” itself, relations among the rulers remain in anarchy.<sup>21</sup>

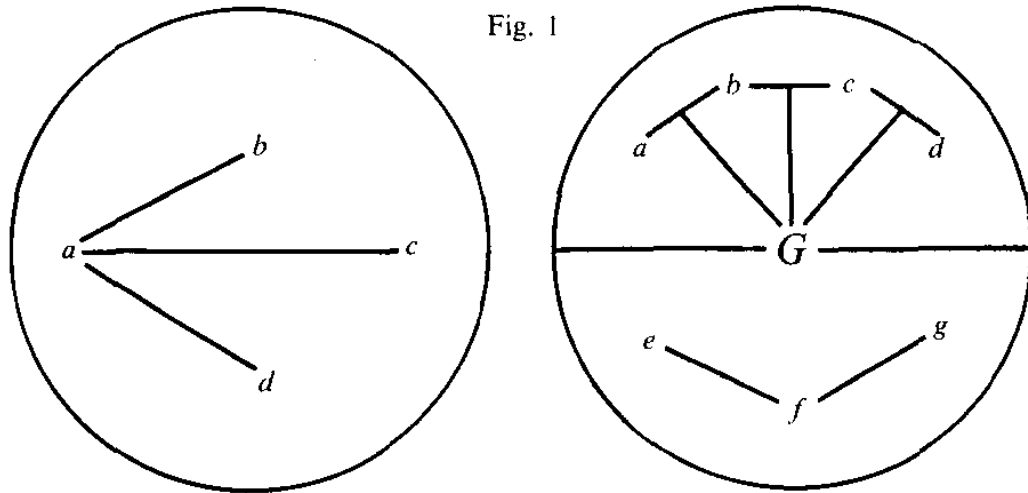
Be it noted, though, that the strict dichotomy illustrated in the figure is not exact. As I wrote in the original essay, “Of course, the rulers of any government have as their power base interest groups in and *out* of government. The leaders of non-governmental interest groups often hold the key to the political survival of

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<sup>20</sup> In the original essay, I used “market anarchy” and “natural anarchy” interchangeably. Henceforth I stick to the latter term throughout, inserting it inside brackets into any quote in the original essay that uses the term “market anarchy.”

<sup>21</sup> Cuzán, “Anarchy,” p. 154.

even the most powerful politicians. . . . Around the edges of government, many private individuals live in a state of anarchy vis-à-vis government officials. . . .”<sup>22</sup>



### Which Type of Anarchy?

Locke hypothesizes that the state of nature is one of freedom and equality. As he puts it, “all men are naturally in . . . 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, without asking leave, or depending upon the will of

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<sup>22</sup> Ibid., p. 158. This point was one suggested to me by Cal Clark. At the time, we were both at New Mexico State University. He’s now at Auburn University.

any other man..” Also, it is a state of *equality*, wherein all the power and jurisdiction in reciprocal, no one having more than another . . . .”<sup>23</sup>

Locke’s state of nature is not lawless. As he conceived it, a man, though free, does not have a license to do whatever he desires or believes necessary for his own security, including mastering “by force or wiles” “all men he can,” as Hobbes posited.<sup>24</sup> Rather, all men are subject to “a law of nature” “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.” “[U]nless it be to do justice on an offender,” no one has the right to “take away, or impair the life, or what tends to the preservation of the life, the liberty, health, limb, or goods of another.”<sup>25</sup> A man’s “possessions” or “goods” are his property, i.e., land and its products, acquired through labor, trade, or gifts. He has a right to them and no one may lawfully deprive him of them.

But absent government, how is that alleged “law of nature” to be enforced? How are men to “be restrained from invading others rights, and from doing hurt to one another”? Against Hobbes, this was not to be done by vesting all authority in an unaccountable monarch or assembly: “It cannot be supposed,” he wrote,

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<sup>23</sup> Locke, *Second Treatise*, p. 8.

<sup>24</sup> Hobbes, *Leviathan*, 4, p. 75.

<sup>25</sup> Locke, *Second Treatise*, p. 9.

that (as Hobbes would have it), when men quit the state of nature “they should intend, had they a power so to do, to give to any one, or more, an *absolute arbitrary power* over their persons and estates, and put a force into the magistrate’s hand to execute his unlimited will arbitrarily upon them. This were to put themselves into a *worse* condition than the state of nature . . . .”<sup>26</sup>

Instead, Locke argued that “the *execution* of the law of nature is, in that state, put into every man’s hands, whereby every one has a right to punish the transgressors of that law to such a degree, as may hinder its violation: for the *law of nature* would, as all other laws that concern men in this world, be in vain, if there were no body that in the state of nature had a *power to execute* that law, and thereby preserve the innocent and restrain offenders. . . .”<sup>27</sup>

Also *contra* Hobbes, Locke warns that the state of nature is not to be “confounded” with the state of war. These  
are as far distant, as a state of peace, good will, mutual assistance and preservation, and a state of enmity, malice, violence and mutual destruction are one from another. Men living together according to reason, without a common superior on earth, with authority to judge between them, is *properly the state of nature*. But force, or a declared

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<sup>26</sup> Ibid., p. 72.

<sup>27</sup> Ibid, pp. 9-10.

design of force, upon the person of another, where there is no common superior one earth to appeal to for relief, is *the state of war* . . . .<sup>28</sup>

Analogously, just as Locke distinguished between the state of nature and the state of war, and between civil society and tyranny, so here I differentiate between three types of political anarchy, namely “constitutional anarchy,” of which “democracy” is now the most common type,<sup>29</sup> and at opposite extremes dictatorship, on the one hand, and civil war, on the other. The fundamental political problem is how to avoid falling into one or the other of these latter two tragic forms of political anarchy.

By “constitutional anarchy,” I mean a state in which authority is divided among branches and levels of government, each exercising a share of the sovereign power according to a constitution or set of fundamental laws, which for simplicity’s sake I will label the Constitution. In a political anarchy, the Constitution serves the same function as the law of nature does in Locke’s theory. In such a regime, there is no central authority with the power to enforce unappealable decisions. The most inclusive part of the state, i.e., the national

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<sup>28</sup> Ibid., p. 15.

<sup>29</sup> As is commonly understood, to qualify as democratic a constitution must provide for an extensive franchise, but just how extensive depends on the historical context. The United States is considered to have qualified long before the 19<sup>th</sup> Amendment guaranteed women the right to vote everywhere in the country.

government, is superior to all others. But in defense of their share of sovereignty, the inferior parts of the state are free to appeal to public opinion to elect members to the national legislature or executive who directly or indirectly, through appointment to the judiciary, will effect a change in the words or the interpretation of the Constitution in their favor.

More to the point, the national government itself is divided into two or three branches, each exercising a share of sovereignty independently of the others, and each free to interpret the Constitution its own way. Even in the United States, where in recent times the president and the congress have accorded extraordinary deference to the supreme court, the former two branches still retain, in principle and in practice, the right to arrive at their own answers.

What this amounts to is that the three branches are engaged in

an ongoing conversation, in which no branch, exactly, has the final word. And that state of affairs makes it necessary that the president [or the congress], no less than the judges, has the standing and the responsibility to reach judgments on the Constitution. More than that, [they have] the obligation to impart those judgments to the public—in the first place to make clear the justification of [their] own acts, and in the second, to remind the public that the Constitution is not the sole custody or responsibility of the judges.<sup>30</sup>

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<sup>30</sup> Hadley Arkes, “The Constitution and Mr. Bush,” *Claremont Review of Books*, VII, 1, Winter 2006/07, p. 58.

Moreover, judicial judgments are not self-enforcing. The congress or the president may ignore them or reinterpret them at will. President Andrew Jackson may not have said “John Marshall has made his decision; now let him enforce it!,” but the quote, apocryphal though it may be, sums up the situation quite well. President Lincoln, in his first days in office, “quashed” two judicial opinions which, applying the principle in the *Dred Scott* case, had denied a black man a passport and another a patent. In recent times, the Congress has ignored the ruling in “*INS vs. Chadha* (1983),” in which “the Supreme Court struck down the ‘legislative veto.’”<sup>31</sup> The Supreme Court can play the same game: “in the recent *Hamdan vs. Rumsfeld* case, [it] simply put aside the congressional act that barred the jurisdiction of the courts in dealing with detainees in this time of war.”<sup>32</sup> In Section 7 of the Military Commissions Act, Congress responded in kind: “in a stinging rebuke to the court,” it “stripped the courts of jurisdiction to hear any habeas corpus claim filed by any alien enemy combatant anywhere in the world.”<sup>33</sup> Not to be outdone, on June 12, 2008, only a week before these words are being written, the Supreme Court struck back: in *Boumediene v. Bush*, a 5-4 opinion issued by Justice Kennedy declared Section 7 of the MCA

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<sup>31</sup> Ibid, pp. 56, 57.

<sup>32</sup> Ibid, p. 58.

<sup>33</sup> John Yoo, “Sending a Message,” *The Wall Street Journal*, October 19, 2006 [on line].

unconstitutional.<sup>34</sup> Whether this puts an end to the tug of war between the branches over the treatment of the Guantánamo detainees remains to be seen.

Another illustration is drawn from the State of Massachusetts, whose government, as is true of all state governments, is, like the government of the United States, divided into branches. It all began in 2003, when the state's Supreme Judicial Court (SJC) ruled in *Goodridge v. Dept. of Public Health* that under the constitution of the Commonwealth homosexual couples could not be denied the right to marry. The state began to issue them marriage licenses the following year.

One of the responses to the change in the law of marriage, led by Voteonmarriage.org, was to take advantage of a constitutional provision allowing voter initiatives pursuant to amending the state constitution. It sought to place the following amendment on the ballot by 2008: "When recognizing marriages entered after the adoption of this amendment by the people, the Commonwealth and its political subdivisions shall define marriage as only the union of one man and one woman."

Following the procedures provided in the constitution, early in 2006 the Secretary of the Commonwealth determined that a sufficient number of certified signatures had been collected and transmitted it to the General Court, as the

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<sup>34</sup> Jess Bravin, "How Bush Misread War Powers," *Wall Street Journal*, June 6, 2008, p. A 10. For a critical view of the Court's rulings see the dissents by Chief Justice Roberts and Justice Scalia.

legislature is formally known. The next step was for the two branches of the legislature, meeting in joint session as a constitutional convention presided by the senate president, to vote in two consecutive sessions whether to put the initiative on the ballot. At least one quarter of the members, or 50 in total, had to vote affirmatively. Governor Mitt Romney urged the legislature to pass the measure while organized groups on both sides of the issue waved placards and shouted slogans across the street from each other in the public square. But even though Sect. 2, Article 48 of the constitution specifies that a “proposal for an amendment to the constitution introduced by initiative petition shall be voted upon’,”<sup>35</sup> and despite it having considered other proposals for amendment in the meantime, the General Court recessed on two separate occasions without taking this one up.

This prompted proponents to appeal to the same Supreme Judicial Court where it all began, filing suit in December seeking “a declaration, essentially, that art. 48 imposes an obligatory constitutional duty on the Legislature in joint session to take final action on the initiative amendment, by a vote of yeas and nays, before the legislative session expires on January 2, 2007.” On December 27<sup>th</sup>, the SJC ruled on the case. Although agreeing with the plaintiffs that the General Court was obligated by the state constitution to vote on the measure, it said that “there is no presently articulated judicial remedy for the Legislature's

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<sup>35</sup> Doyle vs. Secretary of Commerce, 448 Mass. 114 (2006), \*117.

indifference to, or defiance of, its constitutional duties.” Remanding the case “to the county court for entry of a judgment dismissing the complaint,” the Court nevertheless offered this opinion:

Some members of the General Court may have reasoned, in good faith, that a vote on the merits of the initiative amendment in accordance with the directives of the pertinent provisions of art. 48 was not required by the constitutional text and that their duty could be met by procedural (or other) votes short of a vote by the yeas and nays on the merits. Today's discussion and holding on the meaning of the duty lays any doubt to rest. The members of the General Court are the people's elected representatives, and each one of them has taken an oath to uphold the Constitution of the Commonwealth. Those members who now seek to avoid their lawful obligations, by a vote to recess without a roll call vote by yeas and nays on the merits of the initiative amendment (or by other procedural vote of similar consequence), ultimately will have to answer to the people who elected them.<sup>36</sup>

These words may have had an effect, for on January 2, 2007, a vote was finally allowed, the measure receiving 61 yeas. The following June, however, a change of governor and senate president having taken place in the interim, the measure failed by five votes.

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<sup>36</sup> Ibid, 115, 119,121.

This case illustrates several characteristics of a constitutional anarchy, or rather that of its most common contemporary type, a democracy. No office has exclusive or final word. All branches of state government were involved in the legal dispute. One of the branches, the judiciary, interpreted the state constitution in a novel way, prompting at least a large minority of the public, with the support of the governor, to seek to amend it in order to avoid its being interpreted in that manner. Another branch of the government, the legislature, ignored a constitutional provision requiring it to vote on the initiative, and there was nothing that the other branches could do about it except to urge it to comply. All the while, opposing organizations of voters sought to mobilize public opinion on behalf of their respective positions on the issue.

The Massachusetts example, along with the previous discussion of federal cases, suggests two parallels with Locke's state of nature. Firstly, like the law of nature, a constitution imposes certain obligations on the parties involved in a political conflict. Like the former, the latter, "being but words and breath,"<sup>37</sup> is not self-enforcing. Secondly, so that the constitution be not "in vain," everyone has the right to seek its enforcement, exercising whatever lawful powers are available, be it legislative, executive, judicial or, again, this being a democratic constitutional anarchy, simply that of public opinion.

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<sup>37</sup> Hobbes, *Leviathan*, p. 112.

Since public opinion is malleable, subject to influence by office holders as well as organized groups outside government, some issues, including constitutional ones, are settled but temporarily, until the next change of mind on the part of the public. This, incidentally, may very well be the principal advantage that a democracy has over an aristocracy or oligarchy. In the potentially deadly game of politics, loser in a democracy have options other than submission or resistance to a faction with a seemingly unbreakable lock on the government. They can take their case to the electorate. A war of words for the support of the majority of voters is always preferable to the real thing.

In contrast to constitutional anarchy, dictatorship and civil war have less to do with law or public opinion than with force, exercised almost exclusively by a tyrant or faction and their Janissaries or Mamelukes, in the case of the former, or by armies in the field of battle, on the other. Locke's insight into tyranny can hardly be surpassed. Not only does he maintain that a tyrant remains in the state of nature vis-à-vis his subjects, he actually wages war on them:

[W]here an appeal to the law, and constituted judges, lies open, but the remedy is denied by a manifest perverting of justice, and a barefaced wresting of the laws to protect or indemnify the violence or injuries of some men, or party of men, *there* it is hard to imagine any thing but a *state of war*: for wherever violence is used, and injury done, though by hands appointed to administer justice, it is still violence and injury, however coloured with the name, pretences, or forms of law, the end whereof being to protect and redress the innocent, by an unbiased application of it, to all who are under it; where-ever that is not *bona fide*

done, *war is made* upon the sufferers, who having no appeal on earth to right them, they are left to the only remedy in such cases, an appeal to heaven.<sup>38</sup>

Locke's analysis of tyranny casts light on political issues going well beyond same-sex marriage that are thrown up by the *Doyle* case. That the Massachusetts legislature tried to avoid doing its constitutional duty simply to vote yea or nay on whether to put on the ballot a proposed constitutional amendment that had been duly certified as having met all requirements to be considered, could under certain circumstances qualify as one of those "perversions of justice" about which Locke wrote. This is the stuff out of which civil wars are made, whenever the stakes are high enough. Fortunately, the issue in question was not such as to drive any of the parties to take up arms. I do not seek to over-dramatize the case, only to capitalize on the example to show how a constitutional anarchy could break down simply by one of the institutions sharing sovereignty refusing to meet its obligations under the law, just as, in the state of nature, the peace may be broken by any one person willfully violating his obligation to respect others' rights to life, liberty, and property.

### **Implications: A Culture of Restraint**

In *The Principles of Politics*, J. R. Lucas discusses six means for keeping "Leviathan under control." Listed first, and the one that is most pertinent to this

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<sup>38</sup> Locke, *Second Treatise*, p. 16.

essay, is “the Separation of Powers.” This involves “assigning different responsibilities to different, individual or corporate, bodies,” traditionally the legislative, executive, and judiciary. But for this design to work, it must be true that “men are not completely selfish,” “nor completely unreasonable,” “but can work together for some common goal.”

Then, in a passage that is perfectly consistent with the argument of this essay, he adds:

The community of purpose between the separate holders of separate powers must be enough for them to resolve their differences and cooperate, else the whole system will break down. . . . [A] State which does not want to give itself over entirely into the hands of a Leviathan to provide an effective decision procedure for its otherwise unresolved disputes, depends on there being within it other less contentious communities, whose members can resolve their disputes by discussion and compromise, without recourse, or without very much recourse, to a decision procedure. These communities constitute . . . secular Churches or “establishments” whose members are, to a lesser extent than other men, subject to [the] limitations [of selfishness and fallibility]. Every State must have its Mamelukes, to wield coercive power; and should have its Establishment men—its moral Mamelukes—to control it.<sup>39</sup>

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<sup>39</sup> J. R. Lucas, *The Principles of Politics* (Oxford: Clarendon Press, 1966), pp. 79- 81.

Two other limitations are also particularly relevant here: “the Process of Law” and “the Rule of Law.” Both consist of restrictions, the former mostly on the executive and the latter on all three branches. The “Process of Law is an instruction to those in power not to use coercion except with legal authorization” and “the Rule of Law . . . restricts what the authorities may authorize.”<sup>40</sup> The legislature is enjoined from issuing Bills of Attainder or enacting ex-post facto laws, the executive is constrained in the exercise of discretion, and the judiciary “must apply existing law, not make up new laws.”<sup>41</sup> Both of these safeguards place heavy reliance on the executive, which by virtue of its control over the means of coercion is the most powerful branch, being willing to subordinate itself to the weakest branch, the judiciary.

The judiciary is the home *par excellence* for the “moral Mamelukes.” It is “an Areopagite society, in which though judgment may fail and information may be inadequate, yet men are not sufficiently selfish to prefer their own way to the right way, in which, therefore, no sanctions are required.” Judges must be of higher than average “intelligence and disinterestedness.”<sup>42</sup> As members of the Areopagite society, though “finite and fallible,” they are “rational and responsible to a higher degree than is common among men.” To be rational means that one “must in general prefer that his opinions should be true rather than that they

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<sup>40</sup> Ibid., p. 83.

<sup>41</sup> Ibid., p. 84.

<sup>42</sup> Ibid., p. 91.

should be his own, and must feel vulnerable on the score of the truth of what he says—he must feel that he has lost caste, so to speak, if what he had maintained turns out to be false, and must be concerned that this should not happen.”<sup>43</sup> In other words, his love of truth must be greater than his love of self. That this quality is not common goes without saying. Thus, an institution staffed by a disproportionate number of people who have it constitutes a sort of “aristocracy.”<sup>44</sup> Yet, ironically, “the restrictions stipulated by the Ideal Rule of Law are not imposed on the Judiciary in practice.”<sup>45</sup> The judges exercise wide discretion in court and are exempt from penalties when they make honest mistakes. They constitute something like a voluntary sub-community within the government, one which is “not only without coercive sanctions” but “pretty well without sanctions at all.”<sup>46</sup>

It appears, then, that Lucas shares the thesis proposed in this essay, that their political relations with one another, those who wield the levers of power are themselves in anarchy. The separate branches or other centers of authority or power interact with each other according to certain guidelines and ideals, such as the Rule of Law. However, the one branch assigned responsibility for enforcing

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<sup>43</sup> Ibid., pp. 308-309.

<sup>44</sup> Ibid., p. 311. Readers of Plato’s *Republic* and Aristotle’s *Politics* will recognize elements of each in Lucas’ solution.

<sup>45</sup> Lucas, *Principles of Politics*, p. 114.

<sup>46</sup> Ibid., p. 94

those rules, the judiciary, is materially the least powerful. “Characteristically” staffed by relatively anonymous “old men with weak muscles, who abhor the idea of violence and would never themselves be tempted to use force, or to beat up a recalcitrant prisoner in the cells,” their claim to authority lies in their capacity for reasoning about the law. They “can argue and talk, but never wield a truncheon.”<sup>47</sup> For the Rule of Law to serve as a practical limitation on the other branches, particularly on the executive, these have to be willing to abide by the rulings of those enjoying neither electoral support nor control of the Mamelukes. In other words, in the final analysis their cooperation is voluntary, as is the judges’ own observance of the Rule of Law in the exercise of *their* authority.

In sum, borrowing from Locke, in a constitutional anarchy those who occupy positions of authority, lacking “a common superior on earth,” must strive to “liv[e] together according to reason,” not force.<sup>48</sup> This requires that they all practice restraint, resisting the temptation fully to exploit temporary advantages to maximize their power or obtain a favored outcome such as, in the Doyle case, attempting to block a constitutionally-mandated vote on whether to submit a measure to referendum. Within the legislature, the majority faction or party or coalition must not shut out the minority but share power with it, suffering patiently as the latter tries to block, delay, or amend bills perceived to be deeply prejudicial to its rights, to its vision of the public good, or to its interests. Neither

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<sup>47</sup> Ibid., p. 85.

<sup>48</sup> Locke, *Second Treatise*, p. 15.

should it pursue a relentlessly confrontational course vis-à-vis an executive whenever this is controlled by a different faction or party for any but the most serious reasons. For its part, the legislative minority needs to yield to the majority most of the time, seeking concessions at the margins of legislation and not habitually engage in perennially obstructionist tactics. They have to accept defeat, at least temporarily. In the meantime, if the stakes are high enough, they can and should involve others in the dispute, the courts or the public, hoping that enough of them can be brought to its side of the issue.

The executive ought to exercise the power of prerogative sparingly, and then seek legislative approval afterwards. Except in emergency situations, and then only temporarily and in a limited way, it must not seek to shield its decisions from legislative or judicial oversight. Most importantly, leaders of the elected branches must agree to appeal to the ballot box or the judiciary when they find themselves at an impasse, and abide by the count or the opinion. As for the courts, their duty is to act judiciously. They must not abuse their privileged status within the government, but limit themselves to their assigned role in the administration of justice and the larger constitutional order of things. Members of all the branches should participate in periodic rituals of national unity, marking the anniversary of historic dates, especially that of the adoption of the constitution, as well as other occasions fit for expressions of patriotism and fellow-feeling, e.g., state funerals.

Interestingly, in seeking to explain why the medieval republics of Florence and Venice, both of which divided sovereignty yet fared so very differently, the former racked by frequent revolutions, purges, and persecutions, the latter a

model of stability and domestic tranquility requiring very little force to maintain it, S. E. Finer attributes the difference to culture more than to institutions:

The qualities that strike the observer when he contemplates the government of Venice are not the collegiate structure, the elaborate checks and balances, the rotation of office, and the like, for these are commonplace in medieval city-republics. Admittedly, Venice's structure was better designed than most in three respects: the impressive expert knowledge of its Senate, the directing and executive role of the *Collegio*, and the incorporation of an emerging mechanism, the Council of Ten. But if the active citizenry who manned the councils and rotated through the ever-more numerous boards and commissions had been even a fraction as contentious and violent as those in cities like Florence, the Venetian constitution would hardly have worked any better. It worked so splendidly because, in the last resort, the aristocracy that worked it—and for that matter the quasi-aristocracy of *cittadine originarii* with their names in their own 'Silver Book'—were imbued with a sense of responsibility for the Republic that transcended their rivalries. It is harder to explain this than to observe its many manifestations. It has been remarked frequently, for instance, that there are very few prominent names in Venetian history—the political actors are largely anonymous, or symbolize a few great families, perhaps—but they conform to a type. The rules of debate, especially in the Senate, which forbid insult and slander, reprove emotionalism and demagoguery, and seek—successfully in the event—to keep discussion low-key, practical, and consensual, are another

manifestation of their attitudes. In their great crises this Venetian aristocracy behaved like Roman senators and magistrates in their golden days during the Hannibalistic wars. They exhibited a respect for the *mos maiorum*, the laws of the Republic, and then exhibited what one can only call, really, a sense of state.<sup>49</sup>

In conclusion, it appears that for a constitutional anarchy to work, it needs to rest on what Rousseau called “the most important” of all laws, one not engraved on marble or bronze, but in the hearts of citizens. It is the true constitution of the state. Everyday it takes on new forces. When other laws grow old and die away, it revives and replaces them, preserves a people and the spirit of its institution and imperceptibly substitutes the force of habit for that of authority. I am speaking of mores, customs, and especially of opinion, a part of the law unknown to our political theorists but one on which depends the success of all the others ; a part with which the great legislator secretly occupies himself, though he seems to confine himself to the particular regulations that are merely the arching of the vault, whereas mores, slower to arise, form in the end its immovable keystone.<sup>50</sup>

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<sup>49</sup> S. E. Finer, *The History of Government from the Earliest Times*, Volume II, The Intermediate Ages (Oxford: Oxford University Press, 1997), p. 1018.

<sup>50</sup> Jean-Jacques Rousseau, *On the Social Contract* (Indianapolis: Hackett Publishing Company, 1987. Originally published in 1762), p. 48.

Of course, specifying that such a culture of restraint is necessary for the proper working of a constitutional anarchy raises yet another series of questions. Are the elements of such a culture of restraint amenable to promotion by political means? In other words, if a constitutional anarchy requires a culture of restraint in order to avoid civil war, can governing itself make a contribution to the very creation, maintenance, or enhancement of this condition? Rousseau avers that the legislator who designs a constitution fit for the characteristics of a people “secretly occupies himself” with that task, but does not tell us how. My guess is that the answer to this question is “yes,” that enlightened leadership practicing restraint sets an example for contemporaries and future generations to emulate. George Washington’s decision not to seek a third presidential term is a case in point. Lucky or wise is the polity that elevates men of such stamp to the highest positions in the state.