

# AN INTRODUCTION TO THE POLITICAL PHILOSOPHY OF THE CONSTITUTION

Duane Smith  
Associate Director  
Center for Civic Education

Associate Professor  
Department of Political Science  
University of California at Los Angeles

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## **POLITICAL PHILOSOPHY**

It is true that the political arrangements established by the Constitution were the result in large measure of the historical experience and the circumstances of the newly independent colonies, and much has been written about this experience and these circumstances. It is also true, however, that the Framers brought to their deliberations a coherent philosophy about the ends and means of government.

This philosophy, sometimes implicit and sometimes made explicit, guided their deliberations and informed the choices they made among competing solutions to pressing problems. This philosophy of government incorporated three major political doctrines: natural rights, republicanism, and constitutionalism. These ideas were part of the common intellectual currency of eighteenth century America.

It is important, if we are to understand the events surrounding the adoption and ratification of the Constitution, to remember that the discussion of these issues was not limited to a small intellectual elite. A knowledge of these philosophies was widespread. This is not, of course, to say that most Americans had read the works of philosophers such as Locke or Montesquieu. Many, however, had become acquainted with their ideas by reading the pamphlets that were published by the hundreds during the Revolution as well as during the debates over the adoption and ratification of the Constitution. In addition, the doctrines of these and other philosophers had also been preached from numerous pulpits and promulgated in the pages of many of the thirtyeight newspapers that existed in the colonies in 1775.

The modern reader must be struck, for instance, by the frequency with which the authors of the numerous pamphlets and newspaper articles published during the ratification controversy, appealed to the authority of the man they called "the celebrated Montesquieu." These pamphlets were intended for a relatively wide audience, and one can only assume that the authors took it for granted that their readers would know who Montesquieu was and be acquainted with his theories of republican government. It surely is one of the more interesting aspects of this episode in American history that these were people who took ideas seriously, who believed, in short, that ideas have consequences. The challenge before them, as they understood it, was to apply the ideas to the circumstances of the moment, to transform the ideas into political reality.

## NATURAL RIGHTS

If we wish to think seriously about government there are certain basic questions we must ask. For example, we need to figure out how legitimate governments are established, or to put it in slightly different terms, we have to ask, "What is the foundation of legitimate political authority?" We also will want to determine what the extent of political authority ought to be. Should political authority extend to all aspects of life or only to certain of our actions? This question is closely related to the problem of deciding why we need government at all. To figure out why we would prefer to live under a government than to have no government is to answer one of the basic questions of political philosophy and will help us to determine what governments should do.

Nearly one hundred years before the Framers met in Philadelphia to write the United States Constitution, the English philosopher John Locke published the Second Treatise of Civil Government. Locke's immediate purpose was to justify the Glorious Revolution of 1688 and to deny the claims of absolute monarchy based on divine right. The result of this Revolution, of course, was the establishment of the doctrine of Parliamentary supremacy in England. Locke held that the inalienable rights of individuals form the basis of all rightful governments. According to him, individuals possess these rights simply by virtue of their humanity. They antedate the existence of any government. The authority exercised by governments is exercised on the basis of the consent of the governed and they consent to the exercise of that authority in order to acquire security for their natural rights to life, liberty and estate.

In order to make his argument supporting these claims about legitimate government, Locke inquired into what he called "the true original, extent and end of civil government." In other words, he addressed those questions, as all political philosophers have, that must be addressed if we are to make a serious argument about government. In order to deny the claims of absolute monarchy based on divine right, Locke had to try to figure out how legitimate government is established, what the basis of its political authority is, how extensive it should be, and what it ought to be used for.

Notice that these are not questions that can be answered simply by appealing to facts. Hence, the example of history cannot be viewed as authoritative. History will show what has been, not what should be. Many rulers have acquired power simply by seizing it and have used it primarily to aggrandize themselves. This is not, however, generally regarded as an example of legitimate political authority and its use. To determine the difference between legitimate and illegitimate political authority, we must engage in philosophical reflection in which we attempt to make arguments supporting our view of the difference between good and bad governments.

Locke approached the problem, as others had, by thinking about what life would be like without government. Such a condition he called the state of nature and argued that it "has a law of nature to govern it which obliges everyone, 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...." h) But why would people choose to leave such a state. Locke put the question this way: "If man in the state of nature be so free as has been said, if he be absolute lord of his own person and possessions, equal to the greatest and subject to nobody, why will he part with his freedom, this empire, and subject himself to the dominion and control of any other power? To which it is obvious to answer, that though in the state of nature he hath such a right, yet the enjoyment of it is very uncertain and constantly exposed to the invasion of others; for all being kings as much as he, every man his equal, and the greater part no strict observers of equity and justice, the enjoyment of the property he has in this state is very unsafe, very insecure."

Life in the state of nature is insecure because without government there is no single authority to determine what the law of nature demands and to enforce those demands. All men being equal, each is entitled to enforce the law of nature and to punish transgressors. Locke thought that the disadvantages of

this are obvious: men's understanding of the laws of nature is flawed because their reason is imperfect and their judgments distorted by their own selfinterest. Since there are always those who will not observe the laws of nature, men's natural rights are necessarily insecure.

When Locke turned to the question of what justifies the exercise of authority by one person over another, he confronted a problem. The traditional justification had been in terms of some relevant superiority. Plato, for instance, claimed that the philosopher should rule because he could learn things others could not. For Locke, such a justification of political authority obviously was not possible since he has held that men are all equal in the state of nature. It follows, then, that the only way political authority can be established and justified is through the consent of those over whom the authority is to be exercised.

Locke held that this consent was originally given through the social compact in which individuals give up the natural liberty they enjoyed in the state of nature in exchange for the civil liberty possessed by the citizens of political society. The difference between the two is described by Locke in the following way. "The natural liberty of man is to be free from any superior power on earth, and not to be under the will or legislative authority of man, but to have only the law of Nature for his rule. The liberty of man in society is to be under no other legislative power but that established by consent in the commonwealth, nor under the dominion of any will, or restraint of any law, but what the legislative shall enact according to the trust put in it....freedom of men under government is to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it."

Given the manner in which Locke has described our condition without government, it is fairly clearly what he must conclude regarding the proper extent and end of government's authority. He has told us that the state of nature "however free, is full of fears and continual dangers...." People want government in order to escape from these "fears and continual dangers." They unite with one another, as he put it "for the mutual preservation of their lives, liberties and estates, which I call by the general name property." He describes the proper end of government in the following words:

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

Just as the conclusion about the proper end of government is easily derived from the reason why people establish it in the first place, so the extent of government can be derived from Locke's description of government's proper end. He described the extent of the government's authority this way: "the power of the society or legislative constituted by them can never be supposed to extend farther than the common good." The exercise of political authority, according to Locke, ought to be limited to those actions which are necessary for the accomplishment of those tasks for which that authority was established: the attainment of security for the lives, liberties, and estates of the citizen

In Locke's view, the basic problem that creates the need for government in the first place is the imperfection of human nature. To put it in the language of Christian theology by which Locke with his Puritan background was influenced, the problem could be located in man's fall from grace. Stained with original sin, men are bound to ignore or misinterpret the laws of nature in their pursuit of personal gain. However, the same problem man's fallen nature that creates the need for government in the first place creates the major problem of government. Those who are to exercise political authority in order to provide security for the citizens through the rule of law are equally fallen. Hence, they cannot really be trusted with political authority since they may use it to pursue their own advantage rather than to provide safety for the political community. It is important to remind ourselves that the political philosophy of natural rights was influenced by both Puritan and Enlightenment ideas. Nowhere is the Puritan influence

more clearly illustrated than in this basic perception of human nature and its relationship to the political order.

What this means, of course, is that in addition to believing that political authority must be based on consent, it had to be organized in such a fashion that it could not be exercised in arbitrary ways. Locke tells us that slavery consists in being subject to arbitrary authority while the liberty of political society consists in being subject only to the lawfully constituted and exercised authority to which we have consented. The problem at this point to find a way of organizing the government in such a manner that it will do only those things which government is supposed to do. But before turning to that problem, let us examine briefly two issues.

First, it is obvious, is it not, that all of the basic premises of the philosophy of government advocated by John Locke are contained in The Declaration of Independence? There Jefferson wrote:

"We hold these Truths to be selfevident, that all men are created equal, that all are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness That to secure these Rights, Governments are instituted among Men, deriving their just powers from the consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government...."

Jefferson, like Locke, did not mean to claim that all people are the same when he wrote that "all men are created equal." He did mean to say that in spite of the differences, no one has an inherent right on the basis of some claimed superiority to exercise authority over others. Like Locke, he believed that we all have certain inalienable rights that it is the function of government to protect. We establish governments in order to achieve security for our rights, and these governments derive their authority from our consent. If these governments which we establish fail to provide the security which they were established to provide, we may withdraw our consent and set up another government in an effort to improve our lot.

"We hold these truths to be selfevident....," is one of the most important phrases in American political writing. The "truths" which Jefferson announced and for which Lock had argued were hardly selfevident except for the fact that Jefferson and most Americans in 1776 thought they were. In other words, the propositions of the natural rights philosophy were only selfevidently true for Jefferson and most Americans because they thought they were true.

The fact that Jefferson was able to announce the natural rights philosophy as selfevidently true demonstrates the extent to which the major elements of that philosophy of government pervaded the American mentality at the end of the Eighteenth Century. Americans had long before accepted the idea that the proper foundation of government was the social compact. The Mayflower Compact is only one illustration of the fact that the social compact had a certain historical reality for them that it did not possess for John Locke and other political writers who described it as the foundation of legitimate government. And the notion that government is established by the citizens in order "to secure the existence of the body politic, to protect it, and to furnish the individuals who compose it with the power of enjoying in safety and tranquillity their natural rights, and the blessings of life," was wellentrenched long before these wordsh) were written in the Massachusetts Bill of Rights.

Secondly, it is important to remind ourselves, precisely because Americans have generally thought that the natural rights philosophy of government is selfevidently true, that other people in other places in other times have thought otherwise. From classical antiquity through the medieval period it was thought

that men were anything but equal, and that some were so obviously superior to everyone else that they had an inherent right to rule over others. Hence Plato's argument for the rule of the philosopher on the grounds that he had access to a realm of truth denied to others. The doctrine of the divine right of kings similarly rested on the claim that some have a right to rule because of some relevant superiority in this case divine election.

Moreover, it was not widely believed that individuals had rights antecedent to society and government. Consequently, it could not be held that the purpose of government was to provide security for such rights. Instead, it was claimed by many Aristotle and St. Thomas Aquinas, for example that the purpose of the political order is to help people develop those moral and intellectual qualities that make them distinctively human. We cannot be fully human without the kind of environment offered by the right kind of political order, they argued. The best political order is not one that simply provides us with security. It is the one that makes us morally and intellectually better.

When Locke and others argued that we need the civil order simply in order to attain security for our persons, our liberties and our possessions, they were articulating a doctrine which was a departure from the ideas that had dominated western political thought since antiquity. But by the eighteenth century, this concept of the political order had become entrenched in the thinking of Americans who took it for granted and made it one of the foundation stones of the revolution and of the government that was established by the Constitution that emerged from the Philadelphia Convention.

### CLASSICAL REPUBLICANISM

In addition to their belief in the philosophy of natural rights, Americans were firmly committed to the doctrine of classical republicanism. These two philosophies of government do not appear at first glance to be entirely consistent with one another. The natural rights philosophy, after all, was highly individualistic, emphasizing the responsibility of government for the protection of individual rights. Classical republicanism, on the other hand, emphasized the community, holding that the primary characteristic of good government is the furtherance of the common welfare. Americans, however, were able to resolve the apparent incompatibility between these two doctrines by holding that the furtherance of the common welfare is accomplished by protection of individual natural rights. And republican government, they insisted was the only kind of government that can be depended on to offer this protection.

Republicanism was a political doctrine with roots in antiquity. The Americans drew their conclusions about the requirements and advantages of republican government from their study of the great republics of the past as well as from the writings of Montesquieu and a host of English writers.

At the time of the American Revolution Americans were in general agreement on the major characteristics of republican government. Sovereign authority resided in the body of the people rather than in a monarchy. The proper purpose of republican government was the furtherance of the common welfare which consisted in the protection of the individual rights of the citizens.

In the minds of Americans, republican government was synonymous with free government. Its major advantage is that under it citizens are freer than they are under other forms of government. Hence they are more prosperous and enterprising, making the state wealthier and stronger. A free government which protects the liberty of the citizens is inevitably much stronger than tyrannical governments which oppress their citizens, Machiavelli had argued in the sixteenth century, and this was a sentiment with which Americans were in full agreement.

They also agreed that while republican government was the best form of government, it was a form of

government that was not possible under all conditions. Indeed classical theorists of republicanism were in general agreement that republican government was only possible under certain specific circumstances. Republics, both ancient and modern, had ordinarily been confined to small territories, territories much smaller than most of the American colonies, as a matter of fact. These small states were populated by a relatively limited number of citizens. The small size of the state increased the possibility that the citizen body would be reasonably homogenous. These citizens would not differ very much in their habits of life, their religion, or their loyalties. Many of the advocates of republican government were convinced that great disparities of wealth made republican government impossible. Hence they maintained that the majority, at least, of the citizens should be of the middleclass. Citizens who had enough land and money to insure a degree of independence without at the same time having so much wealth that it was not necessary for them to work for a living were generally thought to be necessary for the success of republican institutions.

Each of these requirements was clearly related to the basic purpose of republican government: the furtherance of the common welfare. A small community populated by a predominantly middleclass citizenry which shared common attitudes and goals would be more likely to reach agreement about what the common welfare is than a large heterogeneous population. Moreover, it had become almost an article of faith that only small territories could be governed by republican institutions. When a state became too large, it could only be governed by a monarch. This notion had been expressed by numerous political writers and seemed to be supported by numerous examples from history.

One final requirement for republican government was especially important. Americans had learned from their reading of the great writers on republicanism that republican government was only possible if the citizens possess civic or political virtue. The lessons they learned from these theorists were supported by their studies of history, most especially the history of the Roman Republic.

What they knew in great detail and what almost obsessed them was the history of Rome, especially the accounts of the conquests and civil wars in the early first century B.C. to the collapse of republican institutions at the end of the second century A.D. They read the histories of Plutarch, Sallust and Tacitus, historians who, writing during the decadence of the Republic, contrasted the present with a better past. The golden age of the republic had been full of virtue: simplicity, patriotism, integrity, a love of justice and liberty. Now, luxury, gluttony, sloth, and sensuality were destroying the moral grandeur of the republic.

Americans dwelt with morbid fascination on these accounts of the luxury of Rome, a luxury which was destroying the foundations of republican government and hence of Roman liberty. One American writer, describing the decline of republican institutions in Rome to his fellow Americans, described a luxury which "consisted of a dull, animal enjoyment which left minds stupefied and bodies enervated by wallowing forever in one continual puddle of voluptuousness." The classical historians related in chilling detail the corruption of Rome, both moral and political, and its ultimate decline to a nation denounced by Sallust as "Easy to be bought, if there was but a purchaser."

For Americans, the example of the Roman Republic confirmed what they had learned from the writings of many contemporary propagandists of republicanism: excessive wealth leads inevitably to corruption, there is an intimate connection between private and public or political corruption, and republican institutions depend upon a citizenry that possesses both the private and public virtues that had become conspicuously absent during the decadence of the Roman Republic.

The influence of the example of the Roman Republic is illustrative of what one historian has called the cult of antiquity, a cult that was manifested in many aspects of eighteenth century American life. The choice of pen names, tastes in architectural styles, the penchant for comparing the great political heroes

of the moment with those of antiquity all of these testify to the fascination of Americans with the classical period. The example of the Roman Republic appealed to them because of their belief that the great political achievement of the Republic was the attainment of a degree of civil liberty and stability hitherto unknown, and that this achievement was made possible by the political virtue of the citizens. Cincinnatus, who took up the sword when the defense of the Republic required it and returned to his plow when his services were no longer needed was seen as the personification of republican virtue, and it is not insignificant that George Washington was so frequently compared to him. Perhaps even more importantly, Rome also demonstrated the awful result of personal and public corruption: the destruction of republican institutions and the loss of liberty.

The Framers in Philadelphia took it for granted that the new constitution they were to write must provide for the establishment of republican government. As James Madison later said in Federalist #39, "The first question that offers itself is whether the general form and aspect of the government be strictly republican. It is evident that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with the admirable determination which animates every votary of freedom to rest all our political experiments on the capacity of mankind for selfgovernment."

This did not, however, mean that the Constitution adopted in Philadelphia satisfied all of the requirements of classical republican doctrine as it had been generally understood in 1776. Indeed, the fact that it did not was one of the principle reasons why the AntiFederalists opposed its ratification. For men such as Madison, however, the great achievement of the Convention had been to find a way to establish the institutions of "the extended republic," a republic encompassing a much larger territory and many more citizens than any republic previously had successfully done. Moreover, Madison was to argue, the extended republic, organized according to the principles suggested by the newly improved science of politics, provided a solution to the major problem that had led to the downfall of the famous republics of the past: faction.

The mortal disease of all republican governments had been faction. When the citizens engaged in factional behavior, that is when they pursued their selfinterest at the expense of the common welfare, republican government could not long survive. There had been general agreement that factions were the inevitable consequence of the private and public corruption of the citizens. Hence, the classical prescription for the prevention of faction had been, the development and maintenance of republican virtue. A body of citizens who possessed both the private and public qualities of character associated with republican citizenship would generally prefer the common welfare to their particular interest. Madison, however, believed that history demonstrated that even the most virtuous of citizenries was susceptible to corruption. After all, even the Romans had succumbed to the corrupting influence of excessive wealth.

Consequently, while the Framers were not prepared to dismiss civic virtue as an important factor in the success of republican institutions, they thought it a frail reed upon which to build free government. Other supports were needed. These were found in the size of the territory and the number of its inhabitants, the federal system, the representative principle, and separation of powers and checks and balances. These various institutional devices would make it less likely that selfinterested individuals would be able to combine and form factions contrary to the common welfare. As Madison put it in Federalist #10, "A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less likely to pervade the whole body of the Union than a particular member of it, in the same proportion as such a malady is more likely to taint a particular county or district than an entire state. In the extent and proper structure of the Union, therefore, we behold a republican remedy for the diseases most incident to republican government."

The result was that the Framers' conception of republican government was somewhat different from the classical notions of republican government. In his book Are We To Be A Nation?, Richard Bernstein writes, "At the heart of republican thought was a deep concern with public virtue and an obsession with its opposite, corruption." While it would be a mistake to claim that the Framers completely abandoned these notions, they tended to conceive of republican government in institutional rather than moral and sociological terms. Consequently, Madison defined a republic as "a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior. It is essential to such a government that it be derived from the great body of the society, not from an inconsiderable proportion or a favored class of it...." It was assumed that such a government was the best form of government for the furtherance of the common welfare and the protection of the rights of the citizens.

### CONSTITUTIONALISM

Finally, in addition to natural rights and republicanism, the Framers were influenced in their deliberations by the idea of constitutionalism. While there were many disagreements at Philadelphia, there was no disagreement at all over the superiority of constitutional government and the necessity of a written constitution as the foundation of constitutional government.

One scholar has written that "A constitution is a set of customs, traditions, rules, and laws that structures the way a government is organized and defines the relationship between the government and its citizens." In this sense, every state has a constitution, i.e. more or less regularized ways of governing. Consequently, a constitution might provide for the dictatorship of a single person or it might provide for the dictatorship of the majority of the people. That is to say, such constitutions would establish the unlimited authority of a government of one person or many people. They would not provide the foundation of constitutional government, however, for reasons which we shall examine shortly. The point here is that just as every human body has a constitution, so every state has a constitution. But not all governments are constitutional as that term is most frequently understood.

While most constitutions are in writing, it is possible that a constitution might not be written down in a single document. The British Constitution is the best known example of a constitution that is not. It consists of the common law, Magna Carta, the Bill of Rights, and various customs and usages of government that have evolved over time.

Americans, however, have been proponents of written constitutions. This is no doubt, at least in part, a result of their historical experience. The governing authority of the colonies was established by charters and other written documents. Moreover, the colonists early on took to writing down the rights and duties of governors and governed in an effort to make certain that these rights and duties were clearly understood. The Massachusetts Body of Liberties, written a few years after the settlement of Massachusetts Bay Colony, is one of the earliest examples.

More importantly, however, the Framers shared the increasingly common perception that a constitution exists not simply to describe the system of government, but has as its primary function the imposition of effective limits on the exercise of political power. As the citizens of Concord, Massachusetts put it in 1776 when they adopted the Concord Resolution, "a Constitution in its Proper Idea intends a System of Principles Established to Secure the Subjects in the Possession and enjoyment of their Rights and Privileges, against any Encroachment of the Governing Part." Charles McIlwain, the great student of constitutional doctrine, was expressing the same idea when he wrote, "The two fundamental correlative elements of constitutionalism for which all lovers of liberty must yet fight are the legal limits to arbitrary power and a complete political responsibility of government to the governed."

The idea of constitutionalism came to its greatest development during the period which witnessed the



maturing of liberal democracy with its emphasis on the protection of individual rights against government intrusion. Consequently, it is hardly surprising that the notion of constitutional government is so closely tied up with the belief that the sphere of political authority must be clearly defined and its purpose limited to the protection of individual rights. h) The modern conception of constitutionalism also represented the culmination of a lengthy tradition of higher law thought. The idea that there is a realm of law above the enactments of any particular government has its roots in antiquity. It was further developed by St. Thomas Aquinas in the thirteenth century and became known as the natural law. The natural law was thought to provide a standard by which the laws passed by governments could be evaluated. It was also a law that was above the enactments of sovereigns and hence possessed a higher claim on the obligation of the citizen. By the time we reach the eighteenth century, Americans thought of a constitution as a higher law. It was that body of law which established the government, articulated the rights of the citizens that were not to be violated by the government, and stipulated what the government could do and how it could do it. This is what Thomas Paine had in mind when he wrote, "A constitution is a thing antecedent to a government; a government is only the creature of the constitution." And the constitution which establishes the government also imposes both substantive and procedural limitations on the exercise of power by that government.

A constitutional political system does not simply refer to having a constitution, then. As a recent scholar put it, it does refer "to structural and substantive limitations on government....," it means having a particular kind of constitution.

The Framers were powerfully impressed with the inadequacy of written limits on the exercise of political power. "A mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands," wrote Madison in *The Federalist*. For this reason, they viewed the separation of powers and checks and balances as an absolute requirement for constitutional government. Only if the powers of government were properly balanced among the various branches in such a way that the exercise of power was effectively checked would a constitution actually guard against the arbitrary and improper exercise of political power. The constitution would then insure that the political power delegated to the government by the sovereign people would be used only for the purpose for which the government was established by the people in the first place: the furtherance of the common welfare and the protection of individual natural rights.

### CONCLUSION

It was the influence of these ideas, the ideas of natural rights, republicanism, and constitutionalism on the political thinking of Americans at the end of the eighteenth century that led an American historian to write: "In the era of the American Revolution, more than at any other time in our history, ideas dominated our politics." It is true, of course, that Americans' thinking about political matters was shaped by their experience. It goes without saying that the men in Philadelphia were influenced by their own particular interests. It would scarcely be realistic to assume that they were quite the assembly of demigods that Jefferson described. It would be equally unrealistic, however, to suggest that they were simply the automatic reflections of their particular economic interests and that they were merely interested in protecting those interests. Such an argument explains some things about what the Framers did, but it doesn't explain everything.

As a result of the work of Professors Bailyn, Wood, and others, it is increasingly clear that if we are to understand what the Framers did in Philadelphia, why they did it, and how they understood what they were doing and this understanding is a prerequisite for understanding the Constitution they produced we must begin with an examination of those ideas which were part of the intellectual vocabulary of Americans, the ideas and ideals which Thomas Jefferson insisted were selfevidently true.

