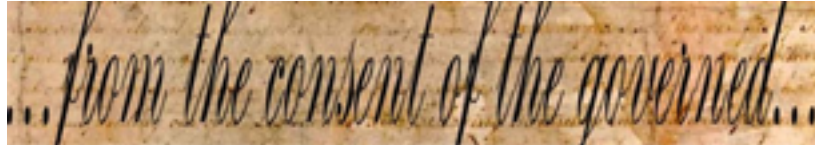


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THE CONSENT OF THE GOVERNED

Mortimer Adler

After that men have instituted governments in order to secure their rights, Jefferson adds that governments devised for this purpose derive their just powers from the consent of the governed.

Jefferson's compression again calls for a slightly more expanded statement to make clear what he meant: a government having just powers is a government by right, not might. Just powers have authority as well as force, and that authority derives from the consent of the governed.

The phrase "consent of the governed" comes down to Jefferson by way of John Locke, but the first use of it occurs in a debate that took place in Lord Cromwell's army between Cromwell and his son-in-law, Colonel Ireton, and a group called the Levellers.

Major Rainborough, representing the Levellers, expressed the view that "every man that is to live under a government ought first by his own consent to put himself under that government." A fellow Leveller, Sir John Wildman, added: "There is no person that is under a just government . . . unless he by his own free consent be put under that government."

The justice of a government, as we have already noted, can be measured in part by the extent to which it secures the natural rights of its people. That measure of justice does not derive from the consent of the governed. It is rather the just powers of a government that depend for their justice, and, consequently, for their authority, upon the consent of the governed.

We encountered the distinction between tyrannical and despotic governments imposed by might—by naked force—and

governments rightly or justly instituted. The key to the difference between them lies in the contrast between the words “imposed” and “instituted.” In governments imposed by might, the governed are involuntarily subject to the power exercised by their ruler. In governments instituted, the people themselves erect a government and confer upon it powers to which they voluntarily consent.

Framing and adopting a constitution is one way, although perhaps not the only way, in which a people who regard themselves as having the right to govern themselves can erect a government to serve that purpose.

What is a constitution? It is the framework of a government. It defines the offices of government and allocates to them certain governmental functions that each is expected to perform. It invests those offices (sometimes called the departments or branches of government) with the authority they need in order to perform these functions.

The officials of a constituted government—its officeholders—have no authority or power in their own persons. They have only such authority or power as the constitution confers upon the offices they hold. For officeholders to arrogate to themselves more power or authority than pertains to their offices amounts to usurpation on their part, and should be punishable by removal from office, by impeachment.

All these political ideas are implicit in the meaning of that single phrase “consent of the governed.” Still more is there. Reference was made to the right of a people to govern itself. Whence comes this right?

It is implicit in the right to political liberty, that form of freedom which consists in being governed with one’s own consent and with a voice in one’s own government. Aristotle defined constitutional government as the government of freemen and equals, in which the citizens rule and are ruled in turn—that is, administering the law when they are citizens holding public office for a term of years and obeying it when, in or out of office, they are subject to the laws of, the land, laws that they have had a voice in making.

The doctrine of the divine right of kings, to which loyalists in the American colonies appealed, attempted to make absolute rule government by right instead of government by might. One of those, loyalists, Jonathan Boucher of Virginia, in an address

delivered in, 1775, rejected the notion that rightful government is derived from the consent of the governed. He said:

This popular notion that government was originally formed by the consent or by a compact of the people rests on, and is supported by, another similar notion, not less popular nor better founded. This other notion is that the whole human race is born equal; and that no man . . . can be made subject to another [except] by his own consent.

On the contrary, Boucher argued, kings and princes “so far from deriving their authority from any supposed consent or suffrage of men, . . . they receive their commission from Heaven; they receive it from God, the source and origin of all power.”

Being a ruler by divine right, an absolute monarch, in Boucher’s view, “is to be regarded and venerated as the vicegerent of God”—the representative of God on earth. The opposite view had been expressed centuries earlier by Thomas Aquinas in his *Treatise on Law in the Summa Theologica*.

The power to make laws, Aquinas wrote, “belongs either to the whole people or to someone who is the vicegerent of the whole people.” While not denying that God is the ultimate source of all power, Aquinas maintained that God confers it upon a people able to govern themselves and that they, in turn, can confer it upon someone they appoint to perform this function as their vicegerent or representative.

As contrasted with the notion of the divine right of kings, the statement by Aquinas is an early expression of the notion of popular sovereignty.

That notion is, in turn, inseparable from the idea with which we are here dealing: that a justly instituted government derives its authority, its just powers, from the consent of the governed.

Republican or constitutional government in ancient Rome was replaced by the absolute rule of emperors when the people gave the Emperor all authority and power. That was, of course, a legal fiction to cover up the seizure of absolute power by the Caesars.

The fiction pictured the transfer of authority from the people to the Emperor as a total and irrevocable transmission of authorized power. The people were thus supposed to have completely abdicated their sovereignty.

Constituting a government by the consent of the people does confer on government officials some of a people's power to govern themselves. This transmission of authority from the people to their representatives is, however, neither total nor irrevocable. Popular sovereignty still remains because officeholders are accountable to the citizens they represent and can be removed from office if they exceed the authority invested by the constitution in the offices they hold.

In Abraham Lincoln's famous statement "government of the people, by the people, for the people"—it is the first phrase that expresses the notion that constitutional government derives its just powers from the consent of the governed. The word "of" in that phrase is misinterpreted when it is thought to mean that the people are subject to government. In that sense of the word "of," all governments, despotic as well as constitutional, are governments of the people—that is, the people are subject to its laws.

Only when the word "of" is interpreted to mean that the government belongs to the people, that it is voluntarily instituted by them, and has no more power or authority than that to which they have given their consent, do the words "government of the people" signify constitutional government.

The word "of" has this possessive meaning in such phrases as "the house of my friend" or "the hat of my aunt." Just as we can also say my friend's house or my aunt's hat, instead of saying government of the people, we can also say the people's government. Daniel Webster in his famous Reply to Hayne, a speech that Lincoln is known to have read, spoke of "the people's government, made for the people, made by the people, and answerable to the people."

Two questions remain to be considered. To whom does the phrase "the governed" refer when we speak of the consent of the governed? And how do those who give their consent give it?

In response to the first question, it should be immediately obvious that not all who are among the governed can or should be expected to give their consent. At no time are the people as a collectivity coextensive with the population. At any time, the population includes infants and children, to whom the phrase "below the age of consent" is applied. The population also includes temporarily resident aliens and persons hospitalized for mental deficiencies and disorders. All these members of the population are subject to the

laws of the land and their human rights are also under protection by those laws.

In earlier centuries there were other disfranchised groups in the population who were among the governed but without suffrage—for example, women, blacks, individuals without sufficient property. They were, therefore, not members of the people who were governed with their own consent. It becomes necessary, then, to expand Jefferson’s phrase “consent of the governed,” replacing it by the statement that a government derives its just powers from the consent of all those who are politically in a position to give their consent. They are the people within the population—the enfranchised citizens of the republic.

The Declaration does not tell us who the people are. That we are left to discover by interpreting clauses in the Constitution and in its amendments that have to do with the qualifications for citizenship and with the extension of the suffrage. We will, therefore, return to this matter in later chapters dealing with the Constitution.

In response to the second question concerning the manner in which those who are in position to consent give it, we must distinguish the two principal ways in which consent can be given. One of these two ways was operative only in the years 1788 and 1789, when the people of the several states went to the polls to vote yes or no on the question whether the Constitution that had been drafted in Philadelphia in 1787 and was now being submitted for their approval should be ratified and adopted.

That event occurred once and once only, although something like it was repeated many times thereafter when territories petitioned for the status of statehood in the federal union. On those occasions, the people of the territories who voted for statehood under the provisions of the Constitution were, in effect, giving their explicit consent to the Constitution itself. It is also the case that on occasions when citizens vote for an amendment to the Constitution, they are giving their explicit consent to the Constitution itself.

The consent of the people governed is explicitly given only in the manner described above. What about the minority who voted no on these occasions?

Since majority rule cannot become a regulative principle by the acquiescence of the majority, we must assume that all members of the people have unanimously accepted it. Unanimity, as Rousseau

pointed out, is required for majority rule to become operative. It logically follows, then, that the minority who voted against adopting the Constitution, or voted against petitioning for statehood, gave their consent tacitly or implicitly when they retained their status as enfranchised citizens and acted politically in that capacity. In doing so, they tacitly acquiesced in the Constitution as the framework of a government in which they participated.

This applies to all who have become enfranchised citizens and have acted politically as such since the years 1788 and 1789. We have given our consent tacitly or implicitly, not explicitly.

Giving consent to government does not preclude dissent from government. Consenting citizens can become dissenting citizens on one occasion or another when they protest against the law or acts they deem unjust as violations of their natural rights or for other reasons. Such dissent remains clearly within the boundaries of consent as long as it is dissent by due process of law and employs constitutional or legal means for seeking the redress of grievances. The First Amendment to the Constitution gives consenting citizens the civil right “to petition the government for the redress of grievances,” as well as rights to freedom of speech and freedom of the press.

This can be said another way. All those who do not explicitly withdraw their consent, including those who dissent within the boundaries of consent, can be regarded as implicitly or tacitly giving it. How, then, can anyone explicitly withdraw consent? In two ways: by emigrating to another country, or by taking up arms in violent insurrection. Civil disobedience that is nonviolent and accompanied by voluntary submission to the punishment allotted for such disobedience does not involve withdrawal of consent.

How the line should be drawn between such civil disobedience and the kind that becomes a mass political protest in which the resort to violence is latent will be considered in the next chapter when we will deal with the Declaration’s statement about the right and duty to withdraw consent and overthrow an unjust government and replace it by another that will respect human rights and promote the pursuit of happiness by its people.

Some enfranchised citizens—currently too many as a matter of fact—do not exercise their rights or perform their duties as citizens. If we maintain that citizens give their consent tacitly when they act politically, must we then say that those who do not act as

they should have tacitly withdrawn their consent? No. Although they do not act as citizens should, they nevertheless willingly accept all the benefits that government confers upon them. They can, therefore, be deemed to have given their tacit consent. 📖

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