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THE UNDERLYING IDEAS IN THE DECLARATION

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The Consent of the Governed

AFTER SAYING 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.

In the preceding chapter 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.

The Dissent of the Governed

THE RIGHT OF THE PEOPLE to institute a government that secures their human rights would appear to have its foundation in their right to liberty; more specifically, that mode of freedom which is political liberty, the freedom of those who participate in popular sovereignty. According to the Declaration, a free people has another right: the right to alter or abolish any form of government that fails to protect or that violates their natural rights.

The second right, like the first, would appear to have its foundation in the same natural right, the right to liberty. But the two rights that derive from the right to liberty are not themselves natural rights. What can be said of all natural rights—that they arise from needs inherent in human nature—cannot be said of them. Nor are they, strictly speaking, civil rights, for they are not established by the provisions of a constitution, like the right to freedom of speech, or by legislative enactments. In what sense are they rights? Is it correct to call them rights?

The declaration of a right is often a short way of saying that certain actions on the part of a people can be justified—that is, it can be regarded as in conformity with the principles of justice. On the basis of having the natural right to liberty, especially the freedom of self-government, a people is justified in setting up a government for themselves, to which they voluntarily give their consent.

It is equally clear that a people is justified in altering or abolishing any form of government that violates their right to liberty, as despotism does by reducing them to subjection under absolute rule. The Declaration's statement of this point, being so compressed, fails to spell out what its words suggest.

In the first place, we must note the difference between altering and abolishing. A constitutional government can be altered by amendments to its constitution; a despotic government cannot be altered, in this way.

Constitutional defects that are altered by amendments may be either defects of omission or defects of commission. They are the former when a constitution fails to secure by its provisions certain rights that are, or come to be, acknowledged as natural rights: They

are the latter when one or more articles of a constitution tend to abrogate known natural rights.

As we shall see in later chapters, our Constitution has been altered by amendments in order to remedy both sorts of defects. In addition, decisions of the Supreme Court, reviewing the acts of both state and federal governments, have provided remedies for the two sorts of defects.

To the extent that amendments to the Constitution have been adopted by popular mandate, they have been enacted with the consent of the governed. Altering our form of government in this way does not involve the withdrawal of consent.

Judicial decisions declaring certain acts of government unconstitutional have sometimes been occasioned by popular dissent that, in effect, petitions the government for a redress of grievances. When popular dissent proceeds in this way to bring about a rectification of injustice by due process of law, it, too, does not involve a withdrawal of consent.

Such popular dissent may involve acts of civil disobedience by a person or a group of persons who disobey a law and willingly accept the punishment assigned for its violation in order to call attention to the injustice of the law they think should be declared unconstitutional. Cases calling for the judicial review of such legislation have come to the Supreme Court in this way.

When does dissent from civil government or civil disobedience involve a withdrawal of consent? If it does not do so when it seeks to alter a constitutional government by due process of law and without violence, then the answer must be that it does so when the actions taken seek to abolish one form of government and to replace it with another.

The word “rebellion” does not appear in the Declaration of Independence. In common usage that word has the connotation of an attempt to overthrow a government, and that is the meaning to be found in the Declaration when it speaks of a people’s right to “throw off” a government that abrogates their rights and cannot be altered by constitutional amendments and due process of law.

Despotic forms of government cannot be altered by constitutional amendments and by due process of law. Being governments by might or force, they can only be abolished or overthrown by resort to might or force. Resort to force—acts of war—is implicit in the etymology of the word “rebellion,” the Latin root of which (re-

bellare) means return to the state of war, a state in which only force is available to resolve conflicts.

A pronouncement by John Locke, with which Jefferson was acquainted, throws light on this point. Locke wrote:

Whosoever uses force without right . . . puts himself into a state of war with those against whom he so uses it, and in that state all former ties are canceled, all other rights cease, and every one has a right to defend himself, and resist the aggressor.

The context in which the Declaration asserts the right of insurrection calls attention to a long train of abuses and usurpations on the part of the British King and Parliament that manifest their design to subject the American colonies to despotic rule. The colonists, the Declaration says at a later point, “have petitioned for redress” and their “repeated petitions have been answered only by repeated injury.” In other words, the colonists had resorted to nonviolent means of rectifying the injustices they thought had been inflicted on them. Those attempts having failed, they were left with only one resort: to take up arms and to use force to overthrow a despotic government.

According to the Declaration, the colonists were not only justified in using violent or forceful measures to overthrow the despotism to which they had been subjected; they were also under a moral obligation to do so. “It is their right, it is their duty,” the Declaration asserts, “to throw off such government.”

The right asserted, as we have seen, amounts to a justification of the act. But how shall we understand the duty, the moral obligation?

It would appear to stem from the moral obligation on the part of human beings to engage in the pursuit of happiness, to try to make morally good lives for themselves. Despotic government, abridging or abrogating the right to liberty as an indispensable means for the pursuit of happiness, prevents human beings from fulfilling their moral obligation to seek their ultimate good. It is, therefore, their duty to remove this obstacle.

Being justified in their effort to abolish or overthrow a despotic government that impairs their pursuit of happiness, the people, when successful in this effort, should not try to get along without any government, which would be a state of anarchy. They should, the Declaration tells us, “institute new government, laying its foundations on such principles, and organizing its powers in such


form, as to them shall seem most likely to effect their safety and happiness.”

The insurrection against despotism carried out by the colonists in their War of Independence was only the first step to be taken. The second step was taken five years after the war had been won, when the Constitutional Convention met in Philadelphia to set up a new form of government by drafting a Constitution and submitting it to the people for their adoption.

It should not go unremarked that the Declaration provisions this second step. Even more remarkable is the fact that, in doing so, it reflexively refers to the principles it has enunciated (the basic political ideas we have been considering) as providing the foundation for the new form of government to be instituted. It also speaks of organizing the powers of that new government in such a way that, when the Constitution is adopted, they will derive their authority from the consent of the governed.

We have reached the conclusion that only a despotic government justifies insurrection and even imposes on us a duty to rebel. With respect to constitutional government, what we are justified in doing and are also under a duty to do is not to abolish it by violent or forceful means, but rather to alter it by way of amendments and other lawful and nonviolent means.

In other words, the right and duty to overthrow a government applies only to the first step the colonists took on the road to setting up the Republic in which we live. Once the second step has been taken, enabling us to live under constitutional government, we have both the right and the duty as citizens to do what is necessary in order to rectify whatever injustices result from defects in our Constitution.

Understanding this leaves open for later consideration the problem of drawing the line between conditions that justify civil dissent within the boundaries of consent and conditions that justify the withdrawal of consent from a duly constituted government. It also postpones until later the question as to whether a completely just form of government should provide its people with adequate and sufficiently speedy means for civil dissent that seek to obtain redress for grievances or to remedy injustice within the boundaries of consent. 

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