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THE AMERICAN TESTAMENT

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. . . that they are endowed by their Creator . . .

The reference to a transcendental source is here repeated. The endowment, however, refers to attributes of the nature created, attributes that derive from the natural equality of men. In his first draft Jefferson had made that point quite explicit, writing "from that equal creation they derive rights inherent and inalienable." The endowment, then, consisted of natural rights—rights inherent in nature. Though an appeal to right reason might suffice for the recognition of such rights, here as before the reference to the Creator gave them an additional and higher sanction, according to the view prevalent at the time. Attempts to violate such rights or to render them void would be an offense against the Creator, whose intention was declared in the nature created.

. . . with certain unalienable rights; . . .

The negative word in this clause gives a clue to the character of the rights conceived as man's natural endowment. The civil or legal rights that the state confers on its citizens or subjects by positive enactment or constitutional provision, it can revoke or nullify. They are alienable. To say that certain rights are inalienable is to say their possession by men does not depend upon legislation of any kind. They are inalienable because they are inherent in the nature of man. They belong to human beings in virtue of their being human. They have moral force and impose moral obligations even when they lack legal force and lack legal sanctions. They can, therefore, be called "moral rights" or "human rights" as well as "natural rights." Though these denominations are not identical in their connotation, all three refer to rights that are not dependent for their existence upon positive law or political institutions.

While the existence of such rights does not depend upon the constitution or the laws of the state, the enforcement of them does. Not depend on the constitution or laws of the state, the enforcement of the laws does. A particular state may or may not give constitutional or legal recognition to the rights here declared to be inalienable; and accordingly, states may be judged on moral grounds or principles of justice in terms of their respect or disrespect for these moral, human, or natural rights.

As already noted, these rights impose moral obligations: They are rights that should be respected by everyone under all circumstances. Their inalienability, however, does not preclude

limitations upon the exercise of these rights, limitations that may be justified under certain circumstances. An individual may forfeit by misconduct his exercise of rights that are inherent in him, but he cannot abnegate his possession of them. They cannot be given away by him any more than they can be taken away from him by others.

The fact that the attribution to men of certain inalienable rights follows directly upon the affirmation that all men are equal by nature as well as by divine creation, has profound significance. If the rights in question are inherent in human nature, and if the equality of men is rooted in the sameness of the specific nature in which all men participate, then these human or moral rights are equally possessed by all. Some men do not have more claim and others less claim to the entitlement of these rights. Whatever any human being is entitled to by virtue of his human rights, all other human beings are equally entitled to.

> . . . that *among these* are life, liberty, and the pursuit of happiness.

The phrase "among these" plainly implies that there are other natural, human, or moral rights in addition to the three mentioned. Questions arise, therefore, concerning what these other rights might be and how they stand in relation to the rights specifically mentioned, as well as why, of all the rights that might have been mentioned, only these three were named in the Declaration.

For the question about the range and variety of inherent and inalienable rights, we are provided with an impressively detailed answer in the Universal Declaration of Human Rights adopted by the United Nations. The fact that the United Nations, because it lacks the coercive force of a sovereign government, cannot enact legislation "to secure these rights" on a worldwide basis does not alter the significance of the declaration itself, or diminish the importance of the fact that its signatories were representatives of all the peoples of the world.[1] {Footnote 1 See Appendix for the enumeration of rights in the Universal Declaration of Human Rights.}

The declaration of human or natural rights by the United Nations enumerates rights that probably would not have been included in a list drawn up in the eighteenth century that might then have been thought comprehensive. Though such a list might have been enlarged in the nineteenth century, it still would have fallen short of the enumeration made in our own time. This historical fact requires us to consider how these rights are discovered, and why rights that are supposedly natural and human should be only progressively discovered in the course of time.

What obstacles delayed their discovery? Why were they not always known?

Such questions themselves have undergone historical changes. The whole doctrine of natural law and natural rights was discredited in the nineteenth century when it was presented in a distorted version. According to that mistaken view, human nature is an open, well-illuminated book from which, by simple inspection, manuals of natural laws and lists of natural rights can be produced. If that were the case, there could be no explanation of the progressive enlargement of the rights enumerated in succeeding centuries, nor any reason for the delay in discovering certain rights not mentioned at earlier times. An explanation is available, however, on the traditional view of the process by which such rights are discovered. According to that traditional view, the effort to discover the precepts of the natural moral law and the specific rights to which all human beings are naturally entitled is subject to the same conditions of error and delayed progress that prevail in other spheres of knowledge.

Our expanding knowledge of celestial phenomena, for example, has depended at crucial stages of progress upon the invention and use of more and more powerful instruments of obsFervation. What we have learned only recently through improved instrumentation did not come into existence recently. Before we were able to observe and describe them, the phenomena were as they are now. It is not the phenomena that have altered or grown; it is only our knowledge of them. So, too, in the case of natural rights: They have not increased in number in succeeding centuries; rather our knowledge of them has enlarged.

What plays a role analogous to the role played by improved instrumentation in astronomy? One answer that has been given to this difficult question is that, in the course of history, the altered circumstances of social life, including technological advances as well as institutional innovations, have removed emotional obstacles to the exercise of reason needed to discover natural rights. It has also been argued that the conscience of mankind has grown more sensitive in the course of time and under the pressure of events.

Jefferson himself provides us with testimony in support of the view that the recognition of certain rights waits on advances in man’s moral consciousness, advances that are not come by easily. He was profoundly uneasy about the flagrant contradiction between the institution of slavery and the equality of men, together with their equal possession of the natural right to liberty. He deplored that “execrable commerce . . . a market where men could be bought and sold.” This led him to introduce into his indictment of George III, clumsily and unconvincingly, his abhorrence of

chattel slavery as a patent violation of a natural, human right. For reasons of policy quite pragmatic, the Congress struck from the document that part of his draft.

Even if they had no other examples than those of chattel slavery and racial discrimination, the American people can learn, from the birth conditions and the birth document of their country, how startlingly slow the constitutional enactment and legal enforcement of natural rights can be. However, the laggard pace in the development of the conscience of mankind yields an argument against the doctrine of natural rights only on the mistaken view that natural rights can be discovered easily. Further, the pages of history make unmistakably clear that, even when the reason and conscience of mankind do affirm certain rights to be inalienably human, they are not forthwith enacted into law.

Jefferson singled out three rights which he clearly regarded as the most fundamental ones to affirm in the Declaration of Independence.

> . . . that among these are life, liberty, and the pursuit of happiness.

Why did Jefferson choose this triad of basic rights? Can it be contended that they are the principal or most fundamental rights to which all others are subordinate as means to the ends they serve? The argument for that contention, severely foreshortened, might run as follows:

An understanding of human nature, derived from reflection on human experience and human history, leads to the recognition of certain obligations that a man must discharge in order to fulfill himself as a man. He ought to strive to preserve his very existence. Being endowed with freedom of choice, he ought to strive to control the course of his life. And in exercising his freedom to choose the direction of his life, he ought to strive to make it a good life; he ought to strive for self-perfection, for the fullest development of his potentialities—for happiness.

To implement the discharge of these obligations, a man must have the right to life, liberty, and the pursuit of happiness: the right to life being his right to security against forces or factors inimical to its preservation; the right to liberty being his right to conditions or circumstances favoring or facilitating the carrying out in action of the choices he makes; and the right to the pursuit of happiness being his right to whatever help organized society can give him in his effort to make a good human life for himself. These rights involve binding claims about what is due each man from his fellow men and about what is due him from organized society and from a government that is instituted to secure such rights.

In further support of the contention that Jefferson's famous triad of inalienable rights are the principal or most fundamental of all human or natural rights, it must be argued that no other rights are on the same level, because all others are rights to the things a man needs in order to preserve his life, exercise his freedom, and pursue happiness. Thus, for example, when at a later time it is declared that a man. has a right to a living wage—a right to earn a living for himself—that right can be seen as a specific determination of a man's right to life or self-preservation.

While life, liberty, and happiness are coordinately goods that each human being naturally desires to preserve or promote, happiness alone is the ultimate goal that is desired for its own sake and not as a means to anything beyond itself. Because of this, even the rights to life and liberty can be viewed as auxiliary or instrumental to the pursuit of happiness, for life and liberty are indispensable means thereto. A human being's moral obligation to make a good life for himself not only grounds his right to pursue happiness but also encompasses all other rights—rights to whatever is indispensable to the pursuit of happiness, such as the preservation of life and the protection of liberty, and still other rights subordinate to these.

The temptation to consider Jefferson's selective triad of rights an inspired choice is engendered especially by the act of substitution he performed with regard to the third element in that triad. Jefferson was acquainted with John Locke's formulation of fundamental rights. Locke's triad had been "life, liberty, and property" or "life, liberty, and estates." Persistently in the prerevolutionary literature, Locke's triad had been reiterated and had been regarded as almost canonical. It is, therefore, difficult to believe that Jefferson's substitution of "the pursuit of happiness" for "property" or "estates" was not deliberate.

Not only did he introduce this striking revision of Locke's phrasing, but he also departed even further from the statement made by his close friend and fellow Virginian George Mason. Less than a month before July 4, 1776, the Virginia Constitutional Convention had adopted a Declaration of Rights drafted by Mason. Section of that Declaration read as follows:

> That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, *the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety*.

It is clear that Jefferson picked up the inherent right of pursuing happiness. It is just as clear that he decided against including Mason's phrase "the means of acquiring and possessing property"; not only that, but also, and even more significantly, he deliberately converted Mason's "pursuing and obtaining happiness and safety" into "the pursuit of happiness."

With regard to the revision of Locke and Mason on property, we know that at a later time Jefferson, in discussing the French Bill of Rights with his friend Lafayette, counseled him against the inclusion of the right to property. There is no reason to think that Jefferson meant to deny that there was a right to property. If it were stated with suitable generality, open to varying determinations by positive laws under changing economic circumstances, he would probably have considered that right a natural right. Even so, he would not have regarded it as being on the same fundamental level as the rights to life, liberty, and the pursuit of happiness. The substitution of that third right for the right of property gave Jefferson's declaration of rights a universality and scope that could not otherwise have been achieved; for it was open to and could cover whatever insights about enabling means for the pursuit of happiness that societies and governments might subsequently discover in the ongoing historical effort to provide human beings with the conditions they need for their well-being and welfare. The possession of property, or its economic equivalents, is certainly only one of such conditions.

The significance of Jefferson's substitution of the pursuit of happiness for property is enhanced by his alteration of Mason's phrasing of this matter. Where Mason spoke of "pursuing *and obtaining* happiness *and safety,"* Jefferson dropped the words "obtaining" and "safety." Reference to safety as something to be paired with or coordinate with happiness weakened the conception of happiness as life's ultimate objective—the goal to be striven for. If the word "safety" meant security of life and limb, it was already covered by the right to life and so should not be mentioned again, certainly not as coordinate with the pursuit of happiness, to which such security may be an indispensable means, but only a means.

In addition, one can surmise that it was Jefferson's understanding of the traditional meaning of the term "happiness" that led him to formulate the human right with regard to it as the right of pursuing it, but not the right of obtaining it. In the traditional philosophical conception of happiness as a life well lived, or a good life as a whole, the achievement of happiness depended on the individual's possession of certain virtues that are entirely within his own power to acquire. If he fails to acquire them, he alone is to blame. No organized society or instituted government can confer moral virtue upon him or make him a man of good

moral character; and so, the attainment of happiness being dependent on a man's interior moral disposition, no society or government could ever secure an individual's right to obtain or achieve happiness. A right that cannot be secured by any devisable institutional means is void of political meaning. What organized societies and instituted governments can do is to provide human beings with the external conditions indispensable to the *pursuit* of happiness, facilitating but not ensuring its attainment. The right to pursue happiness is, therefore, a right to these indispensable external conditions—conditions specified by all the other rights which are subordinate to the right of pursuing happiness.

Jefferson's grasp of the traditional conception of happiness impelled him to correct Mason's error in supposing that governments can secure the right to "obtain" happiness. That supposition fails to recognize the limitations of government and betrays a misunderstanding of the purely personal factors involved in the pursuit of happiness. However, stress on these personal factors may lead to another error that must be guarded against for an understanding of the full truth of Jefferson's fundamental insight concerning the pursuit of happiness as the most fundamental of all human rights.

While each individual must be free to pursue happiness in his own way, given the individuality of his own personal endowments and the special circumstances of his own life, the goal he is striving to achieve—the good human life he is trying to make for himself—is not distinctly individual but humanly common. The happy or good life is essentially the same for all human beings; it is a fulfillment of the same specifically human potentialities or propensities; it is a satisfaction of the same needs inherent in human nature. Whatever things are really good for any human being are really good for all other human beings; and so if happiness consists in a life enriched by all the things that are really good for a man, happiness is the same for all men.

If the contrary view is held, that happiness consists in what each individual wants for himself, and differs according to individual desires or inclinations, then no government could possibly secure for all their right to its pursuit, since the wants or desires of one individual so often come into conflict with those of another. What we must suppose Jefferson to have understood is that unless the pursuit of happiness is cooperative rather than competitive, it would be beyond the power of government to secure this right for all. To be a goal that can be pursued by all without one individual interfering with or impeding another, happiness or the good life must consist in common, not individual, goods—goods that are the same for all and can be participated in by all.

Having drawn from the natural equality of men their equal possession of fundamental natural rights, the Declaration goes on to the role of the government in relation to those rights.

> That, to secure these rights, governments are instituted among men, . . .

The statement that governments are instituted among men to secure these rights should not be read as a statement of historical fact. Jefferson certainly knew from political history that governments come into being in a variety of ways and for a variety of purposes. Not all are instituted, for some are imposed by force, and even of those which are instituted not all are instituted to secure the rights of man for all men.

Jefferson's choice of the word "instituted" is hardly accidental. He certainly understood that only governments that are instituted rather than imposed by force would be governments that might serve the purpose of securing human rights. Only such governments, voluntarily adopted or, as he goes on to say, established by "the consent of the governed," would be concerned with protecting the rights of the governed as opposed to serving the self-interest of those governing by imposed force. The line thus drawn between governments imposed and governments instituted divides governments by might from governments by right.

The word "just," which makes its appearance in the next clause, reflects back upon what is here being said. Not all governments are just, either in the way they hold power or in the way they exercise it. Their possession of power is just only to the extent that the powers they have are legitimate or authorized because they derive from the consent of the people who have voluntarily adopted the constitution or framework of a government that is instituted by them. Possessing legitimate or authorized power, a government exercises such power justly only to the extent that it respects the inherent and inalienable rights of man and attempts to secure them, not just for some men, but for all.

Though the great compression under which he is writing may at first conceal or obscure his meaning, Jefferson certainly has these criteria of justice in mind in his statement about the origin and purpose of government. He is thinking normatively, not descriptively or historically. If what he has in mind were to be stated normatively rather than descriptively, the statement would read as follows: Governments *should be* instituted among men and they *should be* instituted to serve the purpose that governments *ought* to serve, namely, to secure these rights—the inalienable rights previously named as well as other rights not specifically mentioned.

Jefferson's compact statement of the purpose a government must serve in order to be just echoes an equally compact statement current in the Middle Ages, which defined the purpose of government in the following formula: servitium propter jura, non potestas praeter jura (service to and for the sake of rights, not a power exercised beyond or outside of rights) . Any more elaborate formulation of the end to be served by a just government should be interpretable as an amplifying specification of the Declaration's succinct statement.

What appears to be an alternative formulation of the purpose of government is given in the Preamble to the Constitution, in which the elements of the common good are articulated as the several distinct objectives of government. Included among them are such things as union, civil peace or domestic tranquility, national security, and the general welfare. Each of these is an aspect of the good that is common to all members of the community, something in which they all share; but so, too, are the inalienable rights of man elements in the common good, for they are rights common to all members of the community, rights equally possessed by all. These alternative statements about the purpose of government—the one in the Declaration and the one in the Preamble—must, therefore, be read as supplementary rather than as conflicting. In one respect, however, the statement in the Declaration is more philosophical, in that it appeals to the criteria of justice by which legitimate or constitutional governments are to be distinguished from illegitimate or despotic regimes, and by which one legitimate government can be judged to be more or less just than another.

Attention must be paid to the critical verb "to secure" in the Declaration's statement of the purpose of government. Just governments are not instituted to endow men with these rights, or to confer these rights upon them, for human beings already possess these rights by virtue of their being human. The right interpretation can be drawn from the etymology of the term "secure"—from the grave, complex beauty of the Latin word *cura.* Just governments are instituted among men in order to assure them they can be *without care*, without anxiety or apprehension, about the opportunity to exercise within society rights that are naturally theirs. These rights are safeguarded by a government that is just in the exercise of its powers.

> . . . deriving their just powers from the consent of the governed; . . .

The purpose for which just governments are instituted having been stated, a related but different question arises: What is the source of the authority for the powers such governments will

exercise? The preceding discussion has already anticipated the answer to be given—but only in part. A fuller statement of the answer must expatiate on a basic principle in the tradition of Western constitutionalism. Jefferson appealed to that principle and was aware of the dispute concerning the sources of authority that had permeated Western political and juridical history.

The powers of a government are just and legitimate only if they are authorized powers, that is, if they derive their authority from the consent of the governed, for they can gain authority in no other way. The reason is the people's right to self-rule; they inherently possess the authority to govern themselves. If, in doing so, they erect or institute an apparatus of government in the form of public offices each exercising certain administrative powers (legislative, judicial, or executive) , they confer legitimacy upon these powers by transmitting or imparting to them the authority that ultimately and permanently resides in the people.

This principle of transmitted authority through consent had been variously stated in the tradition of political thought with which Jefferson was acquainted. A well-known and recurrently expressed medieval maxim read: Quod omnes tangit, ab omnibus approbetur (whatever touches all must be approved by all) . Sir John Fortescue, Chief Justice of the King's Bench under Henry VI and, along with Bracton, one of the most eminent jurists in England's early constitutional history, appealed to the principle of consent in distinguishing between an absolute and a constitutional monarch. The latter, he wrote, "may not rule his people by other laws than such as they assent to. And therefore he may set upon them no impositions without their consent."

The principle of consent appeared later in the famous debate held in 1647 within the General Council of Oliver Cromwell's army, in the short period between the first and second civil wars. Where Fortescue and other medieval jurists employed the principle of consent to define the limitations on the law-making power of a constitutional monarch, in the debate within Cromwell's army the consent of the governed was used to envision the ideal of a constitutional democracy. The debate occurred in the context of proposals for the extension of the suffrage to the nonpropertied classes in the population. These proposals were put forward in a draft constitution entitled "An Agreement of the People," sponsored by the so-called Levellers who reflected the opinions of the rank and file in Crom-well's regiments. The Levellers were later suppressed by Cromwell, who, with his son-in-law Colonel Henry Ireton, defended the privileged position of the propertied classes. Though they lost at the time, the Levellers won the argument in subsequent history. The statements they made in the course of the

debate were quoted again and again at critical moments in the development of modern democratic theory.

The most striking of these statements was the one made by Major William Rainborough, a leader of the Levellers:

> For really I think that the poorest he that is in England hath a life to live, as the greatest he; and therefore truly, sir, I think it is clear that every man that is to live under a government ought first by his own *consent* to put himself under that government; and I do think that the poorest man in England is not at all bound in a strict sense to that government that he hath not had a voice to put himself under.

The transition in thought here from every man's equal right to pursue happiness (equality in having "a life to live") to every man's right to be governed only with his consent is as swift as it is in the succession of Jefferson's clauses in the Declaration of Independence. Major Rainborough's views are somewhat more expansively expressed in a later statement by a fellow Leveller, Sir John Wildman, who spoke as follows:

> We are now engaged for our freedom. That is the end of parliaments: not to constitute what is already [established, but to act) according to the just rules of government. Every person in England bath as clear a right to elect his representative as the greatest person in England. I conceive that is the undeniable maxim of government: that all government is in the free consent of the people. If [so), then upon that account there is no person that is under a just government, or hath justly his own, unless he by his own free consent be put under that government. This he cannot be unless he be consenting to it, and therefore, according to this maxim, there is never a person in England [but ought to have a voice in elections). If [this), as that gentleman says, be true, there are no laws that in this strictness and rigor of justice [any man is bound to), that are not made by those . . . he doth consent to. And therefore I should humbly move, that if the question be stated— which would soonest bring things to an issue—it might rather be thus: *Whether any person can justly be bound by law, who doth not give his consent that such persons shall make laws for him?*

The Levellers, it should be noted, used the principle of consent to argue for universal manhood suffrage—a franchise not restricted by property qualifications. They were greatly in advance of their time, for the struggle to extend the franchise to all, and to secure for all the right to participate in self-government, did not gain ground, either in England or in the United States, until the middle of the nineteenth century and, with respect to the female half of the population, not until the twentieth. In Jefferson's day, the consent of the governed would certainly not have been interpreted as the consent of the whole population that was subject to government, but rather as the consent of those then regarded as qualified to participate in self-government. The line that separated those presumed to be competent to exercise a voice in the adoption or constitution of the framework of government from those who must passively submit to its authority and power would also divide the enfranchised citizens of the republic from its disfranchised subjects —women, blacks, the unpropertied. However, if we read Jefferson's appeal to the principle of consent in the immediate context of his affirmation of every man's natural right to liberty—a liberty that certainly includes political liberty, the freedom of the citizen as a participant in the self-government of a free people—then the principle of consent cries out for universal suffrage.

The principle is of such importance to the emergence and defense of constitutional democracy that it is worth more attention. The state of the argument about it and about its relation to the doctrine of human equality and the right to liberty, during the revolutionary period, can be discerned in a brief passage from Jonathan Boucher's *A View of the Causes and Consequences of the American Revolution.* This pamphlet was written in England after Boucher had fled the American colonies in 1775, in fear of his life because of the ire he aroused by his defense of the conservative Loyalist position. In the twelfth discourse of that book, Boucher undertook to argue against a sermon delivered by the Reverend Mr. Duché in Philadelphia in 1775, a sermon on a text from Galatians: "Stand fast, therefore, in the liberty wherewith Christ bath made us free." Boucher responded as follows:

> [His premise], therefore, that "the common good is matter of common feeling," being false, the consequence drawn from it, viz., that government was instituted by "common consent," is of course equally false.
>
> 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 is naturally inferior or, in any respect, subjected to another; and that he can be made subject to another only by his own consent. The position is equally ill-founded and false both in its premises and conclusions.

This passage can be taken as negative testimony to the remarkable impetus that Jefferson gave to the nascent idea of democracy by placing the principle of consent in the context of an affirmation of human equality and of the right to liberty. Boucher, in a sermon delivered in Virginia before he left this country, had also argued for the divine right of kings, viewing the monarch as the vicegerent of God, drawing his authority immediately from the deity he represented on earth. Jefferson, in sharp contrast, not only echoed the seventeenth-century Levellers in his view that the authority or legitimacy of government rested on the consent of the governed, but also harked back to the medieval doctrine stated by Thomas Aquinas, that the king, or any other ruling body, acts as vicegerent for and draws authority from the people, in whom God has vested that authority—the authority to govern themselves, either directly or through the instrumentality of vicegerents or representatives.

Other theories of political authority, such as the doctrine that it belongs to rulers by prescriptive possession based on a right they have by long-standing custom *(jure consuetudinario),* as well as the theory that it is theirs by right of divine assignment directly to them, bypassed the people entirely. Only the doctrine of consent enthroned the people as the fountainhead of authority; it is from the people as sovereign that authority is transmitted to whoever holds public office as their vicegerents or representatives.

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