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THE AMERICAN TESTAMENT

Mortimer J. Adler

and

William Gorman

for the Institute for Philosophical Research

and

the Aspen Institute for Humanistic Studies

Part 5 of 12

The Preamble to the Constitution of the United States

Text

WE, THE PEOPLE OF THE UNITED STATES, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

Analysis

THIS beautifully constructed, lucid sentence poses direct questions to any commentator—questions about the nature of the action taken, its agent, its purpose, its beneficiary.

The address to such questions, however, must first take account of the fact that the sentence issued from a convention and must take account of the ideas that led to the invention of such an instrument. Gordon S. Wood, a historian, has firmly shown that "the Americas' refined conception of a constitution did not at once spring into being everywhere with Independence . . . and so, too, the instrument of the constitutional convention was only awkwardly and unevenly developed." The importance of the distinctively American practical invention of a constitutional convention is stressed by historians who are concerned with the emergence of American constitutionalism as a novel political departure.[1]{Footnote 1 See Andrew G. McLaughlin, *The Foundations of American Constitutionalism,* Chapter 4; R. R. Palmer, *The Age of the Democratic Revolution,* Chapter VIII; and Gordon S. Wood, *The Creation of the Americas Republic,* 1776-1787, Chapters VII and VIII.}

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A brief indication of their discoveries is pertinent here in order to explain the precise meaning of the phrase "We the people" (the grammatical subject of the Preamble's elegant single sentence) as well as the significance of "do ordain and establish" (the grammatical predicate describing the action taken) .

We, the people . . . do ordain and establish . . .

Even before the Declaration of Independence, revolutionary leaders in some of the colonies had spoken of the need to rethink their governments. The Declaration of Independence, insistently and with great care, spoke not just of the right to overthrow bad government, but of the people's right to "institute new government." In the late spring of 1775, Massachusetts petitioned the Continental Congress for "explicit advice respecting the taking up and exercising the powers of civil government." In his autobiography John Adams recalled his part in the response of Congress to that petition:

> We must realize the theories of the wisest writers and invite the people to erect the whole building with their own hands upon the broadest foundation. That this could be done only by conventions of the representatives chosen by the people in the several colonies, in the most exact proportions. That it was my opinion that Congress ought now to recommend to the people of every colony to call such conventions immediately and set up governments of their own, under their own authority, for the people were the source of all authority and original of all power. These were new, strange, and terrible doctrines to the greatest part of the members, but not a very small number heard them with apparent pleasure.

Later in the fall of 1775, when New Hampshire similarly petitioned the Congress, John Adams continued the argument:

> Although the opposition was still inveterate, many members of Congress began to hear me with more patience, and some began to ask civil questions: How can the people institute governments?
>
> My answer was: By conventions of representatives, freely, fairly, and proportionally chosen.
>
> When the convention has fabricated a government, or a constitution rather, how do we know the people will submit to it?
>
> If there is any doubt of that, the convention may send out their project of a constitution to the people in their several towns, counties, or districts, and the people may make the acceptance of it their own act.

As early, then, as 1775, John Adams appeared to have a firm hold on the idea of the people as the constituent power.

However, the idea was far from clearly grasped in the colonies at large. Despite the confusions and anxieties attending the initiation of the war of independence, the colonies did proceed, in one or another way, to turn themselves into independent commonwealths or states. Eight colonies did so in 1776. Two more followed in 1777. Rhode Island and Connecticut, for reasons of no importance here, stayed with their old charters.

Massachusetts was very late. It did not give itself a new constitution until 1780. The reasons for the delay are of decisive importance in the whole story.

Andrew C. McLaughlin speaks of "the establishment of State governments" as the "dramatic and conclusive proclamation of independence." Yet he acknowledges that the method by which they were instituted, except in the case of Massachusetts, was murky to a degree. The work of instituting new governments was done by existing governments—the assemblies or provincial congresses that were *de facto* in power. Their documents came from the exercise of that *de facto* power. To be sure, they were "thought of," McLaughlin says, "as more or less coming from the people and expressing popular will." But they had not issued from a body of men expressly assigned by the people to institute new governments. In most cases, their work took effect without any sort of submission to a popular vote. And, in one way or another, the *de facto* governmental bodies stayed on as the new governments.

The establishment of new state governments in such troubled times was impressive and important. But the procedures were not sound if they are measured by "the idea of the people as the constituent power." That idea, which R. R. Palmer speaks of as "distinctively American," was a practical idea, an idea calling for a method of action. The distinctiveness lay in its institutionalizing of old doctrines—in its bringing to effective, symbolic, and historical actuality doctrines about the sovereignty of the people, about the people as the original fount of all power in governments, about authority as transmitted from the consent of the governed, about a fundamental law antecedent to government because constitutive of government, a law different in kind and in force from the statutes that would issue from the constituted government.

Palmer concedes that, though it was surely "adumbrated" in Jefferson's phrase in the Declaration about "instituting new governments," the idea "developed uncleanly, gradually, and sporadically." He concedes that in none of the ten states that gave themselves new constitutions in 1776 and 1777 "did a true constituent convention meet, and, as it were, calmly and rationally

devise government out of a state of nature." In those states, the procedures did not clearly distinguish existing from constituent bodies or statutory law from fundamental law, and failed for the most part to engage "the people" in the process of instituting new governments.

In Massachusetts, the story was different. It is worth a brief retelling here, if it is true that the idea of the people as a constituent power is an important part of the American Testament, and true that the idea found historical maturity in Massachusetts.

Palmer tells the first part of the story:

> The revolutionary leadership in Massachusetts, including both the Adamses, was quite satisfied to be rid of the British, and otherwise to keep the Bay State as it had always been. They therefore "resumed" the charter of 1691. . . . [However), demands were heard for a new constitution. It was said that the charter of 1691 was of no force, since the royal power that had issued it was no longer valid. It was said that no one could be governed without his consent, and that no living person had really consented to this charter. Some Berkshire towns even hinted that they did not belong to Massa- chusetts at all until they shared in constituting the new commonwealth. . . . "The law to bind all must be assented to by all," declared the farmers of Sutton.[2] {Footnote 2 Students of the Western constitutionalist tradition can construe this proposition from the farmers of Sutton, as almost a translation of a maxim of medieval constitutionalism. In his Lectures on Law, delivered at the College of Philadelphia in 1790-1791, James Wilson, America's leading jurist, adverted to this medieval maxim: "Let us next pay the respect, which is due to the celebrated sentiment of the English Justinian, Edward the First. Lex justissima, ut quod omnes tangit, ab omnibus approbetur. It is a most just law, that what affects all should be approved by all. This golden rule is, with great propriety, inserted in his summons to his parliament." The farmers of Sutton urged an application of this maxim in a context where the people, rather than a King, was sovereign.}
>
> \. . . It began to seem that a constitution was necessary not only to secure liberty but to establish

> authority, not only to protect the individual but to found the state.

In the fall of 1776, the Massachusetts provincial congress resolved to consider making a new constitution. It issued an appeal to the towns for a grant of authority to the General Court for that work. In a town hall meeting, the people of Concord responded as follows:

> A meeting of the inhabitants (free men and twenty-one years of age and older) of the town of Concord met by adjournment on October 21, 1776, to take into consideration a resolve of the honorable House of Representatives of this state made on September 17. The town resolved as follows:
>
> *Resolve 1.* This state being presently destitute of a *properly established* form of government, it is absolutely necessary that a government should be immediately formed and established.
>
> *Resolve 2.* The supreme legislature, either in its proper capacity or in a joint committee, is by no means a body proper to form and establish a constitution or form a government, for the following reasons:
>
> First, because we conceive that a constitution in its proper idea intends a system of principles established to secure the subject in the possession and enjoyment of their rights and privileges against any encroachments of the governing part.
>
> Second, because the same body that forms a constitution has a power to alter it.
>
> Third, because a constitution alterable by the supreme legislature is no security at all to the subject against any encroachment of the governing part on any or on all of their rights and privileges.
>
> *Resolve 3.* It appears highly necessary and expedient to this town that a convention or congress be immediately chosen to form and establish a constitution by the inhabitants of the respective towns in this state. . . .

> *Resolve 4.* When the convention or congress has formed a constitution, they are to adjourn for a short time and publish their proposed constitution for the inspection of the inhabitants of this state.
>
> *Resolve* 5. The honorable House of Assembly of this state desires to recommend to the inhabitants of the state to proceed to choose a convention or congress for the purpose abovesaid as soon as possible.

This remarkable set of Concord "resolves" firmly and maturely holds the idea of the people as constituent power. However, the suggestions of the Concord meeting did not at first prevail. The House, through the General Court, enacted a constitution in 1778. It was rejected by a five-to-one majority of the towns—for various reasons, including its lack of a bill of rights; its failure to eliminate slavery; its attaching a property qualification to the voting right; *and also* because it had not been drafted by a body separate from the government.

By June of 1779, however, Concord did prevail. The General Court issued an order for a special election in which all towns were to choose delegates to a state convention, having as "its sole purpose the forming of a new constitution." John Adams, who had been the counselor to the whole nation on the instituting of new state governments, was at the Massachusetts state convention. However, this time he sat, not as a major leader in the *de facto* government of the provincial congress, but as a delegate sent to the special state constitutional convention by the electorate of Braintree, Massachusetts.

Needless to say, Adams was a member of the drafting committee. His draft met with only one important emendation in the convention. The constitution that came from the convention was ratified by the towns, and it became the Constitution of the Commonwealth of Massachusetts in 1780. Its shape and several provisions were of major importance to the deliberations of the 1787 convention in Philadelphia.

The importance of the emendation that the convention made in Adams's draft is stressed by Palmer:

> In the enacting clause [of his draft) of the preamble, Adams wrote: "We, therefore, the delegates of the people of Massachusetts . . . agree upon the following . . . Constitution of the Commonwealth of Massachusetts." The convention made a significant emendation: *"We,* therefore, *the people* of Massachusetts . . . agree upon, ordain and establish .

> . .” The formula, *We the people ordain and establish,* expressing the developed theory of the people as constituent power, was used for the first time in the Massachusetts constitution of 178o, whence it passed into the preamble of the United States constitution of 1787 and the new Pennsylvania constitution of 179o, after which it became common in the constitutions of the *new* states, and in new constitutions of the old states. Adams did not invent the formula. He was content with the matter-of-fact or purely empirical statement that the “delegates” had “agreed.” It was the popularly elected convention that rose to more abstract heights. Providing in advance for popular ratification, it imputed the creation of government to the people.

The emendation, so construed, supports the contention of Andrew C. McLaughlin that “by their words and acts the constitution-makers of Massachusetts *made actual* the theory of the origin of government in the will of the people.”

During the period when the Articles of Confederation were in force, clarity about the people’s constituent power became more widespread. In South Carolina, there was increasing dissatisfaction with the “new constitution” that had been adopted in 1778 by the sitting Revolutionary Congress, even without a new election. In the South Carolina discussion, there appeared in 1784 a pamphlet, *Conciliatory Hints,* written by Thomas Tudor Tucker. Gordon S. Wood calls Tucker’s pamphlet “one of the most prescient and remarkable pamphlets written in the Confederation period.” Wood presents the pertinent passages:

> “All authority [Tucker writes) is derived from the people at large, held only during their pleasure, and exercised only for their benefit. . . . No man has any privilege above his fellow-citizens, except whilst in office, and even then, none but what they have thought proper to vest in him, solely for the purpose of supporting him in the effectual performance of his duty to the public.” Therefore, “the privileges of the legislative branches ought to be defined by the constitution and should be fixed as low as is consistent with the public welfare.” South Carolina needed a new Constitution. The old one “ (if such it may be called)” should be amended by convening the people in accord with “the true principles of equal freedom” that were being accepted by almost

> all Americans in the 1786s, thereby fixing the Constitution "on the firm and proper foundation of the express consent of the people, unalterable by the legislature, or any other authority but that by which it is to be framed." Only such a constitution based on this "undeniable authority" of the collective people would be something "more than the will of the legislature" and therefore "would have the most promising chance of stability." Then, in a brilliant passage, Tucker summed up what Americans had done in two decades to the conception of a constitution: "The constitution should be the avowed act of the people at large. It should be the first and funda mental law of the State, and should prescribe the limits of all delegated power. It should be declared to be paramount to all acts of the Legislature, and irrepealable and unalterable by any authority but the express consent of a majority of the citizens collected by such regular mode as may be therein provided."

Such things as the Concord Resolutions, the Massachusetts constituent procedures of 1779-8o, and Tucker's powerful pamphlet prepared the way for the use, in the Preamble to the Constitution of the United States, of the phrase "We, the people of the United States" to designate the enacting agent of the constitutive act.

Two major actions taken in the Philadelphia Convention, both of them in a way "illegal," all but necessitated that way of designating the source of the enactment.

The Resolution of Congress that called the Philadelphia Convention into existence spoke of "the revision of the Articles of Confederation" as the Convention's "sole and express purpose." Early in the Convention, the members, relying on the fact that the stated object of that revision was "to form a more perfect union," in effect scrapped the Articles of Confederation and proceeded toward the framing of a radically different kind of constitution. In *Federalist #15,* Hamilton called attention to the pivot of this radical change:

> The great and radical vice in the construction of the existing Confederation is in the principle of legislation for states or governments, in their corporate or collective capacities, and as contra-distinguished from the individuals of which they consist. . . . [But) if we still will adhere to the design of a national government . . . we must resolve to

> incorporate into our plan those ingredients which may be considered as forming the characteristic difference between a *league* and a *government;* we must extend the authority of the Union to the persons of the citizens—the only proper objects of government.

The actions of the new national government were to exert their effect directly on the individual citizens. The words of the Sutton farmers became pertinent: "The law to bind all must be assented to by all." *A fortiori,* the fundamental law—instituting government, with assigned powers and purposes—should be assented to by all. The Convention did not fail to follow through on the logic of popular sovereignty. It called for special ratifying conventions, thus bypassing the state legislatures. In *Federalist #40,* Madison flatly conceded the "illegality" of this action:

> In one particular it is admitted that the convention . . . departed from the tenor of their commission. Instead of reporting a plan requiring confirmation of the legislatures of all the States, they have reported a plan which is to be confirmed by the people, and may be carried into effect by nine States only.

In *Federalist #22,* Hamilton directly defended the change in the mode of ratification:

> It has not a little contributed to the infirmities of the existing federal system [i.e., under the Articles of Confederation), that it never had a ratification by the people. Resting on no better foundation than the consent of the several legislatures, it has been exposed to frequent and intricate questions concerning the validity of its powers, and has, in some instances, given birth to the enormous doctrine of a right to legislative repeal. Owing its ratification to the law of a State, it has been contended that the same authority might repeal the law by which it was ratified. However gross a heresy it may be to maintain that a party to a compact has the right to revoke that compact, the doctrine itself has had respectable advocates. The possibility of a question of this nature proves the necessity of laying the foundations of our national government deeper than in the mere sanction of delegated authority. The fabric of American empire ought to rest on the solid basis of the consent of the

> people. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority.

In effect, the Grand Convention pressed for constitutive procedures, like those used in Massachusetts in 178o, that would conform to and confirm the doctrines about the people as the source of authority in government. If the new national government was "to carry its agency to the person of the citizens," then its legitimation would have to come from the persons whom that government was to touch.

The decision that ratification had to come from people's conventions, assembled for that special purpose, subjected the constitution that issued from Philadelphia to general, widespread argument. Patrick Henry, speaking in the Virginia ratifying convention against ratification, said: "What right had they to say, 'We, the people'? My political curiosity, exclusive of my anxious solicitude for the public welfare, leads me to ask—Who authorized them to speak the language of 'We, the people,' instead of, 'We, the states'? States are the characteristics and the soul of a confederation. If the states be not *the agents of this compact,* it must be one great, consolidated, national government of the people of all the states."

Edmund Pendleton, for ratification, answered him: "But an objection is made to the form: the expression 'We, the people' is thought improper. Permit me to ask the gentleman who made this objection, who but the people can delegate powers? Who but the people have a right to form government? The expression is a common one, and a favorite one with me. . . . If the objection be that the Union ought to be not of the people but of the state governments, then I think the choice of the former very happy and proper. What have the state governments to do with it? Were they to determine, the people would not, in that case, be the judges upon what terms it was adopted."

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Founded in 1990 by Mortimer J. Adler & Max Weismann
Max Weismann, Publisher Emeritus
Elaine Weismann, Publisher and Editor
Phone: 312-943-1076
Mobile: 312-280-1011
Ken Dzugan, Senior Fellow and Archivist
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