THE GREAT IDEAS ONLINE

Sep 17 *Philosophy is Everybody's Business* № 910

THE AMERICAN TESTAMENT

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The Declaration of Independence had been issued by the *United* States after an argument of the people as a whole with Great Britain, as well as an argument among the peoples of the several States. The struggle for ratification was also to be an argument. When both arguments were concluded, the Revolution was consummated. The nation was independent *and* it had instituted a new government.

James Madison, "the father of the Constitution," epitomized the event in almost emblematic style: "In Europe, charters of liberty have been granted by power. America has set the example of charters of power granted by liberty."

The American people, it has become commonplace to say, venerate their Constitution. More worthy of veneration, perhaps, than its actual provisions is the manner of its making.

What has been said in these few pages about "We, the people of the United States," about the people's constituent power, and about appropriate procedures for its exercise, is masterfully summarized in the prelude to John Marshall's opinion for the Court in the 1819 *M'Culloch v. Maryland* case—an opinion of decisive importance for the scope of federal power and for the future life of the nation.

Maryland, along with several state legislatures, laid taxes on the Second Bank of the United States. The Baltimore branch of the United States Bank determined to ignore the state law, whereupon Maryland brought suit against its cashier, James M'Culloch. He appealed the Maryland court's decision, which had upheld the state law, to the Supreme Court. John Marshall's opinion, for the Court, reversed and found the state tax on the national bank unconstitutional.

The whole of Marshall's massive argument is not pertinent here. What is pertinent to the points that have been urged in the preceding pages is Marshall's "prelude":

> In discussing this question, the counsel for the State of Maryland have deemed it of some importance, in the construction of the Constitution, to consider that instrument not as emanating from the people but as the act of sovereign and independent states. The powers of the general government, it has been said, are delegated by the states, who alone are truly sovereign; and must be exercised in subordination to the states, who alone possess supreme dominion.
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> It would be difficult to sustain this proposition. The Convention which framed the Constitution was

indeed elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation or pretensions to it. It was reported to the then existing Congress of the United States with a request that it might "be submitted to a Convention of Delegates, chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification." This mode of proceeding was adopted; and by the Convention, by Congress, and by the state legislatures the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject—by assembling in convention.

It is true, they assembled in their several states; and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass. Of consequence, when they act, they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments.

From these conventions the Constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established" in the name of the people; and is declared to be ordained "in order to form a more perfect union, establish justice, ensure domestic tranquility, and secure the blessings of liberty" to themselves and to their posterity. The assent of the states, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the state governments. The Constitution, when thus adopted, was of complete obligation, and bound the state sovereignties.

It has been said that the people had already surrendered all their powers to the state sovereignties, and had nothing more to give. But,

> surely, the question whether they may resume and modify the powers granted to government does not remain to be settled in this country. Much more might the legitimacy of the general government be doubted had it been created by the states. The powers delegated to the state sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty created by themselves. To the formation of a league, such as was the Confederation, the state sovereignties were certainly competent. But when, "in order to form a more perfect union," it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all.
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> The government of the Union, then (whatever may be the influence of this fact on the case) , is emphatically and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them and are to be exercised directly on them and for their benefit.

The fortunes of history gave the American people an unprecedented opportunity to preside over its own political birth. Its birth gave historical reality to doctrines about the sovereignty of the people and the consent of the governed, which had hitherto lived only in the order of reason. Those true doctrines came to be so firmly held that there developed a determination to find exemplary procedures whereby the import of those truths could be enacted, acted out, historically staged. By their invention of clear and symbolic procedures, by their insistence on the proper mode of enactment, the Americans distinguished themselves. No nation had ever so brilliantly presided over the consummation of its political birth.

A written constitution was that consummation_ A constitution as law is radically different from the laws made by a legislature that the constitution sets up and to which it gives the authority to legislate. Nevertheless, it falls under the generic conception of law. A medieval statement of that conception defined law as an ordination of reason for the common good instituted by whosoever has the authority and duty to care for the community, and publicly promulgated. The lawmaker or legislator must have authority; otherwise, his edicts or prescriptions would be mere dictates of force. In the enactment of the fundamental law

which is a constitution, that authority must rest with the people as a whole, for until the constitution has been enacted legislative authority cannot be legally conferred upon any person or assembly of persons. From their inherent right to self-rule, the people themselves have the authority and duty to act for the care of the community.

The lawmaker, whether the people as a whole or its authorized representatives, exercises both reason and will in the formation and enactment of a law. In the case of the fundamental law which is a constitution, the lawmaker, in formulating the provisions of the constitution, sets forth a reasoned ordination of the offices and powers required for the administration of government. Having thus *ordained* the form which the government is to take, the lawmaker, by an act of will, *establishes* its existence.

Being thus rationally formulated and voluntarily instituted or established, laws are made to serve a purpose, which is sometimes explicitly stated, sometimes not. At the end of Book IV of *The Laws,* Plato urged that every law should have a preamble stating its purpose. The medieval definition of law stated the generic purpose of any and every just law—"to serve the common good." The Preamble to the law that is the Constitution of the United States names six specific objectives which together constitute the common good that is to be served.

> . . . 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, . . .

Before turning to those six objectives to ask questions about them, first taking them all together and then taking each of them separately, it is pertinent to ask whose objectives they are.

After the proposed constitution has been adopted and is in force as the fundamental law of the land, the objectives specified in the Preamble are ends to be served by the constituted government. The ultimate justification of any act of government, whether legislative, judicial, or executive, should in principle at least reside in the possibility of showing that it serves one or more of these objectives. However, the objectives stated in the Preamble are objectives that have been assigned to the government being created by the constitution. At the constituting moment—the point at which the constitution itself is being ordained and established by the people—the Preamble states purposes that the people themselves have for constituting a government, and a particular form of government. They do not cease to be the people's purposes

when, subsequently, they become the assigned objectives of the government that the people have established.

The authority and power conferred upon the officers of government, to enable them to serve these purposes, is henceforth and always held by them as instruments or vicegerents of the people. The constitutive action by the people is not an act of abdication. The people does not "confer all its authority and power" finally and irrevocably upon the officers of government, as Justinian would have it when he formulated the juridical fiction about the transmission of power and authority from the people of Rome to the Emperor.

This is to be "a political experiment," James Madison wrote in *Federalist* #39, resting "on the capacity of mankind for self-government." It is "an experiment," Thomas Jefferson said, "to show whether man can be trusted with self-government." The people who have established a government for themselves are to remain, after that government has been established, the permanent, principal rulers; the officers of the established government function only as the transient, instrumental rulers, responsible (in the words of Lincoln) to "their masters." The people as principal rulers must continually measure the performance of their appointed representatives—their instruments of government, now in office, now out—by reference to the purposes or objectives that it had in mind when it devised this framework of government, under which they hold office for a time.

There are two other ways of making what is substantially the same point about the implications of the people's constituent act. C. H. McIlwain, an authority on the Western constitutional tradition, emphasizes that the very idea of constitutionalism always meant *limited* government. A constitution is a fundamental law placing legal limits on the power of government. When the constitution is a written one issuing from a single constituent act, the point is fully manifest. If the transmission of authority and power was to be total and final, as in the Roman juridical fiction about the Emperor, there would be no point to a constitution. A totalitarian government has no limits; whatever pleases it has the force of law. The statement of limits in the Preamble is in terms of broad, general purposes. But their very statement as the People's purposes serves notice that this is to be limited government. The limits will be given a more determinate statement in the provisions of the Constitution, which grants and withholds certain powers.

Again, the very idea of a constitution, issuing from a people and limiting government by the very act of setting forth its organization, implies the distinction between society and the state. (The terms "the people" and "society" designate the same entity. The first term, "the people," emphasizes that a society is a whole

composed of human persons who are themselves natural wholes. The second term, "society," emphasizes that the entity referred to does not have the kind of unity that a natural organism possesses; it has only a unity of order—a unity that stems from the fact that the persons who comprise the society continue to associate for a common purpose, their common good.) The distinction between society and the state is effectively destroyed by any sort of totalitarianism, in which the state, in its omnipotence and omnicompetence, uses "the people" as passive material to be molded or shaped by the state, exercising unlimited powers.

Constitutionalism maintains the distinction between society and the state. Society is an association of associations, including the family, religious associations, economic corporations, intellectual, artistic, and professional associations of many kinds, as well as the political association that is called the body politic or the state. Effective powers may be conferred upon the officers of government to achieve the objectives of the political association into which the people have entered. But the people who are members of that association are also members of other associations that have other unifying purposes, to serve which they must retain a limited autonomy in the discharge of their functions. That autonomy is preserved only so long as the government of the political community does not intrude or encroach upon the operation of these nonpolitical associations. Government should do for the people, Lincoln was to say later, only what the people cannot do for themselves, either as individuals or through the various associations that they form to serve one or another nonpolitical purpose.

The points made—about the objectives of government as the purposes of the people who have established the government, about the limited and instrumental character of the government thus established, about the distinction between society and the state, and about the relation of the political community to other forms of human association within the society as a whole—are confirmed by the very diction of the Preamble. The Preamble does not say, for example, that government is being instituted for the purpose of unifying the people of the several states, but rather for the purpose of making such unity as already existed *more perfect.* If the people did not antecedently possess some unity, they could not have acted as a people. Similarly, if they did not antecedently have liberty, they could not have performed the free political act of constituting a government to serve the purpose of *securing* the blessings of liberty to themselves and their posterity. Each such phrase—to make more perfect, to establish, to insure, to provide for, to promote, to secure —bears witness to the instrumental fashion of government in serving the objectives assigned.

The six objectives stated in the Preamble should first be considered in their relation to one another as elements of the common good.

> . . . 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, . . .

In the second paragraph of the Preamble to the Massachusetts Constitution of 178o, John Adams wrote:

> The body politic is formed by a voluntary association of individuals; it is a social compact by which the whole people covenants with each citizen and each citizen with the whole people that all shall be governed by certain laws *for the common good.*

The word “common” in the phrase “common good,” can be understood in two ways: on the one hand, as signifying goods that are common to all because they are the same for all; on the other hand, as signifying goods that are common to all because they are shared or participated in by all. The happiness which all human beings have an inalienable right to seek for themselves as individual persons is not an individual but a common good, in the sense that the elements of a good human life are the same for all, even though each individual seeks in his own way to make a good human life for himself. The domestic tranquility of a society, its unity, the justice of its laws, its self-defense or security, the general welfare, and the blessings of liberty—these, too, are not individual but common goods, in the sense that they are goods shared by or participated in by all members of the political community.

A good government is one that serves the common good in both senses of the term: in the first sense when it aims to secure for each member of the community his inalienable human rights, among which the right to seek personal happiness is principal and ultimate; in the second sense when it aims to achieve the objectives stated in the Preamble, for each of these is a good in which all members of the community can and should participate or share.

The Declaration of Independence states the ultimate objective to be achieved by a just government. The Preamble states objectives that serve as means to that ultimate objective; for without the elements of the shared common good specified in the Preamble, the individual persons who compose the political community cannot effectively engage in the pursuit of happiness. Just as they must have their lives and liberties protected as

conditions indispensable for living well, so they must enjoy the unity, and peace or tranquility of civil society, a civil society in which justice is done, in which political liberty prevails, and in which the general welfare is promoted—for without these things, they will be impeded or frustrated in their efforts to live well. The reason for their association in a political community is to secure for themselves these common goods so indispensable to their pursuit of happiness.

When the phrase "common good" is used in the singular, it embraces, as elements of itself, the plural common goods specified in the Preamble. The six objectives assigned to government by the Preamble provide us with an articulation of the all-embracing and complex common good. The six purposes, though clearly distinct, must be related to one another; they are like parts of an organic whole, not discrete items in a mere aggregation or collection.

The assertion that no society worth living in can exist without unity, justice, peace, self-defense, welfare, and liberty does not preclude what might well be an extended set of problematic interrela-tions—no unity without justice; no domestic tranquility without justice; no welfare without justice; no liberty without justice; or no justice without unity, order, and peace; or no justice without liberty; or no domestic tranquility without justice; and so on. Given that kind of tension in the interrelations of the six, grave errors of emphasis are certainly conceivable and even likely to occur. For example, an inordinate devotion to public tranquility (lately called "law and order") might become a threat to justice; an inordinate desire to have the general welfare promoted might threaten liberties; an inordinate devotion to liberties might hamper doing justice; an inordinate concern for the common defense (lately called "national security") might subvert the concern for justice and for liberty.

The suggestion is not .only that the political life of the nation should be assessed by reference to the way in which we have implemented the six purposes stated in the Preamble, but also that the constitutional history of the nation should be examined for mistakes of policy in trying to achieve one or another of these objectives at the expense of others.

THE GREAT IDEAS ONLINE
is published weekly for its members by the
CENTER FOR THE STUDY OF THE GREAT IDEAS
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