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The Consent of the Governed

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The acquisition of the Philippine Islands has aroused a profound interest in certain constitutional questions. This is not to be deplored. One of those questions is the meaning, the force and effect of the statement in the Declaration of Independence that "all governments derive their just powers from the consent of the governed." That doctrine is not embodied in the constitution in those words nor in words of similar import, but some contend that the Declaration of Independence is a great beacon fire kindled by the fathers of the revolution and that in its light the constitution, afterwards adopted by them, must be read and interpreted. Without admitting or denying the force of that argument, only suggesting, in passing, that the fathers must have stood with their backs to that beacon when they inserted in the constitution a provision that Congress should not interfere with the African slave trade prior to 1808, we propose to call attention to the legal meaning of the statement quoted.

Every government has been organized, in the first instance, by some one individual, family or self-appointed body of men assuming to act for all the inhabitants of a district or locality. The action taken by such self-constituted ruler or rulers, when approved by their subjects, has been the establishment of a government which, in law, rests upon the consent of the governed. It has never been essential, or necessary even, that such consent should be given by the people acting together as one body. In fact, in no case has such action been taken. The consent obtained is the consent of individuals and is usually inferred from their conduct, their acquiescence, their silence and the absence of all opposition. The consent of the governed means also the consent of the governing class; the wishes of the remainder are never considered. Thus, in an absolute monarchy, all have consented to be ruled by a single person. The will of the monarch is the foundation upon which all law rests. The validity of any statute, order or decree, depends upon its having received his approval and solely upon such approval. In a constitutional monarchy the validity of any particular law depends upon whether or not it has received the sanction of all the individuals and of all representative bodies which the Constitution has prescribed. If, as in England, it must pass both houses of parliament and be then approved by the Crown, the approval of all is necessary. But under any form of government every law made in compliance with the requirements prescribed by the Constitution, by custom or usage, is valid and has the consent of the governed.

The governing class upon whose consent rest the just powers of every government, is always a mere fraction of the people governed, even in a liberal republic. In the State of Michigan, for instance, a large majority of the inhabitants are not given any active part in governing. Women, who constitute a majority of the population, are excluded. The consent of the governed is always masculine, never feminine. Only males twenty-one years of age are admitted to the governing class, and thus more than one-half of the

males are shut out. The consent recognized by the law is the consent of adults, not of infants. And the line separating infants from adults is fixed arbitrarily and without obtaining the actual consent of the infants. With us it is drawn at twenty-one. Among the Anglo-Saxons it was placed at fifteen and among the Romans at twenty-five. By the exclusion of females and all males below the age of twenty-one the governing class is reduced to less than one-fourth of the entire community. And out of this minority there must be taken criminals serving time, paupers, insane persons and idiots, and although the rule as to idiots is most liberal, the exclusion of those classes materially diminishes the number of the governing class. There are various other restrictions, however; on the day of election the voter must be present at the polls in person; residence and citizenship are required and so the sick, absentees, non-residents and aliens are barred out. The number voting at any election seldom, if ever, equals one-sixth of the population.

The approval of a majority of this small minority is not necessary to obtain the consent of the governed. A plurality is sufficient. And since the law does not limit the number of candidates it is possible that there might be as many as six and that one of them should receive just one more vote than each of the others. In such a case the election of the one receiving that extra vote would have the same validity as it would have had if he had received all the votes cast. In the case assumed less than three per cent. of the entire population would govern the other ninety-seven per cent. in opposition to their wishes but with their consent. Government by so small a minority has never occurred in this state, but government by a minority of the governing class is not infrequent. Mr. Lincoln was elected President by a decided minority of the voters. That fact, however, did not palliate the crime of rebellion. He was legally elected President and had the consent of all the people of the United States to perform the duties of that office.

The principle that, under the English Constitution, government derives its just powers from the consent of the governed, was not announced for the first time in the Declaration of Independence. Jefferson is entitled to the credit of having clothed that doctrine in quotable language; the same credit which Lincoln earned by his declaration that this is "a government of the people, for the people and by the people." The principle announced by Jefferson had been clearly established by the English courts before Jefferson was born. Under the English Constitution the people are present in the House of Commons by their representatives and the approval of that House, the consent of the Commons, is essential to the validity of every statute affecting the rights of Englishmen.

In 1702 in the case of Matthews v. Burdette, 2 Salk. 672, the point was made, that a canon of the State Church, approved by the King, making it unlawful for a layman to teach grammar without having first obtained a license from the Bishop, was invalid. It was argued that:

"Teaching was a calling which laymen might follow by the Common Law and a canon cannot restrain him of the liberty the law gave him. The Common Law and the custom of the realm cannot be altered or abrogated, but by act of Parliament, and therefore a canon cannot do it, though ordained by the king's royal license, or afterwards

confirmed by his royal authority, the reason being that since he is a layman, he is not represented, and therefore his consent is not given, and a man cannot be under obligation of a canon *without his consent, express or implied.* In the primitive church the laity were present at all synods. When the Emperor became Christian, no canon was ever attempted without the consent of the Emperor: And his concurrence *included the whole body of the Roman people; because he had the sole legislative power in him.* But this is not the case of our King, for he has not the whole legislative power in him, therefore his consent to a canon makes it a law to bind the clergy, but not to bind the laity."

The same question came again before the courts in 1732 in Middleton v. Crofts, 2 Atk. 650. Middleton and his wife were prosecuted for violating a canon, in having been married, "out of canonical hours, without license or banns, and in a private house." The case hinged upon the validity of a canon of 1603. After calling attention to the legal force of canons Lord Hardwicke, chief justice, speaking for the whole Court, said:

"Upon this important question, therefore, it is safest for judges to proceed upon sure foundations, which are, the general nature and fundamental principles of this Constitution, acts of Parliament, and the resolution and judicial opinion in our books, and from these to draw our conclusions.

"To urge first from the general nature and fundamental principles of this Constitution, nothing is so undoubtedly true, as that no new laws can be made to bind the whole people of this land, but by the King, with the advice and consent of both Houses of Parliament, and by their united authority; neither the King alone, nor the King with the concurrence of any particular number or order of men, have this high power. To cite athorities for this would be to prove that it is now day, and therefore I will only refer to the Parliament roll, 2 H. 5, No. 10, and the case of Proclamations, 12, Rep. 74.

"The binding force of these acts of Parliament arises from that prerogative which is in the King, as our Sovereign liege Lord, from that personal right which is inherent in the peers and lords of Parliament, to bind themselves, and their heirs and successors, in their honors and dignities, and from the delegated power vested in the Commons, as representatives of the people, and therefore Lord Coke says, 4 Inst. 1. These represent the whole Commons of the realm, and are trusted for them by reason of this representation, every man is said to be party to, and the consent of every subject is included in an Act of Parliament; but in canons made in convocations, and confirmed by the Crown only, all these are wanting, except the royal assent; here is no intervention of the peers of the realm, nor any representation of the Commons."

It was the contention of Jefferson that the colonies could not be governed without their consent; that as citizens of Great Britain the colonists had brought with them, as a part of their birth right, the Common Law of England and that under the English Constitution they could not be taxed by a Parliament in which they were not represented; that taxation and representation were inseparable.

It is a source of surprise to the student of American history to find that in less than a decade after the termination of a successful war waged in defense of that principle of the English Constitution, those

same colonists adopted a written constitution in which they expressly conferred upon the general government absolute power, save as to a few prohibitions, to govern the people of a territory and did not in any manner provide for their representation either in the national or any local legislature. The Constitution expressly provides that Congress may make all needful rules and regulations for any territory. No provision is made for the exercise of any political power, or the enjoyment of any political rights, by the inhabitants of such territory. No political rights of any description are recognized as belonging to the inhabitants of any territory, no political right, the right to have a voice in the government.

At the time the Constitution was framed there belonged to the nation the Northwest Territory and it cannot be contended, therefore, that this omission was purposely made and indicates that the framers of that instrument did not contemplate the acquisition of any additional territory. It already possessed territory and the Act ceding it to the nation provided that it should ultimately be divided into states and those states admitted into the Union. True, at the time the Constitution was framed only a very small portion of that territory contained any settlers, but it is clear that the framers of that instrument contemplated that it would soon be settled by emigrants from the States and they certainly realized that in the meantime a stable government was essential for the protection of life and property. The first territorial government established is in perfect harmony with the sole and absolute power conferred upon the general government. The people of the territory were not consulted as to the form of government they desired. They were given no voice whatever in the enactment of territorial laws and they were given no part in the election or the appointment of any judicial or executive officer.

In 1803 Jefferson acquired from France Louisiana, all that portion of the United States west of the Mississippi, except the territory obtained by conquest and treaty from Mexico and the states of Texas, Oregon and Washington. After this acquisition it became necessary to provide for the government of that territory. This was done by an act of Congress called in special session to ratify the treaty of acquisition. The act provided, "That until the expiration of the first session of Congress, unless provision for the temporary government of the said territory be sooner made by Congress, all the military, civil and judicial powers exercised by the officers of the existing government (French and Spanish) shall be vested in such persons, and shall be exercised in such a manner, as the President of the United States shall direct." Senator Benton says that this bill was framed by the Cabinet and received the supervision of President Jefferson. It will be seen that the Act conferred upon the President all the powers possessed by the Emperor Napoleon and the King of Spain and gave him authority to appoint, without the consent of the Senate, officers to take the place of the existing colonial French and Spanish officers, and that the persons so appointed were to have and exercise all the powers of the former colonial officers. In short, Congress determined to govern the acquired territory, temporarily, as it had been governed by France and Spain, substituting in the place of the Emperor Napoleon and the King of Spain Thomas Jefferson,

and conferring upon that scholar, philosopher and Democrat the combined powers of both. Under that Act the President appointed a governor with authority to exercise the powers of the Spanish Intendant General.

There is nothing in the writings of Mr. Jefferson to indicate that this temporary government was not in his opinion a government whose just powers were derived from the consent of the governed.

Sixteen years later Florida was acquired from Spain and the Act for the temporary government of Louisiana was copied, made applicable to Florida, and passed by Congress. President Monroe was authorized to appoint a governor who should exercise all the powers of the Spanish Intendant General. He selected for that post Andrew Jackson, and it is not probable that he could have found another man in the Union better equipped, both by nature and education, for the exercise of such ample authority. The Florida Act extended over that territory the revenue laws of the United States and provided for the appointment of a United States Judge.

Soon after Jackson entered upon the performance of his duties as governor, he discovered that certain papers and archives belonging to the late Spanish government were in the hands of private persons. He ordered the persons having those papers to turn them over to him. This order not having been obeyed with due celerity Jackson arrested and threw the culprits into the caboose, doing precisely what the Spanish Intendant General might have done, and, perhaps, what he had often done. The persons arrested and imprisoned applied to the United States Judge for a writ of habeas corpus and he, regarding the imprisonment as illegal, in violation of the Constitution of the United States, granted the writ. When Jackson learned of this action he issued an order directing the judge to appear before him at his office the next day at 10 o'clock to show cause why he should not be punished for contempt in thus interfering with the Governor in the exercise of the powers of the late Spanish Intendant General. The Judge had an attack of rheumatism that night and a doctor's certificate that he was confined to his bed was a sufficient excuse for his not appearing before Governor Jackson. Thereupon a lengthy correspondence ensued between the Judge and the National Government, and, to conclude the whole matter, the Judge was informed by the Secretary of State, John Quincy Adams, that while the Government had no reason to question the Judge's good intentions he was wholly mistaken in his opinion that he had any authority to interfere with Governor Jackson while that officer exercised the powers of the Spanish Intendant General, or, that the exercise of those powers were in conflict with any provision of the Constitution. [See Parton's Life of Jackson.]

This power of Congress to legislate for the territories has frequently been under consideration by the Supreme Court and is no longer a matter for judicial controversy or of doubt. Perhaps in the exercise of those powers the limit was reached in the legislation of Congress for the punishment of polygamy. In 1851 the Government which the Mormon people had established in Utah several years before, granted to the Mormon Church a charter incorporating that Church, making every resident Mormon a member of the corporation and authorizing the Church to acquire and hold personal and real property to any amount.

The territorial government of Utah was organized, after the granting of this charter, under an Act of Congress, in 1851. The territorial legislature afterwards passed acts confirming that charter. In 1862 Congress passed an Act to punish polygamy in all the territories and to annul this Mormon Church charter. The Act also provided that no religious corporation in any territory should hold real property exceeding in value $50,000. In 1882 the Edmund's Act was passed and in 1887, a further Act, which directed the Attorney-General to institute proceedings to forfeit and escheat to the United States the property of the Mormon Church. The property of the Church was estimated to be worth at that time $3,000,000. The proceedings instituted by the Attorney-General were taken to the Supreme Court and the case was heard in 1889. Two questions were involved; first, the power of Congress to repeal the charter of the Church and, secondly, the power of Congress to confiscate its property. Both of those questions were answered in the affirmative. Here was a case where a large number of citizens of the United States had gone into a tractless wilderness, a thousand miles from civilization and had organized and established a government for themselves. Such government had granted a charter incorporating a religious organization. Afterwards a territorial government was organized over the same territory under an Act of Congress and the Mormon government was thus displaced. The new territorial government then by a valid act ratified the charter previously given. Justice Bradley, who delivered the opinion of the Court, said:

"The power to make acquisitions of territory by conquest, by treaty and by cession is an incident of national sovereignty. The territory of Louisiana when acquired from France, and the territories west of the Rocky Mountains, when acquired from Mexico became the absolute property and domain of the United States, subject to such conditions as the government, in its diplomatic negotiations, had seen fit to accept relating to the rights of the people, then inhabiating those territories. Having rightfully acquired those territories, the United States Government was the only one which could impose laws upon them, and its sovereignty over them was complete. No state of the Union had any such right of sovereignty over them; no other country had any such right. These propositions are so elementary, and so necessarily follow from the condition of things arising from the acquisition of new territory that they need no argument to support them. They are self evident." He quotes from prior opinions of the Supreme Court delivered by Chief Justice Marshall, Chief Justice Waite and Justices Field and Mathews. Mormon Church v. U. S. 136 U. S. 1.

It will be noticed that no reference to the consent of the governed is made either in the Constitution conferring upon Congress the power to govern our territories, or in the decisions of the Supreme Court, defining that power. The reason for this omission is found in the principle that when a government is once organized the people have by its establishment and the adoption of a constitution, given their consent, in advance, to the enactment of every law made in accordance with the powers delegated.

When territory is transferred from one sovereignty to another, it is usual for the treaty of session to make some provision giving the inhabitants of the ceded territory an

opportunity to elect whether they will, or will not, consent to be governed by their new rulers. Under the late treaty with Spain, Spanish citizens, residing in Cuba, were given some fifteen months within which they might decide whether they would retain their Spanish citizenship and return to Spain or remain in Cuba and become citizens thereof. Those who remained, after that period, thereby gave their consent to be governed by Cuba and that government has in that manner obtained from them the consent of the governed.

The reader will bear in mind that we have examined this question of consent solely from a legal standpoint. What powers this nation may constitutionally exercise in the government of its outlying territory is one thing, what power ought to be exercised and the proper method of exercising such power, is another question altogether, and is usually one of public policy, pure and simple. Whether or not in governing the people of the territories and the inhabitants of Porto Rico and the Philippine Islands, the actual consent of the governed should be obtained in advance and to what extent political power should be conferred upon them in any given case, are questions of governmental policy which we have not considered in this article.