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Economic Liberty and the Constitution, Part 2

by Jacob G. Hornberger

The primary significance of the Declaration of Independence lay not in the political revolution it spawned but rather in the idea it expressed. For eons people had accepted the notion that their lives and fortunes were unconditionally subject to the dictates of their government. Rulers were rulers, and people were people. Rulers ruled and people obeyed. And since people's rights came from government (i.e., the king), it was commonly believed, it was certainly within the prerogative of government to regulate those rights or even to take them away. Hardly anyone questioned those beliefs.

With the publication of the Declaration of Independence in 1776, however, the centuries-old notion that government is the source of people's rights was swept away. It is nature and nature's God, not government, Jefferson wrote, that is the real source of people's rights. Government exists by the consent of the people, not the other way around.

Such rights as life, liberty, property, and the pursuit of happiness are natural and inherent to the individual — they are fundamental to his very being. Government's purpose, as the Declaration expresses, is to protect, but not regulate or destroy, the exercise of those fundamental rights. And when government violates that mandate, the people have the right to alter their government or even abolish it, in extreme cases through violent revolution.

It is impossible to overstate the importance of the core message of the Declaration of Independence — that the rights of the people preexist government. No longer would people be living their lives under the misguided notion that to do so was a privilege bestowed upon them by their rulers. While government officials would continue suppressing and oppressing people in various parts of the world, what mattered was that now people understood that such oppression and suppression were illegitimate rather than valid exercises of political power. The core idea expressed in the Declaration of Independence removed any moral legitimacy from political tyranny anywhere in the world.

It is important to view the U.S. Constitution in the context of the Declaration of Independence, because the spirit of the Declaration guided the formation of the Constitution. The

Constitution called into existence a federal government whose purpose (notwithstanding the tragic and ultimately very costly exception of slavery) was to ensure that people would be free to live their lives in any way they chose, so long as their conduct was peaceful.

The idea was that government would have the right to use force to punish violent persons who would interfere with other people's pursuit of happiness — persons such as murderers, thieves, burglars, and invaders. Thus, ordinary, law-abiding people would be free to go about their daily business in their own way, knowing that an institution (government) existed to punish the violent, criminal minority.

But how could people be sure that the wrong crowd wouldn't grasp the reigns of government power and use it in an oppressive way? In other words, what if the murderers and thieves simply got elected and used government power to accomplish what they were prohibited from doing as private persons?

That problem was solved by using the Constitution to create a governmental structure that would not depend on getting the "right" people into office. Instead, it called into existence a government whose powers were limited to those expressly enumerated in the document itself. Thus, since the powers were expressly limited to those few powers that were enumerated in the Constitution itself, it would make no difference who wielded the power.

For example, suppose Congress was filled with religious fanatics. One day, they enact a compulsory-attendance law that requires all children to attend church services on Sundays. The law provides for severe penalties for parents whose children fail to comply with it.

Would the law be valid? Under the principles of the Declaration of Independence, the compulsory-attendance law would lack moral legitimacy. Freedom, including liberty of religion, is a fundamental God-given right with which no government can legitimately interfere.

The limits of majority rule

What about the political legitimacy of such a law? In those nations in which government's powers are omnipotent — that is, governments that have usurped the unfettered power to do the "right thing" — while such a law would lack moral legitimacy one might have a difficult time arguing that the law was "illegal" or politically illegitimate. Supporters of the law in a democracy would argue, "We won the elections fair and square by majority vote and now we get to do what we think is best for the country. If you don't like it, run for office, win, and repeal our laws."

But in the United States, because of the Constitution, the situation is different: under our constitutional system, majority rule has limits. The legal question would be: "Is the power to enact a compulsory church-attendance law listed among the government's enumerated powers in the Constitution?" A careful search of that list would reveal no such power. Thus, the law would be "illegal" or politically illegitimate even though it had been enacted by the majority.

Moreover, our American ancestors provided another safeguard against that type of law — the Bill of Rights. Despite the enumerated-powers philosophy that guided the Constitution, many people feared that U.S. officials would ultimately not be constrained by such a list. Their idea was that, just to be safe, there should be a list of enumerated rights and specific restrictions on government power. That’s the reason, for example, that the First Amendment to the Constitution forbids Congress from enacting any law respecting the establishment of religion.

Now, it is important to note that under our system of government, majority rule does not trump fundamental rights. Instead, rights trump majority rule. That is, even though majority vote is used to elect people to public office, that majority cannot do whatever it wants. It is limited to exercising the powers that are enumerated and is prohibited from exercising powers that are specifically prohibited.

Therefore, even if 95 percent of the people favor a compulsory church-attendance law, such a law would be morally repugnant under the principles of the Declaration and would be legally repugnant under the principles of the Constitution.

The importance of judicial review

Suppose that the religious fanatics in Congress decided to enact such a law anyway and suppose that the president decided to enforce the law. Would the 5 percent of the people who oppose the law have any remedy short of violent revolution (which the Declaration expressly concedes to them)?

Yes, because one of the distinguishing characteristics of the system of government that the Founders established was an independent judicial branch whose judges, by virtue of being provided guaranteed lifetime appointments, would be independent of both the legislative and executive branches.

Equally important is the power that the Constitution implicitly granted to the judicial branch — the power of “judicial review,” the power to declare laws and actions in violation of the Constitution. While such a power was not expressly provided in the Constitution, in the 1803 case of *Marbury v. Madison*, the Supreme Court, under Chief Justice John Marshall, held that judicial review was a power inherent in a judicial branch of government, and such has been the law ever since. Thus, the Supreme Court operates as an ultimate bulwark against tyrannical laws enacted by Congress and enforced by the president.

The Declaration referred to “life, liberty, and the pursuit of happiness,” which was a revised form of the phrase “life, liberty, and property” that the English philosopher John Locke had used in his famous work, *Two Treatises of Government*. The critical inquiry, however, is over the meaning of those terms. For example, what does “liberty” mean? Simply not being in jail? Or does it mean more than that? The right to vote? To read, speak, and publish unpopular things?

The right to own weapons? The right to counsel in criminal cases? The right to travel? To our Founders, liberty meant all of those things ... and much more.

The critical battle that ultimately took place in the United States in the 20th century involved what has become known as “economic liberty.” Do people have a right to open businesses? To trade? To accumulate wealth? To decide what to do with their own money? Is economic liberty a fundamental right, such as religious liberty, or is it subject to the will of the majority?

While the battle over economic liberty would be waged in America’s political and intellectual arenas, in the Supreme Court it would revolve around the phrasing of the Fifth and Fourteenth Amendments — the phrasing that combined the “life, liberty, and property” wording of John Locke with the due-process wording (“law of the land”) of Magna Carta — the phrasing that prohibits Congress and the states from enacting any law that deprives any person of “life, liberty, or property” without “due process of law.”

Coincidentally, in the same year that the Declaration was published — 1776 — another monumental event took place. That event involved an idea expressed in a book entitled *An Inquiry into the Nature and Causes of the Wealth of Nations* by a Scottish philosopher named Adam Smith. The idea expressed in that book would revolutionize mankind — and would do more to help the economic plight of the poor than any other idea in history. Smith provided the economic foundation for the idea of economic liberty.

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