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On the Limits of Government, Part 2

by Scott McPherson

In 1776 the Continental Congress submitted to a "candid World" the "self-evident" truths that "all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness...."

Government, the Declaration of Independence proclaimed, is merely the *means* to a noble end. Its signers did not want to live in anarchy; they wished to reaffirm the principle, handed down to them through the ages, that holds that government is formed as the *protector* of people's *rights.* "To *secure* these Rights," states the Declaration, "Governments are instituted among Men deriving their just Powers from the Consent of the Governed." [Emphasis added.]

To speak of power coming legitimately from the "consent of the governed," or being exercised by representatives of the people, is therefore to address only half of the matter. Mobs exercise power — but that does not make their power legitimate. Might does not make right. As Thomas Jefferson advised in his First Inaugural Address (March 4, 1801),

> Bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will, to be rightful, must be reasonable; that the minority possess their equal rights, which equal laws must protect, and to violate which would be oppression.

The origin or nature of rights is undoubtedly in dispute even between the strongest and most dedicated advocates of individual liberty. The deistic philosophy of the Founding Fathers upheld "the Laws of Nature and of Nature's God" as protecting those rights with which "all Men" are endowed, which would later be expanded on in the "natural law" philosophy of such men as the great lawyer and abolitionist Lysander Spooner.

Christians see rights as coming directly from God, or, as the *Wall Street Journal* put it some years ago, "The God who looked out upon the earth and pronounced it good designed us to glorify Him as free men and not as serfs."

Some have pointed to a strictly naturalistic view of existence to justify and uphold the concept of individual rights. Ayn Rand, who best articulated this position, referred to rights as "the means of subordinating society to moral law."

Curiously, many who deny or disparage the idea of individual rights as some kind of bourgeois "Eurocentric" fiction with no basis in reality will happily demand that people's rights be protected — when it suits them. Here we find claims to such "rights" as "health-care rights," "welfare rights," the "right" to a "harrass-ment-free workplace," and many other perversions of the concept of rights. I have expanded on the nature and consequences of rights elsewhere (see "Capitalism and Collectivism," *Freedom Daily,* June 2007). But regardless of the nature of rights, it is widely understood that for persons to have and exercise their rights means that they should be free to live their lives as they see fit, without arbitrary or malicious interference, so long as their actions do not infringe on another's ability to do the same.

Limiting governmental powers

The first known voluntary expression of this principle came from King Henry I in 1100; this "Charter of Liberties" admitted that the king's powers were ultimately exercised under the law, and therefore limited by it.

On June 15, 1215, the barons of England, backed by the support, or at least the acquiescence of the people, held King John literally under their swords at Runnymede, on the outskirts of London. The idea that any person, a king even, could exercise power without respecting the liberties of the people went out the window when that grumbling monarch placed the royal seal on Magna Carta. The importance of Magna Carta is evident in the exclamation of King John himself upon first viewing the barons' demands: "Why do not the barons ... ask my kingdom?"

The "Great Charter" served as forefather to our own Bill of Rights, a specific and unequivocal statement that some actions were off limits to *any* government, however powerful or popular.

Among the items listed are found the seeds of Parliament itself (chapter #14). Perhaps the most famous is the promise "No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land" (chapter #39). Herein we find the roots of trial by jury, due process, and habeas corpus — cornerstones of our judicial system. Also found is a promise that accused persons will be allowed to call witnesses (chapter #38), and in chapter #40 ("To no one will we sell, to no one will we refuse or delay, right or justice") that those accused of crimes are guaranteed swift and impartial justice. (See *That Men Shall Be Free: The Story of the Magna Carta,* by Clifford Lindsey Alderman, and *The Groundwork of British History,* by George Townsend Warner, pp. 106-108.)

Over the years Magna Carta would be reissued no fewer than *fifty-four* times by succeeding kings. The Magna Carta of King Henry III (1225), contained the promise "that no freeman could be denied 'de liberis consuetudinibus suis,' — in other words, the benefit of legal customs promoting his freedom. In obedience to these customs, the common law actively searched for reasons to make a man free" (from John Graham's *Constitutional History,* p. 152). This promise was the means by which English feudalism was gradually abolished — and Southern courts in the United States later chipped away at the institution of slavery.

Above all else Magna Carta was a limit on the power of government; it acknowledged the ancient rights of free people. "Over and over again," writes Warner, "these clauses have been invoked against the Crown. This was especially the case in the struggle between king and Parliament in the 17th century."

Following the "Glorious Revolution" of 1688, the first act of Parliament was to pass the "Act of 1 William and Mary, Session 1, Chapter 1" (1689), what has come to be known as the English Bill of Rights, which guaranteed among other things the right to bear arms, the right of subjects to petition for redress of grievances, and the right of subjects to be free of taxes not levied by Parliament; and which declared that it was unlawful for the king to keep a standing army in time of peace without the consent of Parliament.

A major weakness of the British government however is that it has no written constitution. Its "constitution" rather exists in the following three forms: the common law, statute law, and judicial precedent. While considered a "Bill of Rights," the Act of 1 William and Mary suffers from the fact that it is ultimately a statute and not a constitutional provision. This fact was acknowledged by Derek Phillips, legislative advisor for the Office of Legislative Affairs in Cambridge, who wrote that "the [English] Bill of Rights is a statute and as a statute, it can be, and has been, amended by subsequent statutes." (See "Wrongs and Rights: Britain's Firearms Control Legislation at Work," *Journal on Firearms & Public Policy,* Fall 2003.)

The U.S. Constitution

Article I, Section 8, of the Federal Constitution lists the *specific* powers delegated to the executive, legislative, and judicial branches of the federal government.

Those who created the American federal government wanted above all else to protect the natural right of the people to be free of restraint or interference — *even and perhaps especially against the government itself. That,* and that alone, is the reason Americans live under the rule of law. The law is supposed to protect them against *anyone* — mugger, rapist, robber, murderer, or even president, legislator, or judge — who might wish to violate their right to live, to be free, and to pursue their happiness.

The qualifiers in the Preamble to the Constitution were not carte blanche to pass any law that can gain majority support; they were above all else to serve the last stated purpose — to

"secure the Blessings of Liberty to ourselves and our Posterity." Following the Philadelphia Convention, George Washington wrote to his friend the marquis de Lafayette, "The people evidently retained every thing which *they did not in express terms* give up." [Emphasis added.] The Framers understood the limitations of the English Constitution and sought to limit the federal government with a written Constitution of *specified* and *delegated* powers.

Not content with this alone, they added just a few years later the first ten amendments — the Bill of Rights. Here we find the idea that certain highly important individual rights should be a *part* of the Constitution itself; further, the Ninth and Tenth Amendments make it clear that more rights exist that the federal government may not legitimately trample on — no matter how popular it may be to do so at the time.

> [The Framers] were … completing the historical process that had been working out in English history since the meeting of the barons with John Lackland at Runnymede. The long effort to establish a government of law and not of men was reaching its logical conclusion in an effort to make the government itself dependent on fundamental law." (Andrew C. McLaughlin, *The Confederation and the Constitution,* p. 167.)

The various U.S. state constitutions invest greater legislative power in the state governments, but those provisions are not meant to amend the rights listed in the federal and state bills of rights. They are rather to be read *in accordance* with those rights. What is implied here is that a law will have been deemed *necessary* and *essential* to protect the rights of individuals — to address a wrong that would continue, absent an intervention by the law.

It is not too much to ask that legislators respect a certain standard when it comes to passing laws: Power is to be exercised on behalf of the people, through their representatives, and with their consent — but that does not mean the majority may disregard the rights of the individual. When reviewing *any* piece of legislation, from the federal level down to the local, ask yourself whether it is necessary to protect the life, liberty, or property of you or your fellows — or is it instead an arbitrary and malicious expansion of government power at the expense of individual liberty? The matter is succinctly expressed in the following adage: "Our freedom is more important than your great idea."

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