

Light Brings Salt

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The roots of liberty

Note: If we are to be prepared to evaluate what's happening in the political arena and to have some idea whether anything fits with our foundation, that is the constitution we need to have some background in what led up to our founding. The following article should give us some perspective along those lines. P/T

The roots of liberty and American government run deep—back to the year 1164 in Clarendon, England. At that time, the idea of democratic republicanism and the liberal state could hardly be imagined. The student of English history will remember this as the place and date of the Constitutions of Clarendon, which struck the decisive blow in the battle over royal prerogatives between Henry II, King of England, and Thomas a Becket, the Archbishop of Canterbury.

Installed as a puppet, Becket had found true faith and refused to bow to the whims of a tyrannical king. Becket's refusal to sign and submit to the Constitutions of Clarendon forced him into exile and, ultimately, led to his assassination at the hands of Henry's knights—hardly a picture of democratic process.

Clarendon has been remembered as a loss of rights for the church, a triumph of the secular over the sacred. However true this interpretation of events may be, Clarendon's significance for the movement toward the modern liberal state is equally important. With Clarendon, the English church would no longer be able to use excommunication to enforce its temporal demands over the subjects of the crown. Rather, trial by jury began to remove arbitrary justice from the hands of bishops and kings alike, replaced by justice dispensed under a code of law administered by fellow citizens. Despite Henry's dubious intentions, Clarendon begins to delineate the modern relationship between church and state: Civil law, not Rome, would hereafter govern temporal affairs.

Half a century later, in 1215, the next major leap forward in modern liberal governance would be ushered in with Magna Carta, the "Great Charter,"

issued by King John of England at the demand of his rebellious barons. Magna Carta was reissued several times and comes to us in its final form, issued in 1297 by Edward I, John's grandson. Though the context for Magna Carta is a very different one, it is nonetheless an important corrective to the abuses of Clarendon, establishing the inviolable freedom of the Church of England from the English crown. If Clarendon protected the state from the church, Magna Carta protected the church from the intrusions of the state.

Far from limited to church-state relations, Magna Carta formalized the fundamental rights enjoyed by all citizens of the modern liberal state. Among others, Magna Carta codified the following: rights of inheritance, property rights, protections for debtors, the rights of localities to a degree of self-government, trade rights, retributive justice (designing punishments to fit the crime, as opposed to one punishment for all crimes), protections for citizens from the abuses of domestic authorities, requirements of witnesses to establish guilt, and the right to trial by one's peers. Most important, however, was the heart of Magna Carta, which established the objective rule of law over and above the subjective rule of the king. Rex Lex ("The king is law") was slowly being replaced by Lex Rex ("The law is king"). With Magna Carta, the king was bound under the law by a *national covenant*—a declaration of mutual obligations of the ruler and those ruled to one another.

John Locke would articulate this contractual vision of a government of laws existing to protect the liberties of its citizens in his *Second Treatise on Government* (1690). The context for Locke's thought was the Glorious Revolution (1688) and the English Bill of Rights (1689), in which William and Mary of Orange affirmed the limits of government, protecting the liberties of its citizens and correcting the gross abuse of royal power under James II.

It is in this setting that Locke summarizes the purpose of the state. In Chapter 9 of his *Second Treatise*, "Of the Ends of Political Society and Government," Locke

writes on the preservation of property, concluding that men come together and subject themselves to laws. Governments exist to judge and enforce this rule of law. In this way men voluntarily covenant together to form governments, each surrendering some freedom in order to preserve the liberty of all. The one (the state) and the many (its members) thus mutually serve the cause of liberty.

When the Stamp Act was passed for the American colonies in 1765, when courts of admiralty enforced justice without trial by jury and a standing army held in the colonies during a time of peace, the purpose of government to guarantee the liberties of its citizens was foremost in the minds of many colonists.

The First Continental Congress met in October 1774 to seek redress for the colonies' grievances. Their Declaration and Resolves laid claim to the rights that had evolved over the centuries, from Clarendon to the English Bill of Rights. The colonies are entitled, Congress declared, to "life, liberty and property," and "they have never ceded to any foreign power whatever, a right to dispose of either without their consent."

When the British crown and parliament refused to recognize the equal rights of the colonists as British citizens, the Americans seized upon another essential feature of the idea of government as covenant: If a government ceases to exist under its obligations to its citizens as the preserver of liberty, then the contract is broken and the citizens reserve the right to abjure that delinquent government. In other words, government is by consent of the governed.

Over the course of America's struggle for independence, this theme would be rearticulated and expanded upon by some of the colonies' greatest minds: Virginia's Declaration of Rights, Thomas Jefferson's Lockean forerunner to the colonies' Declaration of Independence; Patrick Henry's Resolutions of the Stamp Act (1765) and his later cry of, "Give me liberty or give me death!" (1775); Thomas Paine's Common Sense (1776) and The Rights of Man (1792); and Samuel Adams' speech at the statehouse in Philadelphia (1776), to name a few. Government is a covenant, they said, and a covenant cannot be broken without consequence.

Later, these Patriots would turn from justifications for their declaration of independence from the old government to articulations of what should replace it. The 12 years between the institution of the Articles of Confederation (1777), which maintained the maximal autonomy of the individual states, and the ratification and implementation of the United States Constitution (1789), which would turn a confederation of states into

a federal republic, where punctuated by heated debate about the sustenance of liberty under any unified government.

Having thrown off one tyrannical government, federalists, who advocated a strong central government, and anti-federalists, who advocated states' rights, were sharply divided as to the powers of the new government. Which model would better guarantee the objective of a government existing to preserve the liberties of its citizens?

The federalists won that debate, but two centuries later, it is clear that many of the elements of a "tyrannical government" have re-emerged, as predicted by anti-federalist protagonist Thomas Jefferson. Most notably, Jefferson warned that the judiciary would become a "despotic branch" and that the Constitution would be "a mere thing of wax in the hands of the judiciary which they may twist and shape into any form they please."

Indeed, the despotic branch has twisted and shaped our government's foundational document into what is now called in common parlance, a "Living Constitution", effectively undermining "Constitutional eisegesis"—the constructionist interpretation of the Constitution as written and ratified.

If the Constitution can be amended by judicial diktat rather than as prescribed by law, then we are a nation governed by men rather than the law, and the consequences are dire.

Where does that leave us today? Few who serve in the Executive, Legislative or Judicial branches of our national government honor their oaths to "support and defend" our Constitution.

Of course, the Constitution is subordinate to the Declaration of Independence. The Constitution's author, James Madison, wrote Thomas Jefferson on 8 February 1825 these words concerning the supremacy of the Declaration of Independence over our nation's Constitution: "On the distinctive principles of the Government... of the U. States, the best guides are to be found in... The Declaration of Independence, as the fundamental Act of Union of these States."

The Declaration elucidates "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." It also records "That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government..." Liberty is elusive, and awaits its next great leap forward.