

Government - preserving the covenant
Covenant in Representative Government

Preserving the "Covenant" In Representative Government

By

LeGrand Baker

Sons of the American Revolution Magazine

Winter, 1987

pages 16-18

In drafting our Constitution and Bill of Rights, the Founding Fathers demonstrated unparalleled wisdom in defining the principles of free government and the delicate balance of powers needed to achieve them.

For the members of the Second Continental Congress, The Declaration of Independence was not so much a statement of what they were doing as it is a justification of what they had already done. More than three months before, on April 6, 1776, they had removed themselves from the British Empire by severing the economic ties which had bound them to England. The next steps were to define that economic severance as a political departure, and then to exert sufficient military prowess to consummate that definition. After that, the greatest challenge would be, in the words of the Declaration of Independence, "to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."

The initial step, though traumatic, was relatively easy. The British Empire was theoretically an economic, rather than a military empire. In April they withdrew from the Empire by closing American ports to all British shipping, and then declared those same ports open to trade with all other nations. The question of whether Congress had the authority to do that was answered by the outcome to the Revolutionary War. The questions of why they chose to do it, and the legality of their actions were addressed by the Declaration of Independence.

The legal premises on which they acted were "the laws of nature and nature's God." For Jefferson and his contemporaries, a simple reference in the Declaration to those political doctrines was sufficient to establish his point, but for people of the 20th century, the ideas expressed by that phrase are indistinct, obscured as they are by time and disuse. Yet, those two ideas, originating with European thinkers but matured to fruition in the minds of Jefferson, Adams, Madison and other Americans, are the theoretical bases for the legitimacy of a free government

Government by Covenant Concept

The "laws of nature" referred to the concept of government by covenant, and was based on this scenario: In the beginning, before man had established a political structure for his society, there were essentially two sorts of people: those whose lives and pocketbooks were enriched by what they produced or created, and those who exercised themselves only enough to steal or extort the fruits of other men's labors. The former, finding they were expending too much of their otherwise productive energies defending themselves and their property from the latter, contrived a system whereby they could delegate to "government" the police and military responsibilities of defence. This would free the citizens at large to pursue their private affairs in peace and security.

They designated one among them to be king, covenanting with him that they would provide him sufficient income and adequate power to secure "their safety and happiness" but not enough to restructure their private affairs. In return he covenanted with them that he would never abuse his authority by turning that power against them. The object of the covenant was to establish a system whereby the people could be protected but not dominated. Given the nature of

the covenant, it followed that if the king violated his office by usurping additional powers and using it to oppress the people, his tyranny would automatically release them from further moral or legal obligations to keep their half of the bargain. Calling upon this rationale, the Declaration of Independence asserts that the English King had "abdicated Government here, by declaring us out of his protection, and waging war against us."

The "laws of... Nature's God" is the claim of the supremacy of higher law. There are some things, such as rape and theft, which are wrong by their own nature, and no act of a legislature or edict of a king can make them not wrong. Governmental law must consist with natural law so that which is inherently wrong will be legally wrong also.

The Functions of Government

With "the Laws of Nature and of Nature's God" as their premises, the Founding Fathers believed that all governments had four legitimate functions: First, to protect its citizens (i.e., military and police power); Second, to provide equality before the law while protecting the innocent from its misapplication; Third, to enhance freedom by helping individuals function more easily and equitably within society (i.e., postal and highway systems to enhance communication, even-handed tariffs and sanctity of contract); Fourth, to leave individuals alone, so, through the exercise of their freedoms, they might become the best they are capable of being. To discover one's potential, and mature it to fruition, Jefferson reasoned, is the purpose of life (if it is not, there is no over-riding purpose), so it is a necessary function of legitimate government to stand aside and let people be their best. In this, government functions as an umbrella, protecting each from unacceptable external disquietudes, while leaving him free to walk where he will.

Madison, perhaps more than Jefferson, understood it was easier to use those ideas for the rationale of revolution than it was to incorporate them into a working government. But, as Washington had so eloquently pointed out at Newburg, if these were the principles for which Americans had been willing to sacrifice their lives, they must also be the undergirdings of any government founded upon that sacrifice.

What Is "Government"

To appreciate the complexity of the problem as the Framers appreciated it, we must understand that there is no such tangible thing as "government." What we call "government" is the interaction of select individuals and their uses of coercive power. Since the single characteristic which makes these individuals different from other citizens is their access to such power, it is not simplistic to define government as the power to coerce. That definition holds true whether one is speaking of a dictatorship or the home of dotting grandparents, whether the power is threat of violence or threat of disapproval. The fact remains, if there is no power to coerce, there is no government. A free society is not anarchy. The exercise of those four legitimate functions of government are necessary to the preservation and enhancement of freedom. Therefore, the coercive powers that constitute political structure must be legitimized so they may be brought to bear - but in a way to minimize their propensity to be abused.

One way which suggested itself by their experience was to give people access to the power through representative government, but even that was fraught with danger. The scenario of the covenant did not lend itself so readily to representative government, for the idea of representation seemed to preclude the need for the covenant. Yet, as Madison pointed out in the Tenth Federalist, corrupt and power-hungry men will gravitate to government because it is the seat of power, and such men would, by their nature, seek to obviate or circumvent the objects of the covenant.

The problem for the authors of the Constitution was how to retain the framework of the covenant within the structure of representative government without abandoning the powers to smiling demigods. Again the answer is alluded to in the Declaration of Independence. The key is found in the organizational relationship of the powers. They must be balanced so delicately that the energy which may be used by government to protect its citizens is rendered inoperative when employed to violate the sanctity of individual incentive.

The Solution: A Miracle

That the Founding Fathers were able to take this key and from it devise an implementable answer to their dilemma is one of the miracles of human history.

Their solution was dual sovereignty which incorporated separate layers of government, and recognized the people as citizens of each. In this two-tiered system, the weaker state and local governments had the authority to deal with the personal lives of their citizens and sufficient police power to be effectual; while the stronger, federal government, which could exercise the ultimately coercive powers of the military, was limited in its jurisdiction to providing for "the common defence," and promoting "the general welfare." (They read that "general welfare," not "general welfare." In both instances where this phrase is used in the Constitution its intent is to define, and thereby limit, federal jurisdiction to matters that concerned the whole of the American nation.) In this balanced, stratified system, the Founding Fathers achieved the seemingly impossible by separating the potentially dangerous powers of military protection from the potentially oppressive authority to deal with the concerns of individual citizens.

The Framers were so confident of the ultimate success of their "glorious experiment" that many were annoyed when Massachusetts and other states threatened to reject the Constitution on the grounds it did not contain a Bill of Rights. The arguments against the amendments were not that the people ought not to be guaranteed those rights, but that the federal constitution was not the appropriate place for them. A Bill of Rights, it was reasoned, belonged only in the state constitutions because the powers which might be used to threaten individual freedom was held by the states. Notwithstanding this argument, Massachusetts passed a provisional ratification which would automatically become void if a Bill of Rights were not attached to the federal Constitution.

Why the Bill of Rights

As written by Madison and ratified by the states, the Bill of Rights became the codification of the structural principles necessary to the adaptation of government by covenant to

the democratic-republican system of dual sovereignty. The first ten amendments had three major objectives:

First, to protect the people from the federal government. The ninth amendment gathers up all the powers not assigned to the federal government by the Constitution and returns them to the people. It reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The first amendment was more specific. It insured that Congress could not interpose itself between the people and their state governments in matters dealing with the most fundamental freedoms. (It was not until after 1900 that the words of the First Amendment "Congress shall not.." were extended to apply to the states as well.)

Second, to protect the people from all government. Amendments two through eight are a guarantee that the coercive powers of the military and law enforcement cannot be used as a rack on which to oppress the innocent

Third, to protect the States against federal encroachments. The Constitution gives the national government no power to interfere in the lives of its citizens unless that interference is initiated by the citizen himself. As for instance, if a citizen chooses to become engaged in foreign or interstate commerce, then he places himself under federal jurisdiction; but if he limits his commercial activities to within his own state, he is protected by the buffer of state government from federal authority. The tenth amendment insures the stability of that buffer. It reads, "The powers not delegated to the United States by the Constitution; nor prohibited by it to the States, are reserved to the States respectively, or to the people." Thus the Tenth Amendment, by guaranteeing the autonomy and sovereignty of the state governments, serves as a bulwark between the people and national power.

With the ratification of the Constitution and the addition of the Bill of Rights, our forefathers carried to completion the work begun with the decision to separate themselves from England. They had instituted a new government, laying its foundation upon the principles of the laws of nature and nature's God, and had organized its powers in such form that it would be strong enough to protect its citizens but not so strong that It could impose Itself upon their private lives. In doing so they had provided a further guarantee to freedom by defining it in terms of the structure of the power of government. It was not a perfect system, and proved, in the 20th century, to be a very vulnerable one. But it has withstood, almost intact, 200 years of bantering and twisting - and remains a monument to the rectitude of the intentions of the men who created it.