JUDICIAL INTERPRETATION AND "THE CONSENT OF THE GOVERNED"

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Some of you may have heard about the college that recently hired a new president. The search committee had narrowed the candidates to a mathematician, an economist and a lawyer. During the interview, each was asked, "How much is two plus two?" The mathematician answered immediately, "Four." The economist thought about it a bit and answered, "Four, plus or minus one." The lawyer looked around the room and motioned for the committee members to gather close. In a hushed tone, he replied, "How much do you want it to be?"

This little story captures a big problem in our society: lawyers and judges who interpret constitutions and other laws as though they can mean anything they want them to mean.

One example is a recent Massachusetts Supreme Court decision innocently entitled *Goodridge* v. *Department of Health*. That was the one that rewrote the State's definition of marriage so that it includes same-sex couples rather than accepting the legislature's express requirement that marriage be limited to a "union of one man and one woman."

The Court's stated justification for that bold step was that limiting marriage to opposite-sex couples, a limitation in effect since the beginning of the English common law, served *no rational purpose*. Therefore, according to the Court, the limitation violated Article 10 of the Massachusetts Declaration of Rights, which simply provides: "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws...."

Ironically, the opinion never bothered to explain *how* that provision could possibly invalidate the heterosexual limitation in the State's marriage law. Even more ironically, that provision was written by John Adams for a Puritan population that could never in a million years have predicted that this provision would one day be used to sanction and even mandate an arrangement so far removed from their moral views.

But let's imagine for a moment that the tables were turned. Suppose the Massachusetts legislature had enacted a law, like the one in San Francisco, expressly *extending* marriage rights to same-sex couples. Now suppose the Massachusetts Supreme Court had invalidated that law on the ground, say, that recognizing same-sex marriages would somehow violate the rights of *heterosexual* couples and their families. Let's call this the "*Badridge*" decision just for fun. As a matter of principle, would that decision be any less outrageous than the *Goodridge* decision?

I have to confess that, initially, I probably would not be as outraged by the *Badridge* decision as I was by *Goodridge*. Half of me would be glad to see the Left getting a taste of its own medicine. But if I believe in the political principles our nation's

founders believed in, as I do, I *should* be just as outraged by *Badridge* as I am by *Goodridge*.

My objective today is to explore with you why that is so and, more generally, how our founders would have viewed the debate over the proper role of judges. Based on my reading of their writings and the history of the founding period, I believe the founders would have viewed decisions like *Goodridge*—and *Badridge*—as fundamentally immoral. Not just unwise or misguided, but immoral. And the *reason* they would have seen such decisions as immoral is that they violate the principle, succinctly stated in the Declaration of Independence, that "governments … deriv[e] their *just* powers from the consent of the governed." Any other governmental action, in the founders' world-view, is "unjust." It is what they called a "usurpation" of the people's right to govern themselves.

History of the "Consent of the Governed" Principle

To understand why, we need to understand something of the history of the "consent" principle. Why did Thomas Jefferson put that language about "consent of the governed" in the Declaration? Was it just a nice-sounding phrase? In fact, it was the keystone of the Declaration and, indeed, the entire revolution. It captured the fundamental reason the colonists had decided to leave the British Commonwealth, and why they were willing, as the Declaration put it, to "pledge their lives, their fortunes, and their sacred honor" to the cause of independence.

In the Declaration. As you know, the Declaration itself gave a long list of specific grievances against King George and the British Parliament. And most of those boiled down to the charge that they had violated the "consent" principle in various ways.

The first charge, for example, was that the King had refused to put into effect laws passed by the colonial legislatures for preserving public safety. Under the political philosophy of the day, a law passed by the people's representatives in the Legislature was deemed passed with the people's consent. Thus, to refuse effect to such a law was to thwart the "consent" of the people.

The next charge was that the King had refused to create new colonial governments *unless* the colonists gave up their right to representative government. That of course would ensure that *none* of the laws to which those people were subject would be enacted with their consent.

Another charge was that the King had subjected the colonists to laws passed by Parliament, where the colonists had no representation. And finally, of course, was the charge that the King and Parliament had imposed taxes on the colonists "without their consent." This was the same complaint the colonists had levied against the infamous Stamp Act and the Townshend Acts, i.e., "no taxation without representation." (And you thought that slogan originated with the D.C. license plate department!)

In the Declaration, these violations of the "consent of the governed" principle provided the justification—the *moral* case—for the colonies to withdraw from Great Britain.

And then, at the very end of the Declaration, that principle came into play once again. There, the delegates to the Second Continental Congress noted that they were acting "in the Name, and by the Authority of the Good People of these Colonies." In other words, the *people* of the colonies, through their representatives to Congress, were giving their consent to the actions taken there.

In the Works of Other Founders and Congresses. Was this concept of the "consent of the governed" unique to Jefferson's political philosophy? No. As you know, the Declaration itself was Jefferson's eloquent attempt to summarize the views and decisions of the entire Second Continental Congress. And many of the individual founders, including a number of the delegates to that body—had invoked the same principle in their own writings about the conflict.

For example, James Wilson of New Jersey, who signed both the Declaration and the Constitution, wrote that "[t]he *only* reason why a free and independent man was bound by human laws was this—that he bound himself."[2] In other words, he *consented* to be bound by them, either directly or through his representatives in a legislature. Similar arguments had been made in the writings of such luminaries as John Adams and Samuel Adams, also from Massachusetts.

Two years before the Declaration of Independence, moreover, the *First* Continental Congress had relied upon the same principle in a document called "The Declaration of Rights and Grievances." It stated that "the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council: and as the English colonists are not represented … in the British parliament, they are entitled to a free and exclusive power of legislation in their several provincial legislatures …"

In the Writings of Early American Colonists. In fact, the consent concept had been a dominant theme in the writings of earlier American colonists. For example, Thomas Hooker, the founder of Connecticut, had written that to have legitimate government, "there must of necessity be a mutuall ingagement, each of the other, by their free consent."[3] John Winthrop, founder of Boston, had put it this way: "the essentiall forme of a common weale or body politic … I conceive to be this—The *consent* of a certaine companie of people, to cohabite together, under one government for their mutual safety and welfare."[4]

In the Works of Influential Political Philosophers. The same concept was expressed in the writings of English and Scottish political philosophers who provided much of the inspiration for the American Revolution. The most famous and influential of these was John Locke, who wrote: "Men being … by nature, all free, equal, and independent, no one can be … subjected to the political power of another, without his

own consent. The only way whereby any one divests himself of his natural liberty, and puts on the bonds of civil society, is by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceable living one amongst another …"[5]

In summary: When you look at the record, it's clear that the major issue in the Revolutionary War was this principle of the "consent of the governed." The colonists thought they were entitled to it. The British didn't want to give it to them. And that's why they went to war.

In the Constitution. Just as the consent of the governed was the fundamental issue in the Revolution, so too the fundamental goal of the Constitution was to enshrine that principle in American government. As the historian Forrest McDonald put it, "[t]he Framers' *whole purpose* was to establish a government based upon consent."[6]

The text reflects that purpose in several ways. First, the Constitution begins: "We the People of the United States…do ordain and establish this Constitution…" In other words, it was the people who were creating, and therefore consenting to, this fundamental law.

Second, the Constitution's ratification procedure required approval, not by the states acting as such, but by conventions of people within the states – i.e., by the people themselves. This of course implied that sovereignty resided in the people, and that the *people* at large were giving their consent to the creation of the new government.

Third, the Constitution placed the legislative power right up front, in Article I. It thereby conveyed that the legislative power – the process by which the consent of the people is discerned and effectuated – was paramount.

Fourth, the Constitution specified that the people's representatives would be subject to frequent elections – every two years – to keep them responsive to the people's demands.

The "consent principle" also played a major role in the ratification debates. Those who advocated adoption of the Constitution were called "Federalists." And some of them—Madison, Hamilton, and Jay—wrote an entire series of essays—called the *Federalist Papers—in* support of ratification.

Federalist 39, for example, made the consent principle clear. "The Constitution is to be founded on the *assent* and ratification of the people of America, given by deputies elected for the special purpose." The essay also said that the Constitution was designed to create a "republic," which it defined as "a government which derives *all* its powers directly or indirectly from the great body of the people . . ."

As you know, there were also a lot of influential people—the "Anti-Federalists"—who opposed the Constitution when it was proposed for ratification. One was Patrick

Henry, then governor of Virginia, who had encouraged the Revolution with his statement, “Give me liberty or give me death.”

But the Anti-Federalists’ opposition wasn’t to the idea of “consent of the governed.” They were concerned that the new federal government would overshadow the states, which were viewed as more responsive to the people. And they thought the document didn’t go *far enough* to ensure that the new government would respect the “consent” principle. And so the Anti-Federalists ultimately got the people to agree to require, as a *condition* of ratification, that a series of amendments known as the Bill of Rights would be added.

One of those amendments—the 10th—expressly recognized the principle of consent. It states that all powers not expressly granted are *reserved* to the states or the people. In other words, the rights and powers of government don’t come from the government. They come from the people. And the government can’t have any powers the people haven’t given it.

For the founders, then, the consent of the governed was the central issue, both in the war for independence and in the subsequent drafting and ratification of our Constitution.

Why “Consent of the Governed” Was Viewed As A Moral Principle At Ratification

So why did the founders feel so strongly about the principle of consent? Was it because they thought government built on that principle would make wiser decisions? That such a government would be smaller and less intrusive? Or that it would be more stable, less prone to being overthrown? All of these undoubtedly played a role in their thinking.

But there was another reason, even more important and fundamental than these. And that was that the founders had strong views about morality—not just sexual morality, but right and wrong in general. They believed there was such a thing as moral or just government, and unjust or immoral government. They believed the British government had lost its *moral* legitimacy prior to the Revolution. And they wanted their new government to rest on a strong moral foundation.

They also believed, as John Adams put it just a few days before the Declaration of Independence was issued, that “the only *moral* foundation of government is the consent of the people.”[7] Or to use the language of the Declaration, any governmental power that is not based on the consent of the people is not a “just power,” and is therefore morally illegitimate. To exercise any such power is to “usurp” the power of the people – another phrase Jefferson used throughout the Declaration.

But *why*, you may ask, did they think that the “consent of the governed” was necessary for a morally legitimate government? It all sprang from their view of the fundamental nature of men and women.

Natural Rights Philosophy. Whatever their religious views—and they had a lot of different views on religion—they virtually all believed that individuals enjoy certain "natural" or "God-given" rights. As Jefferson put it in the Declaration, "We hold these truths to be self-evident, 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 …"

For the founders, the need for "consent" flowed directly from a person's natural right to equality and liberty. For if you exercise political authority over me without my consent, we're no longer "equals," are we? You're my superior.

Indeed, if you can make me do whatever you want regardless of how I feel about it, I'm not "free." I am, in essence, your slave. And that's a violation of my inherent freedom. As Samuel Adams put it in 1772, "The right to freedom being the gift of God Almighty, it is not in the power of man to alienate this gift and voluntarily become a slave."[8]

Locke had made the same point in his *Second Treatise on Government* (at 95): "Men being … by nature, all free, equal, and independent," he said, "no one can be … subjected to the political power of another, without his own consent."

Theology. Those who believed in the Judeo-Christian religious tradition had additional reasons to believe in the moral necessity of consent. In the mid-1600s, for example, the famous author and political philosopher John Milton had taught that our inherent freedom flows from the fact that we are, in the words of Genesis (1:27), created "in the image" of God. Milton reasoned that, because God is inherently free, and we are created "in his image," we have a natural right to freedom as well.

Other Christian leaders taught that political freedom was essential to the full development of Christian qualities such as faith, charity, obedience, and humility. A government that limited human freedom—that imposed obligations without the people's consent—would stifle the development of these qualities and thereby undermine God's work in the hearts of his children.

Sacrifices of the Revolution. The delegates who gathered in Philadelphia to develop and draft the Constitution in the summer of 1787 had another reason to feel strongly about the principle of popular consent: Many of their friends and comrades had died, or made other enormous sacrifices, in fighting for that principle during the revolution. And those sacrifices undoubtedly contributed to their feeling that the principle for which they had fought was a moral one, not just a matter of prudence.

Indeed, at least nine of the 56 signers of the Declaration had died as a result of the war or its hardships on them. One of those was John Hart, one of the five signers from New Jersey. He had owned a large farm and several grist mills. While his wife was on her deathbed, Hessian mercenaries destroyed his mills, ravaged his property,

and scattered his thirteen children. Hart became a hunted fugitive. When he finally returned to his land, he was broken in health, his farmland was scourged, his wife had died, and his children were scattered. He died three years after signing the Declaration.

Another signer of the Declaration, Phillip Livingston of New York, never saw his home again because the British immediately seized it for a naval hospital. He sold all of his remaining property to finance the revolution, and he too died before the war was over.

So I can imagine that, when the Constitutional Convention convened, there was a good deal of reminiscing about mutual friends who had been leaders prior to the revolution but who had suffered or even died in the interim. Those discussions must have given the delegates an added determination to enshrine and protect the principle that had been at the heart of the revolution.

Why "Non-Originalist" Interpretation Is Immoral Under This Principle

What does all of this have to do with the way modern judges interpret constitutions and statutes? Why, for example, should people like those who wrote the *Goodridge* decision care about this history? Because it shows that, when a judge goes beyond simply applying a law or constitution according to its original meaning, and instead pours his own new meaning into it, he or she is engaged in an *immoral* act.

Let me give you an example: Suppose Congress passes a law that says anyone convicted of murder in committing another federal felony will be drawn, quartered, and disemboweled – like Mel Gibson in *Braveheart*. Suppose also that when the issue reaches the U.S. Supreme Court, it says, "Wait a minute, you can't do that. That's a 'cruel and unusual punishment,' and is therefore barred by the 8th Amendment." Wouldn't that be a violation of the "consent" principle? After all, the law was passed by the people's representatives in Congress, and therefore with the "consent" of the people.

"But wait," the Court would say, "the people also consented to the Eighth Amendment as a *limit* on Congress' power. And there's no question that being drawn and quartered is both 'cruel and unusual' under anyone's definition." And the Court would be right. By its terms, the people's consent to the 8th Amendment trumps their later consent to a law requiring overt torture.

But suppose Congress amends the law to require execution by lethal injection—something designed to ensure the prisoner's suffering is minimized. And the Court then holds that this punishment can't be imposed because they think *any* execution is "cruel and unusual punishment" in violation of the 8th Amendment. Would that violate the principle of "consent of the governed?"

Absolutely. Execution was common when the 8th Amendment was adopted, so it would *not* have been considered "cruel and unusual" when the people consented to that

amendment. The people, therefore, have never "consented" to a restriction that prohibits their representatives from imposing the death penalty. For judges to impose such a restriction is a clear "usurpation" of the people's authority, and is therefore, in the founders' world-view, an *immoral* use of the judicial power.

Those who laid the intellectual foundations of our republic anticipated this very issue. In *Federalist 81*, for example, Hamilton squarely rejected the idea that the courts would be allowed "to construe the laws according to the *spirit* of the Constitution" rather than its letter. He said it would be *dishonest*—a "pretence" as he put it—for them to "substitute their own pleasure to the constitutional intentions of the legislature."

Hamilton's statement echoed Locke's *Second Treatise*, which said (at 134), "[t]his legislative [power] is not only the supreme power of the common-wealth, but sacred and unalterable in the hands where the community have once placed it." That is, the legislature occupies a *sacred* place in a republic because it is the body through which the people give or withhold their consent to government action. Locke continues:

> "[N]or can any edict of any body else"—including judges—"have the force and obligation of a law, which has not its sanction from that legislative which the public has chosen and appointed: for without this the law could not have that, which is absolutely necessary to its being a law, the *consent* of the society …."

Indeed, Locke taught that, even if it wanted to, the legislature had no right to delegate its law-making authority to anyone else, including judges. He said (at 141):

> "The legislative cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it cannot pass it over to others. … [W]hen the people have said, We will submit to rules, and be governed by laws made by such men …, no body else can say other men shall make laws for them … The power of the legislative [branch is] only to make laws, and not to make *legislators* …"

Finally, George Washington made a similar point in his famous farewell address:

> "If in the opinion of the People, the distribution … of the Constitutional powers be in any particular wrong, let it be corrected by an *amendment* in the way in which the Constitution designates. But let there be no change by usurpation"—there's that morally charged word again—"for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in *permanent* evil any partial or transient benefit which the use can at any time yield."[9]

In other words, even though some good might come from a particular misinterpretation of the Constitution, by a judge or another official, it will lead to greater mischief later on. And it is an immoral act—a "usurpation" of the people's right to *self*-government.

Conclusion

So what can we do to stem the rising tide of "usurpation" by a judiciary that sometimes thinks our laws—the people's laws—can be interpreted to mean whatever will achieve the judges' own preferred political goals?

First, we can support candidates who share our belief in the rule of law – that is, the rule of *real* laws, enacted by the people's representatives, rather than phony laws concocted by creative lawyers and judges. Don't expect to hear candidates for office say, "Oh yes, I want judges who will twist the law beyond recognition for their own political ends." But when you hear candidates say things like, "I will appoint judges who respect the right to X, or the right to Y, or the right to Z," you know you're dealing with a candidate who *really* wants judges who will be willing to do just that when they think it will advance X, Y or Z.

Second, we can be on the lookout for political philosophies that seek to justify the exercise of political power *without* the consent of the governed. Much of the political philosophy written since the founding of our nation is designed to do just that. Many utilitarians, for example, say it's okay for a judge or bureaucrat to do something without the people's consent as long as it will increase the overall "welfare" of society. Marxist philosophers say it's okay to do that as long as it enhances the position of the poor—the "proletariat" – at the expense of the rich. (Modern class-warfare politicians do the same thing, except they try to pit the poor *and* the middle-class against "the rich.") And some "race studies" or "women's studies" philosophers say it's okay to act without popular consent as long as it betters the lot of women or of this or that racial group.

Third, we can oppose these judges, candidates, and philosophies on *moral* grounds, rather than relying only on practical arguments. You've probably already found that it's very difficult to oppose a moral argument with a practical one. And, as Washington recognized, there's almost *always* some kind of moral argument to support a "usurpation" of the people's right to self-government. So we have to explain, with patience and courage, why the usurpation is itself immoral.

In that regard, I'm reminded again of *Braveheart* and the gripping scene of William Wallace's execution. As the scene begins, he's just endured the most horrific torture because of his refusal to recant his teachings about the rights of the Scots against their English captors. The judge supervising the torture has repeatedly invited him to beg for mercy, as a way of trying to damage his credibility with his people. Finally he motions the judge that he would like an opportunity to speak. And the crowd, thinking he's finally going to beg for mercy, begins chanting, "Mercy! Mercy! Mercy!" The judge thinks so as well, and therefore has the torture stop. Wallace then takes a deep breath and, in a voice that rings through the town and into the surrounding countryside, yells the word "FREEDOM!" And that one word, uttered in such power, inspires his countrymen to join together and throw off the English yoke.

I hope that we who believe in the founders' vision will, through peaceful means, bring that kind of courage to the struggle for government based, not on the rule of elites, but on the "consent of the governed."

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[2] Bailyn, *The Ideological Origins of the American Revolution*, 174 (1992).
[3] Miller & Johnson, *The Puritans* (1963) at 188.
[4] *Id.* at 199 (emphasis added).
[5] *Second Treatise*, Sec. 95.
[6] *Novus Ordo Seclorum*, p. 282
[7] Adams to James Sullivan, May 26, 1776, in Adams, *Works of Adams*, 9:375-378.
[8] *The Rights of the Colonists* (November 1772).
[9] 35 G. Washington, Writings 228-29 (J. Fitzpatrick ed. 1940) (emphasis added).