

Constitutional Corner – Fundamental Principles-Unalienable Rights

“We hold these Truths to be self evident...”

To Thomas Jefferson and the men of 1776, certain eternal truths were self-evident because reason and inquiry had found them to be so, and their faith had confirmed it. Mankind was created equal, in the sight of God and before the law, and each individual had a moral equivalence that enabled them, or should have, to live their life in freedom and liberty, without “saddles on their backs.” Slavery, institutionalized well before the Founding period, prevented many men, women and children from enjoying their equality; but eventually, with occasional missteps along the way, America would walk in the full light of this truth.¹

After affirming the truth of “equality,” Jefferson went on to proclaim the next: that all individuals had been endowed (gifted, furnished, equipped) with unalienable (inviolable, absolute, non-transferable) rights, among which were at least three (and by implication, more): the right to the continuance of life, the right to liberty² and the right to pursue their individual happiness. Jefferson, for reasons he never explained, had departed from the standard litany of the time, replacing a uniformly held right to acquire and possess property with the more obscure but now familiar “pursuit of happiness.”

That *unalienable rights* were thought fundamental to the American system is itself too fundamental a proposition to require defense.

The Founders knew the source of these rights:

“The sacred rights of mankind are not to be rummaged for among old parchments or musty records. They are written, as with a sunbeam, in the whole volume of human nature, by the hand of the divinity itself; and can never be erased.”³ Alexander Hamilton

Securing these rights so they could be enjoyed was to be the charge of government.

“Rights” had been part of the fabric of colonial life since the inception; each colonial charter had affirmed that the colonists brought with them the full “liberties, franchises and immunities” of Englishmen “as if they had been abiding and borne within this our realme of Englande.”⁴ From that point onward, rights had been never far from the public mind, and, as the road to

¹ I’m sure some will challenge this conclusion.

² “Liberty is to be free from restraint and violence from others” John Locke, Two Treatises of Government.

³ The Farmer Refuted, February 23, 1775.

⁴ Virginia Charter of 1606.

independence began to straighten, took on ever more prominence. We today can look back on a rich history of colonial “rights” proclamations:

- 1620 – Mayflower Compact (Plymouth)
- 1636 – Code of Law (Plymouth)
- 1639 – Fundamental Orders (Connecticut)
- 1641 – Body of Liberties (Massachusetts)
- 1677 – Declaration of the People (Virginia)
- 1765 – Declaration of Rights and Grievances (Stamp Act Congress)
- 1766 – An Inquiry Into the Rights of the British Colonies (Richard Bland)
- 1774 – A Summary View of the Rights of British America (Thomas Jefferson)
- 1774 – Declaration and Resolves (1st Continental Congress)
- 1775 – Declaration on the Causes of Taking Up Arms (2nd Continental Congress)
- 1776 – Declaration of Rights (Virginia)
- 1776 – Declaration of Independence (Congress)

But not all rights were then or are today, unalienable. Not all are endowed by God. We should be careful when speaking of rights that we distinguish between those endowed by God and those created and bestowed (or withdrawn) by government. The later are certainly not unalienable, they are created and can equally be destroyed by government. These rights can be granted to all or a few, as the people, through their government, will it (or as the government, arbitrarily, acts unjustly). These take the name of civil rights, although people today often and carelessly misapply that label to their natural rights as well. Adding more confusion is the term “human rights.” Are “human rights” unalienable, or are they civil and thus alienable in nature?

Voting is the perfect example. The right to vote in elections is clearly not an unalienable, natural right. The test? Were man to return to a state of nature, voting would be meaningless. Only when man joins voluntarily in society does voting take on any meaning, it is an artifact of society: and thus a civil right.

In Colonial America, “the franchise” was occasionally denied non-property holders, oftentimes women and usually those below majority age. Gradually the states lifted these restrictions; sometimes it took [Constitutional amendments](#) to bring uniformity across the nation. But what the government giveth, the government can taketh away. There is talk today of [raising the voting age back to 21](#) (63% say yes), or [restricting the right to vote to those capable of demonstrating cogent thought](#) (by resurrecting poll tests). Voting is clearly a civil right – for all citizens 18 and older – at least for the moment.

But how do we know we have a natural, unalienable right to life, liberty and property, at least? Where is the proof?

Consider that among the Ten Commandments is the prohibition of murder; does that not infer a right to the maintenance of one's life? We can also argue, as did John Locke, that we are all God's property, ...“made to last during His, not one another's, pleasure.”⁵ To “take” God's property is to invoke his wrath.

Speaking of taking, “Thou shalt not steal” would be meaningless were there no God-given right to personal property. A prohibition of kidnaping⁶ equates to a right to personal liberty. Notice also that having a *right* to something implies a *duty* on others to honor that right. A prohibition of lying (bearing false witness) reflects an unalienable right to receive true testimony. There are others.

Interestingly, it was due to the existence of other, perhaps less obvious rights, that we did not have a Bill of Rights in the original Constitution. All knew, as James Wilson of Pennsylvania would later argue, that a bill of rights was potentially dangerous: “*A bill of rights annexed to a constitution is an enumeration of the powers reserved. If we attempt an enumeration, everything that is not enumerated is presumed to be given.*”⁷ As the Constitutional Convention wound down, George Mason, author of the [Virginia Declaration of Rights](#) (all Virginians should read this), believed a Bill of Rights could be quickly drafted (“in a few hours”); Roger Sherman (CT) pointed out that nearly all the state constitutions contained bills of rights (only eight of them did) and these would secure the people's rights. Mason rejoined with an oblique reference to the Supremacy Clause, implying that the state constitutions were insufficient.

Despite the caution expressed by James Wilson and others, it became obvious that only the promise of a Bill of Rights would garner enough Anti-Federalists votes to ratify the Constitution. The promise was made, the votes secured and the Constitution ratified.

As if to assuage Wilson's concern, James Madison made sure the 9th Amendment was included:

“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

Until 1965, the 9th Amendment lay mostly dormant, seldom mentioned by the Supreme Court. In *Griswold v. Connecticut*, however, the Court created a “right to privacy” by stitching together bits and pieces of “emanations from penumbras” found in other amendments, and that opinion opened the floodgates. “Within fifteen years the Ninth Amendment...was invoked in more than twelve hundred state and federal cases in the most astonishing variety of matters.”⁸

⁵ Second Treatise on Government, p. 271.

⁶ Exodus 21:16.

⁷ Debates in the Convention of the State of Pennsylvania, Wednesday, October 28, 1787.

⁸ Leonard W. Levy, *Origins of the Bill of Rights*, p. 242.

Today, however, the whole idea of unalienable rights is summarily overlooked, sometimes even denied, along with the God who provides them. We certainly can't have public school teachers teach the concept of unalienable rights, can we? That would inevitably lead to a discussion of their source, and, thanks to *Everson v. Board of Education* (1947), we can't have that going on with "impressionable young minds." Do our *churches* teach unalienable rights? No, for that would require tip-toeing to the edge of "political speech." Equally verboten. So, we teachers of the Constitution get used to blank stares when we inquire as to the source of unalienable rights, at least when we ask anyone under 21.

Meanwhile, *civil rights* march ever onward.

On January 11, 1944, with World War II raging throughout Europe and D-Day still six months in the future, instead of walking into the House of Representatives to deliver his State of the Union address as numerous Presidents before him had done (he was recovering from a bout of flu), President Franklin D. Roosevelt sat down before an array of microphones and entered the living rooms and parlors of America with yet another "Fireside Chat." This one would be different.

Towards the end of his speech, FDR said:

"We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. 'Necessitous men are not free men.' People who are hungry and out of a job are the stuff of which dictatorships are made.

In our day these economic truths have become accepted as self-evident. We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all regardless of station, race, or creed.

Among these are:

- The right to a useful and remunerative job in the industries or shops or farms or mines of the Nation;
- The right to earn enough to provide adequate food and clothing and recreation;
- The right of every farmer to raise and sell his products at a return which will give him and his family a decent living;
- The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad;
- The right of every family to a decent home;

- The right to adequate medical care and the opportunity to achieve and enjoy good health;
- The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment;
- The right to a good education.

All of these rights spell security. And after this war is won we must be prepared to move forward, in the implementation of these rights, to new goals of human happiness and well-being.”

FDR was smart enough to know that the Constitution couldn't be “bent” enough to bring these “rights” to life, it would take legislation, perhaps even constitutional amendments (FDR's “right” to “earn enough to provide adequate food and clothing” took the form of minimum wage laws). But by anchoring these rights to new, previously undiscovered but now apparently “self-evident” economic “truths,” did FDR imply these “rights” were or should be viewed as natural? Did God grant us the right to “a useful and remunerative job,” the right to a “decent home,” a “good education?” If so, where do we find God confirming this? Through nature? Through Scripture? No, these would all be, once created, “civil rights:” here today, (possibly) gone tomorrow -- except that we know from experience how hard it is to repeal an “entitlement,” once granted.

Speaking of entitlements, to listen to some on college campuses today you would think that God himself had created a right to a free education, that it was as natural as the right to life (perhaps they see this “right” lurking somewhere in the “pursuit of happiness”).

One way our unalienable rights are routinely infringed is with zoning laws. Although some of these clearly secure the right of each of us to enjoy peace and quiet, others are arbitrary and capricious, yet we put up with them. Lysander Spooner got it right when he said:

“A man's natural rights are his own, against the whole world; and any infringement of them is equally a crime, whether committed by one man, or by millions; whether committed by one man, calling himself a robber, (or by any other name indicating his true character,) or by millions, calling themselves a government.”⁹

Here's the test: do citizens acting as individuals have the right (and power) to restrict their neighbors from painting their garage doors purple (as someone in my neighborhood did)? If you agree they do not individually have this right, then where does government, which ostensibly

⁹ <http://www.constitution.org/civ/notrea1.htm>

derives all its power from the people, obtain the right to so restrict through a zoning law? There are limits to the exercise of government power when restricting unalienable rights.

America's unique-in-history proclamation of unalienable rights, endowed by Almighty God, stands as a beacon on a hill. The constitutions of other nations may enumerate long lists of "human rights," but without tracing their source to an eternal God, without declaring them unalienable, the constitutions of other nations place these rights at the whim of government.

We forget our unalienable rights at our peril.

Note 1: This will be the last Constitutional Corner essay until 7 January 2016. You'll continue to receive *The Constitution's Week in Review* during that period. I encourage you to join us on WFYL radio Friday mornings in the meantime. The subject of future shows during December will be:

4 Dec: The principle of unalienable rights: Life, Liberty & Property

11 Dec: The principle of political power derived from the people

18 Dec: The principles of republicanism & limited government

25 Dec, 1 Jan Rebroadcast of best previous shows on Christmas and New Year's Day

8 Jan The principle of constitutionalism, including the role of government and the principles of separation and balance of powers

Note 2: on Friday, 27 November, "We the People, the Constitution Matters" will be a replay of our 13 November show (on self-government). On December 4th, we discuss the principle of unalienable rights. This is an incredibly important topic and I hope you will join the discussion (the call-in numbers are 610-539-8255 or 610-539-1783/1784). If not, you can listen to one of the show's several rebroadcasts or [download the recorded podcast](#) later that day and listen at your leisure.

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