LIBERTY TREE

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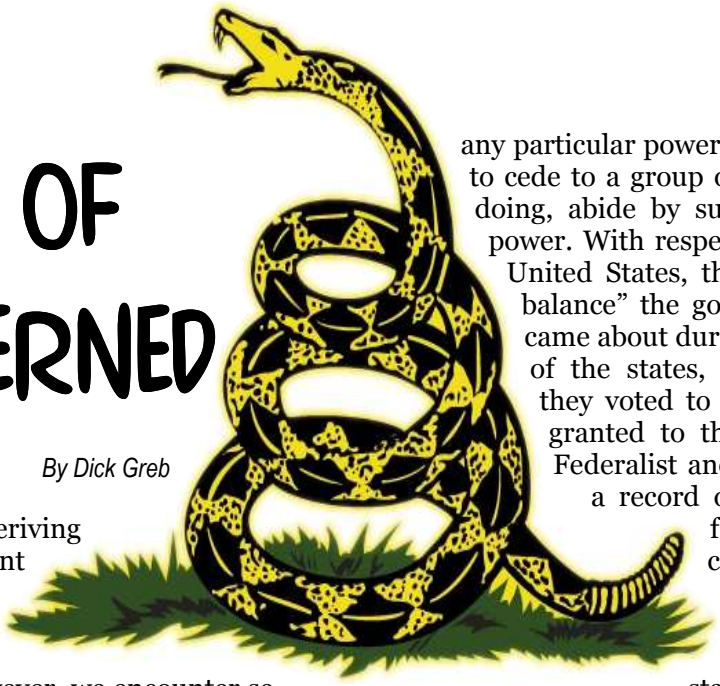
CONSENT OF THE GOVERNED

By Dick Greb



The concept of government deriving its *just* powers from the consent of the governed is a cornerstone of the American experiment in limited government. And to be sure, in theory it is a desirable one. However, we encounter serious problems with this concept when it comes to putting it into practice. To start, let's take a look at what Black's Law Dictionary (6th Edition) has to say about "consent."

> **CONSENT.** A concurrence of wills. Voluntarily yielding the will to the proposition of another; acquiescence or compliance therewith. ... Consent is an act of reason, accompanied with deliberation, the mind weighing as in a balance the good or evil on each side. It means voluntary agreement by a person in the possession and exercise of sufficient mental capacity to make an intelligent choice to do something proposed by another.

As you can see, consent entails a choice — a conscious decision whether or not to accept a proposal, made after deliberation of the pros and cons of such proposal. In the case of just powers, then, it's a conscious decision whether any particular power is one which you are willing to cede to a group of representatives, and in so doing, abide by such group's exercise of that power. With respect to the Constitution of the United States, this act of "weighing as in a balance" the good and evil of the proposal came about during the ratifying conventions of the states, whereby after deliberation, they voted to concur in the powers to be granted to the federal government. The Federalist and Anti-Federalist Papers are a record of the respective arguments for and against the acquiescence of these grants of power. [1]

And yet these first acts of "consent" by the state conventions exemplify a major flaw in putting the principle into practice. The only people who could rightly be considered to have consented to the Constitution are those who actually voted *for* it — that is, the delegates to the ratifying conventions themselves. Certainly it can't be said that those who voted *against* adoption agreed to grant the powers. But even if you consider all the delegates to be bound by the decision of the majority of them (presumably by the fact that they participated in the vote), what about the rest of the people of the state? After all, by what right can those delegates obligate others to the decisions that they make? Is the simple fact that they were elected (or selected, whatever the case may be) by *some portion* of the people of the states be enough to bind *all* of the people? I should think not! Or, is the entire population to be considered to have consented to be bound by the decisions of the delegates by their participation in the selection process of said delegates? Even so, what about those citizens who declined to participate? And of course, that's the rub — how is *consent*, and more importantly *lack of consent*, to be manifested? It is at this point that the practical application of the consent principle falls apart.

In the above example, it is clear that a tiny minority of people are purported to be authorized to bind the majority of the people of a state. As a more specific example, according to online sources, Maryland had a 1790

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1. One striking aspect of the Anti-Federalist Papers is the prescience of the authors in predicting the calamities that would result from the adoption of the Constitution. Certainly history now bears out their fears.

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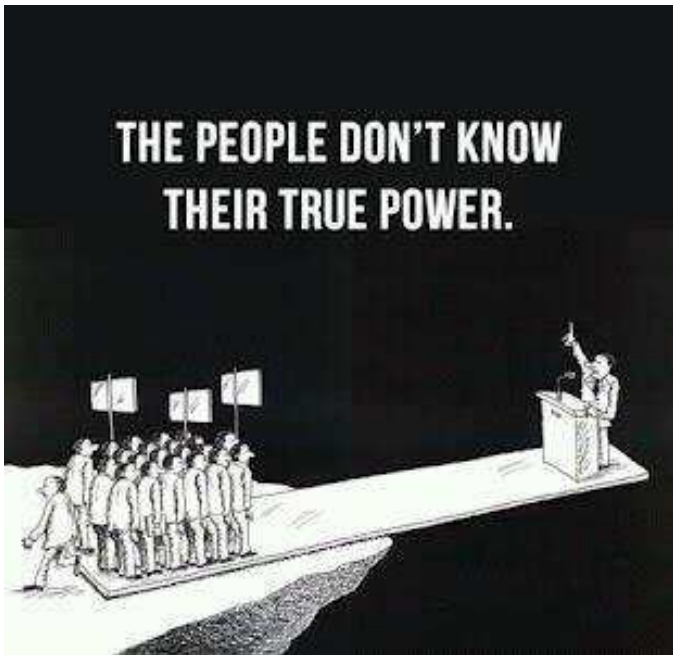
population of 319,728,[2] and sent 74 delegates to its ratifying convention.[3] Thus, these delegates were a miniscule .02 percent of the total population, yet are deemed to have bound the remaining 99.98 percent of Marylanders by their decision.[4] Even if we assume for the sake of argument that *all* of the people represented by any given delegate desired the outcome for which that delegate voted, then right off the bat, we can still see that 15 percent of the population — that is, 47,527 of them[5] — *did not consent* to grant the powers that the Constitution conferred on the new government. But wait, it gets worse!

Since it is highly unlikely that every one of a delegate's constituents desired the same result, we can really only assume that 51 percent (a simple majority) of them did. That means that up to 49 percent of the population represented by the 63 delegates who voted to ratify the Constitution (that would be another 133,371 people) could also have been opposed to the grants of power. If we add them to the other 47,527 whose delegates opposed ratification, we get as many as 180,898 people (a whopping 56.6 percent of the total population) who *may not have consented* to the grant of powers.

Now, to be fair, if we assume the same 51 percent of agreement for all delegates (rather than just for the aye-voters), then the percentage drops to 49.3 percent; but that only helps to illustrate the severity of the problem, because here we have only 15 percent opposed. However, if we look at the hypothetical example of simple majorities throughout the process, then ratification could have been effected by only 38 delegates, representing only 51 percent of their constituents; that means as few as 83,752 Marylanders – a mere 26.2 percent of the population – could presumably cause the other 235,976 to be bound by that minority's actions. What does that do to the whole idea of "consent of the governed?"

Looking beyond the inherent problems in the practical application of the principle to that first generation, we must also consider the impact on subsequent generations – indeed, ultimately upon ourselves. For now, let us forget the statistical possibilities of the previous examples, and assume that 100 percent of the people at the time of the ratification of the Constitution did in fact consent to those grants of powers to the government. What happens when that first generation of consenters have children? Can those children be deemed to have consented to the grant of powers the same as their parents? According to the definition in Black's given above, consent requires "sufficient mental capacity to make an intelligent choice," thus presumably excluding young children from giving it. But eventually there comes a time when those children cease being under the decision-making authority of their parents, and are considered capable of giving or withholding consent according to their own balancing of pros and cons. The question is: how does that new generation express their consent or lack thereof?



Thomas Jefferson, in a letter to Major John Cartwright dated June 5, 1824, recognized this problem of the consent of succeeding generations in the context of making the Constitution changeable.

> Can one generation bind another, and all others, in succession forever? I think not. ... A generation may bind itself as long as its majority continues in life; when that has disappeared, another majority is in its place, holding all the rights and powers their predecessors once held, and may change their laws and institutions to suit themselves. Nothing then is unchangeable but the inherent and inalienable rights of man!

Notice that Jefferson neglects to mention the injustice described above with respect to the majority (really just slightly more than one quarter) binding the rest of the current population, but realizes the inherent injustice of binding future generations. It is also interesting that in describing the circumstance that the new generation is born into, he recognizes that they "hold[] all the rights and powers their predecessors once held." Thus, the powers granted away to the government by their parents, nevertheless inhere in the children. By this line of thought, the government has no right to exercise the powers against the children, unless and until those children make a similar affirmative decision to grant them by their own consent. But this is just the *theoretical* view.

In actual practice, since the government was established as a perpetual institution, and is already exercising those powers, then without contrary action, it will continue to do so forever. Therefore, if the children desire to consent to the prior grants of power, then as a practical matter, they can merely do nothing. Looking again at Black's, we find this:

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2. http://www.infoplease.com/ipa/A0004986.html
3. http://teachingamericanhistory.org/ratification/elliot/vol2/maryland.html
4. Actually, only 63 of the 74 delegates voted to ratify the Constitution, and 11 voted to reject it.
5. With the numbers given, each delegate would represent an average of 4,321 people.

WHO IS ELIGIBLE... or not?

With the passage of the 2005 REAL ID Act, Congress let it be known that unless States complied with the "minimum issuance standards" the 'people's representatives' had set for driver's licenses, the citizens of those States would be prevented from using their licenses to board aircraft, enter federal facilities, or "any other purposes that the Secretary [of DHS] shall determine."[1]

The "minimum issuance standards" imposed by Congress include "[p]roof of the person's social security account number or verification that a person is *not eligible for* a social security account number."[2] Many States have quoted this nearly verbatim in their own roll-over-and-comply statutes. For example, Oregon states, "If a person is *not eligible* for a Social Security number, the person shall provide proof, as defined by the [DMV] by rule, that the person is *not eligible* for a Social Security number."[3] In Maine, the statute reads: "the Secretary of State may not issue a license ... to any person who does not possess and provide a valid social security number. ... This ... does not apply to a person who provides written proof to the Secretary ... that the person is *ineligible* to receive a social security number."[4]

REAL ID splits all persons into only two categories: those with SSNs, and those *ineligible — i.e.,* not legally qualified — to have SSNs. But what does it mean to be ineligible for a social security account number?

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1. P.L. 109-13, 119 Stat 311-16, § 201(3), codified at 49 USC 30301 note.
2. P.L. 109-13, 119 Stat 311-16, § 202(c)(1)(C), codified at 49 USC 30301 note, emphasis added.
3. Or. Rev. Stat. § 807.021(2)(c), emphasis added.
4. Me. Rev. Stat. Title 29-A, § 1301-6, emphasis added.

www.ssa.gov/history/check.html

Social Security poster urging people to obtain account numbers promptly, 1936-1937.

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> ***tions***, or facts, ***or by inaction or silence***, which raise a presumption or inference that the consent has been given. An inference arising from a course of conduct or relationship between the parties, in which there is mutual acquiescence or a ***lack of objection*** under circumstances signifying assent. (emphasis added)

According to this definition, inaction can be construed as *implied* consent.[6] And yet, take another look: consent can also be implied by *actions,* as well as by silence. That's a lot of opportunities for implied consent to be deemed given. Which brings us back to the question of how to manifest one's lack of consent to be ruled over by a small minority of elected representatives. Unfortunately, the sad truth is that, while there are plenty of ways to show one's consent, there really is no way to officially show one's refusal to consent. The system that is in place simply doesn't allow for it.

If you vote, even for liberty-minded candidates, the act of voting implies your consent to be bound by the results of the election. If you decide not to vote, that decision will be treated as an acquiescence in the outcome nonetheless. Legislation to restore your inherent rights and powers can only be accomplished through the representatives of your state or district, who are the very people that you want to *give no power* over you in the first place. Simply refusing to abide by the edicts and proclamations of the ruling clique will just make you an outlaw, subject to whatever pains and penalties they decide to impose upon you. The bottom line is that, no matter what you do or don't do, you will be treated as if you have indeed consented. To be honest, I guess the bottom line is really that the government doesn't care whether you consent or not, because it will exercise its rule over you either way.[7] It recognizes no restraints like "consent of the governed" principles. They may make for good sound bites on Independence Day perhaps, and may even give to some the *illusion*

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6. To my mind, implied consent is little more than a sleight-of-hand method of claiming consent when none has been given, as in the case of blood-alcohol tests whenever police decide to pull you over. It also brings to mind the "implicit representations" that pseudo-judge Nickerson substituted for explicit "statements"— that alone are punishable under IRC §7600 — in order to impose his unconstitutional restraint on the Fellowship's free speech back in 2006. This travesty can be found on page 12 of Nickerson's memorandum (click on docket item #68 at http://www.save-a-patriot.org/doj/docket/docket.html).
7. After all, it's willing to exercise powers never granted to it at all, which is clearly illegal, so why should it balk at extending that illegality to additional "subjects"?

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of liberty, but even in optimal circumstances, they really have no practical effect.

All that being said however, there may be a method by which consent of the governed can be manifested in a practical manner.[8] It involves poll taxes, a type that has been vilified, perhaps for valid reasons, and even prohibited in some constitutions (Maryland being one of them). One reason for this prohibition is that they are seen as a way to disenfranchise the poor, since a poll tax could be made high enough that only a relatively rich person could afford to vote. In the present system, this could certainly be unfair, but with an added condition, I think that problem could be eliminated. If you limit the funding of the government to this kind of tax, and more importantly, limited the reach of the powers to be exercised to those who vote (and pay the tax), the result could be a true embodiment of two important principles. The first, consent of the governed, is implemented by the act of voting. By participating, you consent to be bound by the results of the elections and by the laws and decisions made by the representatives thereby chosen. Conversely, those who decline to vote cannot be bound by any of those laws or decisions. The second, no taxation without representation (and its corollary, no representation without taxation), is implemented by the limitation of government funding to the proceeds of the poll tax. Those who choose to be represented by the government are the only ones who are taxed to support it. Those not paying the tax could not vote to take away the property of others so it could be given to themselves, and those who were paying the tax would have no power to oppress the non-voters. Ultimately, this setup should serve to be self-limiting in the way that excise taxes are purported to operate. The lower the tax, the more people who could, and would be willing to pay it, and in doing so, consent to be bound by the decisions made by those they elect. And the higher the tax, the fewer who would be willing. This system would also be more conducive to keeping a government within the bounds of the powers granted by our Constitution, because every expenditure would have to be covered by only those who authorized it, eliminating the incentive for extravagance. Anyway, that's one of my ideas for "providing new guards for [our] future security," but I'm open to other suggestions.

For the time being though, it looks like our only practical answer to government usurpation of ungranted powers comes from John Locke, in Chapter 19 of his *Second Treatise on Government*. Whether because elected representatives attempt to enact unauthorized laws, or unelected people attempt to enact any law at all, the end result is the same: "*they make laws without authority, which the people are not therefore bound to obey; ... **being in full liberty to resist the force of those who, without authority, would impose anything upon them***." Along those same lines, it would do well for those who attempt to keep the people subjected against their will to remember what President John F. Kennedy said back in 1962: "Those who make peaceful revolution impossible will make violent revolution inevitable."

8. Of course, how practical it would be is subject to debate.

WHO IS ELIGIBLE. . . (Continued from page 3)

Consider firstly that Congress has passed no law *requiring* any person, whether U.S. citizen, national, or foreigner, to *have* an SSN.

Instead, Congress mandated that the Commissioner of Social Security "take affirmative measures to assure that social security numbers ... be assigned" to appropriate individuals, but only in carrying out his "duties under subparagraph[s] (A) and ... (F)" of 42 U.S.C. § 405 (c)(2). What are those duties? Under (F), the Commissioner must require proof of or application for an SSN from anyone *who wants social security benefits*. Under (A), the Commissioner is required to keep records of wages and self-employment income of "individuals" (who want benefits), and to inform those individuals, survivors, or estates of the amounts shown in the records.

Within those limited duties, the Commissioner has no legal authority to assign numbers unless to (1) a foreigner upon admittance to the U.S. to work or permanently reside, (2) an *applicant for or recipient of* social security benefits, (3) a parent requesting a number for a preschool-age child, or (4) a child upon his or her first school enrollment. The Commissioner is mandated to require of "*applicants* for social security account numbers" evidence necessary "to establish the age, citizenship, or alien status, and true identity *of such applicants*, and to determine which (if any) [SSN] has previously been assigned."[5] Thus, if a U.S. adult or teenager with no number has never *applied*, the Commissioner has no authority to issue an SSN. Turning this on its head, the non-applicant U.S. citizen is legally *disqualified* from being issued a number.

The federales hope citizens and State bureaucrats confuse the *opportunity to take action and apply* for a number with meeting the legal qualifications to receive that number. Congress deliberately exploited this casual misunderstanding in the REAL ID Act, just as the Social Security Board did in their 1930s recruitment posters informing citizens that recipients of "wages" were "eligible" to *apply* for SSNs. Being eligible to apply is separate and distinct from being eligible for the issuance of a number — the latter arises only upon making proper application.[6]

Similarly, one may choose to apply for a driver's license. But the *opportunity* in law to apply for a license does not make one eligible *to receive* the license until application is made to the DMV.

It is highly improbable the SSA will provide proof of ineligibility for non-applicants, since it would be a tacit admission of limited authority. Perhaps the only way of proving such ineligibility is by affidavit to State bureaucrats. In any event, Save-A-Patriot is willing to assist in these sticky matters.

5. See 42 U.S.C. § 405 (c)(2)(B).
6. Imagine saying that because a person who meets the constitutional age and citizenship requirements is eligible to *run* for president, he is therefore eligible to simply *take office*!