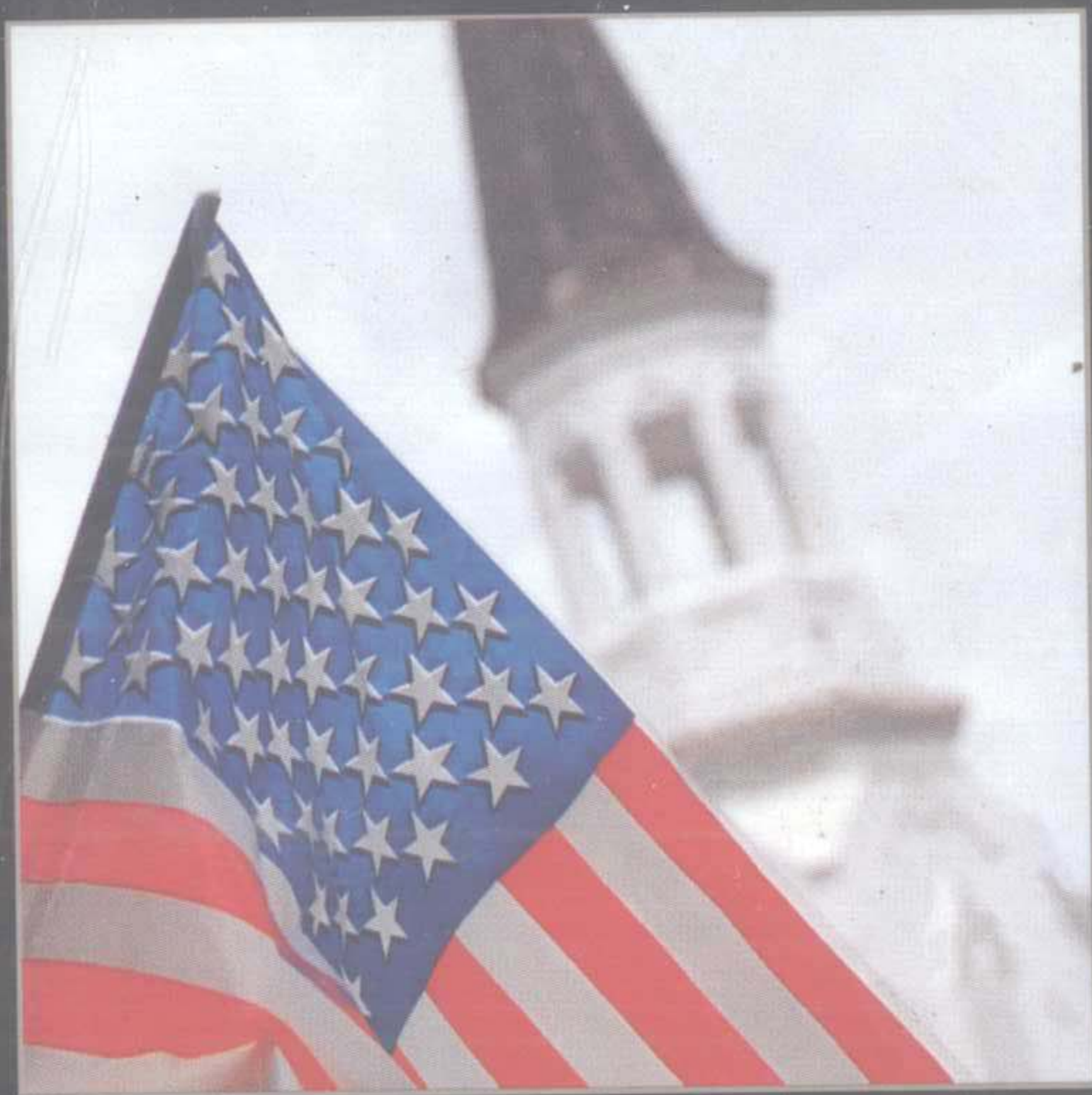


# THE DISSENT OF THE GOVERNED

A MEDITATION ON



LAW, RELIGION,  
AND LOYALTY

STEPHEN L.  
CARTER

AUTHOR OF *THE CULTURE OF DISBELIEF*



# *The Dissent of the Governed*

✠ A MEDITATION ON ✠  
LAW, RELIGION, AND LOYALTY

*Stephen L. Carter*

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# *Preface*

This book constitutes the expanded and edited text of the Massey Lectures in the History of American Civilization, delivered at Harvard University in May of 1995. I have styled the book as a meditation, because I freely confess that I continue to puzzle over the subject that occupies the lectures it contains: the relationship between loyalty and disobedience on the one hand and, on the other, between recognition of the sovereign's authority and realization that the sovereign is not always right. In America, this conflict is eternal, with results at times glorious—as in the mass protest wing of the civil rights movement—and at times tragic—as in the armed and violent wing of the militia movement.

As a legal theorist, as a citizen of a democracy, and as a Christian, I believe, deeply, in dissent, not simply as a right, but often as a responsibility. Our moral progress demands richer understandings of the world, and nobody has yet invented a better or more democratic source of those understandings than dialogue among free and equal citizens. Dialogue suggests differences of opinion; when an individual or a group differs with the opinion of the majority as reflected in law or custom, the opportunity for dissent presents itself. As the reader will quickly discover, I believe that dialogue is what the Declaration of Independence is all about, and that the refusal to engage in dialogue—most particularly when it is the state that does the refusing—is itself a manifest injustice that demands correction.

America, however, is dying from a refusal to engage in dialogue. I do not mean that nobody speaks—*everybody* speaks—but rather that nobody listens. In particular, the instrumentalities of government, especially at the national level, seem to most Americans woefully inaccessible. Both our national history and our national present teach the same lesson: people who hold power, whatever their politics, will not listen to those who disagree with them unless they are forced to. These lectures explore that aspect of the American political character, with special reference to religion, trying to illustrate it in unexpected places, as well as to help us find a path toward ameliorating it before it destroys our democracy.

Although the third lecture was substantially rewritten after delivery, I elected to make only small changes in the first two lectures, as well as in the structure of the principal argument of the entire book, prior to publication. So I must ask the reader's indulgence for my frequent references to certain momentous events—most notably the Republican landslide in the November 1994 midterm congressional election and the April 1995 bombing of the federal building in Oklahoma City—that were, at the time of the lectures, still fresh in memory. The alert reader will also notice several other stylistic fillips that may seem more appropriate to a spoken lecture than a written text.

I also beg the indulgence of readers familiar with my book *Integrity*, who have already been exposed to the story of the two liberal Christians involved with the Christian Coalition, which I discuss, from a somewhat different perspective than before, in the first lecture of the present book, and who are also familiar with my views on civil disobedience, even though I withdraw here some of what I wrote there.

Many individuals have contributed to the creation of this book. I am grateful first of all to the Program in the History of American Civilization at Harvard, and especially to Professor Alan Heimert, who extended the invitation to deliver the lec-

tures, and was tireless and unfailingly courteous as my host in Cambridge. I benefited from the many suggestions (not all of them friendly ones) that I received from members of the audience at the time that the lectures were delivered, as well as at a faculty workshop at the Yale Law School that focused on the second lecture. I discussed the subject matter of the third lecture at workshops at the law schools of DePaul University, the University of Oklahoma, and Washington University (St. Louis), and received helpful advice on those occasions as well. Particularly helpful have been comments and proposed avenues of research from Bruce Ackerman, Akhil Amar, Robert Ellickson, Henry Louis Gates Jr., Anthony Kronman, and Kate Stith. Both the lectures and the resulting book would have been impossible without the splendid efforts of my research assistants, Deborah Baumgarten, Goodwin Liu, and Lewis Peterson, students at the Yale Law School. And, as always, I would not have been able to write a single word without the love and support of my family: my patient children, Leah and Andrew, and, most especially, my wife, Enola Aird, for whose sharp eye for the senseless sentence and for whose gifts of wisdom, guidance, and criticism I will forever be grateful.

Finally, I should note that when I chose the title *The Dissent of the Governed*, I was unaware of the fascinating 1976 book of the same name by the sociologist James D. Wright. Wright's useful contribution was to analyze—empirically as well as by other means—the extent of alienation in the United States in the late 1960s and early 1970s. He found that there was rather a lot of it, among virtually all segments of American society. I am afraid that in the twenty years since his book was published, things have just gotten worse.

S.L.C.

New Haven, Connecticut / Aspen, Colorado

July 1997

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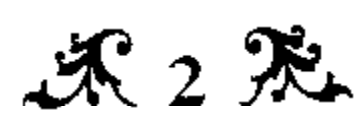
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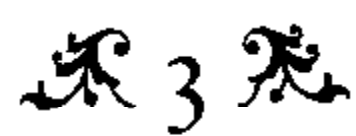
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# *Allegiance*





MY SUBJECT is the dissent of the governed. As will become clear, I am playing deliberately on Jefferson's famous language in the Declaration of Independence, in order to meditate on an aspect of our republic that we think too little about.

I want us to reflect together over these next three afternoons about the deeply rooted American tendency to dislike dissent, most notably in causes we despise. I will be speaking particularly about the ways in which whoever happens to control the apparatus of the sovereign uses its authority to manipulate both language and policy in order to make dissenters seem un-American.

In this first lecture, I will offer the justification for my inversion of our classic understanding of the Declaration of Independence, and will explore the role of religious communities in our public life, especially in education, in order to suggest how an understanding of justice as flowing not from *consent* but from our attitudes toward *dissent* might actually bind up some of the wounds from which we as a nation have bled these last few years.

In the second lecture, I will consider what happens when dissent spills over into conduct, especially conduct that happens to be illegal; and in the third lecture, I will work through the rhetoric of our constitutional courts as they deal with dissent. I should stress that in none of this is my goal principally one of law reform. I style these lectures as a meditation because I am not sure that I have answers to the problems that I am raising—and yet I am convinced that the problems are real, and will grow increasingly dangerous to our democracy if we pretend that they do not exist.

### *Allegiance and Democracy*

A useful place to begin is with the foundational document of American history—not the Constitution, the foundational doc-

ument of American law, but the Declaration of Independence. Garry Wills, in his splendid book on the document, tells us that the people who signed the Declaration paid little attention to it, considering it a relatively small bit of business, less important, for example, than the *act* of declaring independence, which took place two days earlier. This written list of grievances was principally for the purpose of convincing foreign powers to line up on the side of the Colonies rather than the side of England. The signatories, says Wills, did not believe that they were setting forth a new theory of government.<sup>1</sup>

Yet the writing—the act of communicating a justification—is crucial to understanding the act of declaring independence, for by offering a written argument, the leaders of the Revolution sought to provide to the world a justification for what must have seemed a foolish and headstrong move. And that writing, on a careful examination, has unavoidable implications for the subject of these lectures: the problem of dissent.

Consider what is obviously common ground. The proclamation of the Declaration was, by its terms and by its effect, an act of disallegiance, the breaking of the tie of presumptive obligation that we describe as loyalty. The argument for that act is quite famous, but bears quoting, for it actually involves a bit of a trope and hides an important point:

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.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.

Let us stop there for the moment. From this quotation, certainly the best-known in the entire document, we discover that government is created in order to secure the inalienable rights

with which all people—the Declaration, of course, says “men”—were endowed in the act of divine creation. I will return to that point presently. For the moment, consider the final part of the quotation. What is the source of the powers of the government? Why, “the consent of the governed,” of course, the drafters’ famous appeal to the fans of Locke and Montesquieu, who may or may not have been popular reading at the time of the Revolution.

But did the drafters even believe this? When one reads the list of complaints in the Declaration, one does not discover any that have their roots in the lack of “consent” in any Lockean sense—consent to the government apparatus—although, to be sure, a number of them assert, in effect, a lack of consent to particular policies of the Crown. Read to the end of the Declaration, and you find what should perhaps be treated as the heart of the matter:

In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.

Note where the argument is going. That the King is a tyrant goes almost without saying. But what, in the end, makes him tyrannical? It is not merely, perhaps not mostly, that he, in alliance with Parliament, has done oppressive things to the Colonists, although that is true, and the list is quite an extensive one. The nub of the matter, however, seems to be that he has ignored their complaints. Listen again. We are told that the Colonists have “Petitioned for Redress in the most humble terms,” petitions that “have been answered only by repeated injury.” It seems to be the rejection of the petitions for redress—

the fact that the Crown is ignoring the particular concerns of the Colonists—that provides the justification for revolution.

Thus, the point of the Declaration seems not to celebrate the notion of *consent*, but to celebrate the notion of *dissent*. The complaint is that the Colonial acts of dissent, the articulation of the many small and large disagreements with the Crown, have fallen on deaf ears. It is not the failure of *consent* but the failure of *dissent* that has thus provided the impetus, and still more the justification, for the separation of the American colonies from the Crown, that is, for the American Revolution. True, it is consent of the governed that delivers the initial legitimacy (the “just powers”) to the government. But it is the rebuffing of the “repeated Petitions” that dissolves that legitimacy.

Now, let's be careful. It is important to note that it is the sovereign's choice to ignore the petitions, not the petitions themselves, that provides the justification for the act of disallegiance. In other words, it is the Crown's treatment of the dissenters—not the fact of their dissent—that turns out to be crucial.

If this analysis is accurate, then we can say that under our reconstructed Declaration of Independence, if the sovereign repeatedly ignores and rebuffs the complaints of its subjects—or, nowadays, its citizens—the sovereign will lose their allegiance. Because whatever may be the significance of the allegiance of an individual to a sovereign, the individual surely expects a modicum of respect and attention in return.

Let me emphasize that I am not, yet, making an argument about political theory. I am making an argument about practical politics—a practical politics that the drafters of the Declaration of Independence perfectly well understood. The practical political point is this: whatever may be the source of the sovereign's theoretical legitimacy, that legitimacy may vanish if “repeated Petitions” for “Redress” are, in the eyes of the citizenry, “answered only by repeated injury.”



Now, what happens when we transfer this argument across some two centuries and more since the signing of the Declaration? What happens is this: we can look around the United States and see a nation in which large numbers of citizens do indeed feel that their petitions to their government go unanswered, and, as a result, have lost a degree of their faith in that government. Does this mean that they are also losing their allegiance? That, it seems to me, is by far the most crucial question for everyone who is concerned about the future of the American democracy. And it is the question that will occupy me in this first lecture.

### *Disallegiance and Democracy*

As we struggle toward the end of the twentieth century, the mightiest, wealthiest, and most envied nation on the face of the planet, surveys tell us that four out of five Americans believe that something has gone terribly wrong with our society, that we have somehow jumped the track. But what? Let me offer some possibilities.

I have spent much time recently traveling to different parts of the country and talking to audiences, many of them deeply religious, about the intersection of law and politics. The mood I have found has been depressing. I pride myself on being the world's worst political prognosticator, but in the early fall of 1994, I began to tell my friends and colleagues that the people I was meeting on my sojourns were so upset, so mistrustful of government, that the elections were going to turn the country upside down. For once, it seems, I was right.

There is, I suppose, no consensus on precisely what terribly wrong direction the nation has taken, but it is plain from the surveys and from the phenomenal growth in conservative religious organizations—as well as from my conversations with the

people I have been meeting—that much of the concern focuses on questions of morality. The sense, in other words, is that it is the nation's *values* that have gone off the track.

This sense is particularly strong among socially conservative religious communities, principally the Evangelical faiths and Roman Catholics. (I include among these socially conservative religions the strong black church tradition, whose adherents tend to be, on nearly every moral issue, well to the right of the American political mean.) Nowadays, these communities are marked by a yearning for morality, both in the sense of a set of values connected to their particular religious traditions, and in the different but of course related sense of simply wanting to live in a society that talks seriously about standards of conduct, about right and wrong—and, by extension, a society in which citizens who choose to talk seriously about right and wrong are not treated as outcasts.

This concern crosses into politics, and although secular liberals often do not like it, there is no choice but to accept it. Such groups as Christian Coalition, the Traditional Values Coalition, Concerned Women for America, and Excellence in Education number their members in the millions. Nobody challenges the figures. These and similar groups attack a secular morality that, as they describe it, celebrates the self, insists on the relativism of values, and maligns the nation's religious traditions. One need not agree with their social critique or their program to appreciate their appeal.

The appeal, moreover, crosses political lines. Bill Clinton won the presidency in 1992 and again in 1996 as a New Democrat, and liberals who yearn for the old kind would do well to recall that since 1964, *every* elected president has been either a conservative Republican or a Southern Democrat. At some point, one must concede that there is more going on than coincidence. And one of the things that is going on is that the

American voters seem most ready to cede the bully pulpit of the presidency to people who they believe will speak in the language of right and wrong. Sometimes, the people are more ready to do this than to cast their votes for another candidate who might, on the issues, be more in tune with their views.

One reason for this is that most Americans describe themselves as religious; and for most religious people, religion matters. It is difficult sometimes for secular liberals to imagine that there are people to whom faith is more important than particular political ends, but in fact there are many. In my travels, I have met self-described political liberals who are members of, or sympathetic with, such groups as Christian Coalition, simply because they do not feel that liberal organizations respect their religiosity. I often tell the story of meeting two black women who moved from involvement in liberal politics to involvement in conservative Christian groups for no other reason than their perception that, among their natural liberal political allies, their desire to talk about their faith—evangelical Christianity—made them an object of sport. Choosing between possible homes, then, they preferred a place that honored their faith and disdained their politics over a place that honored their politics and disdained their faith.

Their story is a tragedy, but it is one that is repeated across the country. Mainstream politics, with its arrogant rejection of religious argument and traditional religious values, has alienated tens of millions of voters, and by no means are all of them hard-line conservatives. You will note that I use the term “politics”—not “liberalism”—because even though, as will be seen, liberalism bears some of the blame, the dominant political ethos is complicated. And the very complication of contemporary government makes matters worse. In nearly every community I visit, I find people who believe that they live in a system in which vital decisions are made in far-off Washington by face-

less and often nameless bureaucrats who care nothing for them or their values. And the anger at Washington as an entity can trump all other concerns. One woman in a small town near Harrisburg told me that she is not against school lunch programs, she just doesn't trust "Washington" to administer them—or, perhaps more to the point, she is angry because she does not feel that "Washington" trusts her.<sup>2</sup>

That is the frightening way people talk about the nation's capital nowadays, using the name of the city as though it has a malevolent sentience of its own. Washington, where the federal government sits. Washington, which doesn't care and doesn't listen. You can almost hear the echoes of the language of the Declaration of Independence. Listen again: "In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury." That is why I worry that the country is in the throes of a massive act of disaffection, of which the 1994 elections were but the merest spasm.

Now, do not misunderstand me. I am not talking about the members of the nation's burgeoning militia movement, or the people who tune in to hear talk radio hosts advising them to shoot federal agents in the head because they will be wearing bullet-proof vests. And, God knows, I am not talking about the vicious and soulless murders of the innocent that we witnessed in the bombing of the federal building in Oklahoma City in April of 1995. I am not, in other words, talking about violence (although I will have something to say about it in the second lecture). I am talking about ordinary, hard-working, law-abiding families, patriotic Americans whose political allegiance to the nation runs deep and whose moral roots are in their religious traditions, to which their allegiance runs just as deep; families who are concerned, frightened, and, more and more, profoundly alienated from politics and from a government that they think does not care about them.