

Constitutional Corner – Fundamental Principles-Political Power

“We hold these Truths to be self evident...that to secure these rights, Governments are instituted among Men, *deriving their just powers from the consent of the governed.*”¹

“Deriving their just powers...”

“That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants and at all times amenable to them.”²

“That all political power is vested in and derived from the people; that all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.”³

“Political power grows out of the barrel of a gun.” Mao Zedong⁴

Political power, the stuff of legend. Who’s right, the Founders or Chairman Mao? Are there other sources of political power than the people or armies? Where does political power originate, how do governments get ahold of it, and what should We the People do when power is assumed or abused?

Last week we explored the concept of “unalienable rights,” the first of Jefferson’s “sacred and undeniable” truths. The right to do something connotes the power to do it; the two go hand-in-hand; having the right to do something but lacking the power to do it would render the right meaningless. The sum of your rights = the sum of your powers.

In a state of nature, individuals are the fount of natural political power, having been bestowed by their Creator with certain rights and the power to put them into operation. When they leave the state of nature in order to create a society, and then create a government to order and secure rights within that society, the people must of necessity give up certain of their sovereign power to the government, or the government would be powerless and impotent. It is important to note that they do not give up their unalienable rights, or any portion of them; what they surrender to government is power sufficient to enable government to join in the protection of their rights. The people transfer this power to government through a Constitution whether written or un-written.

Notice that Jefferson limits this power-sharing to the “just” powers of government; governments can and do operate “unjustly,” exerting power not derived from the people. This

¹ Declaration of Independence, 4 July 1776.

² Virginia Constitution, 29 May 1776 Article 1, Section 2,.

³ Missouri Constitution of 1875, Art. II, Section 1

⁴ https://en.wikipedia.org/wiki/Political_power_grows_out_of_the_barrel_of_a_gun

use of arbitrary and assumed power will be discussed later. The process by which governments obtain “just” power was considered commonplace in the Founding period, which is why we see the idea ensconced within so many founding-period documents.

Jefferson asserted:

“The constitutions of most of our States⁵ assert that all power is inherent in the people; that they may exercise it by themselves in all cases to which they think themselves competent, or they may act by representatives, freely and equally chosen.”⁶

Despite having this truth imbedded in many of the state constitutions, James Madison wanted to make it equally clear as well in the national constitution. His first proposed amendment read: *“That there be prefixed to the Constitution a declaration, that all power is originally vested in, and consequently derived from, the people.”*⁷ The First Congress demurred.

Many Americans have lost sight of this “self-evident” truth today. Just look at the type of responses found on [Yahoo Answers](#) to the question: “What is the source of all governmental power in the USA?” None of the answers are even remotely correct and some reflect an inability to even comprehend the question. Of course, you can argue that Yahoo Answers doesn’t attract the kind of people who give thoughtful answers to important questions, and you would probably be right. So conduct your own poll; ask people you encounter at random, or even your friends, where political power comes from in the U.S. and see what kind of responses you get.

We’ve established that the people delegate some portion of the power they enjoy to government. There is certainly a limitation on this delegation, as John Locke explains:

“For no Body can transfer to another more power than he has in himself; and no Body has an absolute Arbitrary Power over himself, or over any other, to destroy his own Life, or take away the Life or Property of another.”⁸

There is a limit on the quantity of power delegated as well as quality or scope. For instance, if I have no natural right/power by myself to command my neighbor to cease from raising chickens in his backyard, how in the world can I delegate this power to my county Board of Supervisors

⁵ At least the original constitutions of: Connecticut, Maryland, Massachusetts, New Hampshire, New York, North Carolina, Pennsylvania, and Virginia did.

⁶ Letter to John Cartwright, 4 Jun 1824.

⁷ http://www.constitution.org/bor/amd_jmad.htm

⁸ John Locke, Second Treatise of Civil Government.

to empower them to create zoning laws to that effect? Zoning laws have been declared constitutional by the Supreme Court, but that does not mean they comport with either logic or natural law. The taking of property by eminent domain falls in this same category. Just saying.

Back to the process of delegation; to ensure there is no mistake concerning *what* specific power is being delegated, the people write it down in the form of a Constitution.

"A Constitution is not the act of a Government, but of a people constituting a government, and a government without a constitution is a power without right."⁹

Through the United States Constitution, "We the People" vest (confer or bestow) *all* legislative power in a Congress,¹⁰ *the* executive power in a President,¹¹ and *the* judicial power in "a Supreme Court and such inferior courts as Congress may from to time to time ordain and establish."¹² The distinction between "all, the, and the" in these three clauses is important, and the distinction should be obvious. "All" means all; no power to legislate was vested in the Executive or Judicial branches. The People state nowhere in the Constitution that the legislative power can be further delegated beyond Congress, neither would John Locke approve.¹³

That the new Constitution established a government of limited powers was made clear by the document's supporters, the Federalists, in the thirteen ratifying conventions (and in the Federalist Papers as well). For the Federalists to have argued otherwise would have ensured the document's rejection from the start. To emphasize this point in the Virginia Ratifying Convention, Madison proclaimed:

"[T]he powers of the federal government are enumerated; it can only operate in certain cases; it has legislative powers on defined and limited objects, beyond which it cannot extend its jurisdiction."¹⁴

Despite these assurances, to make it crystal clear that there were limits to the powers being granted the national government, the states insisted on the inclusion of what would become the Tenth Amendment:

⁹ Thomas Paine, Rights of Man, 1791.

¹⁰ Article 1, Section 1, Clause 1.

¹¹ Article 2, Section 1, Clause 1.

¹² Article 3, Section 1, Clause 1.

¹³ "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....Nor can the people be bound by any Laws but such as are Enacted by those, whom they have Chosen and Authorized to make Laws for them." John Locke, Second Treatise of Civil Government" John Locke, Second Treatise on Government.

¹⁴ Speech in the Virginia Ratifying Convention, June 6, 1788

“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.”

And let’s also not forget the Ninth Amendment; for our purposes here it is equally important:

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

If the people retain un-enumerated rights they also retain unenumerated powers that attend those rights.

To reiterate, whatever power was not delegated to the national government was delegated to the state governments, or retained by the people. To determine what was delegated to the state governments you must read each state constitution.

The men who comprised the First Congress understood this concept. Nevertheless, Representative James Jackson (GA) reminded them:

"We must confine ourselves to the powers described in the Constitution, and the moment we pass it, we take an arbitrary stride towards a despotic Government."¹⁵

However, James Madison warned:

"[a] mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands."¹⁶

Today however, thanks to the liberal jurisprudence of the Supreme Court, or in some cases the complete abandonment of jurisprudence;¹⁷ the Court has turned the Constitution into a near limitless grant of power – to the extent that former Rep. Peter Stark (D-CA) could state in a [Town Hall Meeting](#) in Hayward, California in July 2010, that: *“The federal government, yes, can do most anything in this country.”*

“The consent of the governed”

¹⁵ 1st Annals of Congress, 489.

¹⁶ Federalist No. 48, February 1, 1788.

¹⁷ “[The Constitution] had nothing to do with [today’s decision.]” Dissent of Chief Justice John Roberts in *Obergefell v. Hodges*,

Does our national government really operate today with the consent of the governed? Did the people really consent to going \$20 Trillion in debt? Were the Court's various power-expanding decisions over these many years represent the consent of the people?

Yes and no. Supreme Court decisions are by no means the express will of the people as the decisions were being rendered, but by silent consent of the people they become so, most of them at least. *Roe v. Wade*, which enlarged a right to privacy the Court had invented in *Griswold v. Connecticut*, is still being vigorously contested in the public square, as *Obergefell v. Hodges* hopefully will be. *Citizens United* is routinely opposed by many on the Left and some on the Right.

Alexander Hamilton makes clear in Federalist 78 that the ultimate arbiters of the Constitution's meaning are the people, not the Congress or the Courts.¹⁸ The Supreme Court does not represent the people; the people do not nominate the judges, confirm the judges (at least not directly) nor do the judges have any accountability to the people -- serving, essentially, for life.

"Consent" can, of course, be expressed either actively (overt) or passively (tacit). Active consent is exemplified by calling or writing your Congressman and letting him or her know whether or not you agree with a certain vote or position (you've done that, haven't you?). Passive consent is exemplified by scheduling your life around episodes of *Dancing with the Stars* instead of taking time to engage with your representatives.

We speak of "informed consent" as being preferred to its uninformed version. For there to be informed consent, information must be both available and accessed. This is where many Americans come up short. Information about what is happening in government is readily available, perhaps to extremes, but seldom accessed. We've all heard of "low-information voters," voters whose knowledge and critical thinking stops at "D" or "R."¹⁹ Polls routinely show many Americans of voting age to be pathologically uninformed of their Constitution and the government it creates. This I blame on the public education system which produced the vast majority of these voters, as well as the culture they entered after graduating which prizes and encourages popular knowledge over the political.

In his essay (and later book), "[*The Engineering of Consent*](#)," first published in 1947, Edward Bernays describes how "consent" of the people can be manipulated by a media establishment intent on created the impression of actual consent. Skilled PR specialists, steeped in psychological research findings, have demonstrated the ability to change public opinion.

¹⁸ "If there should happen to be an irreconcilable variance between [the Constitution and a statute, whether as written or as interpreted by the Court], that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the *intention of the people to the intention of their agents* (emphasis added).

¹⁹ I'm not asserting that party-line voting is inappropriate, so long as it is done with forethought.

Bernays himself was hired in 1928 to lead a, as it turned out, successful campaign to entice more women to smoke in public. Given that homosexuals only comprise 2-3% of Americans, and state constitutional prohibitions were enacted by popular vote, one wonders whether *Obergefell* was merely the culminating event in a similar campaign.

Is the delegation of political power to government via a constitution, and sustained through consent of the governed, permanent?

On June 27, 1788, the Virginia Ratifying Convention forwarded their ratification to Congress. They opened their endorsement by stating:

“WE the Delegates of the people of Virginia, ..., DO in the name and in behalf of the people of Virginia, declare and make known that the powers granted under the Constitution, being derived from the people of the United States may be resumed by them whenever the same shall be perverted to their injury or oppression, and that every power not granted thereby remains with them and at their will...”

Not only was this forward to the ratification instrument an affirmation of the source of the government’s power, it was a warning that this power was being granted (at least that portion granted by the people of Virginia) only so long as it was used properly. If the people’s delegated power was ever used to injure or oppress them, the delegates said, the people of Virginia would resume or take back the power they had granted.

On February 4th, 1861, the people of Virginia did just that, joining several other states in seceding from the Union, employing what we euphemistically call today, “Mr. Jefferson’s Option:” *throw[ing] off such Government, and ... provid[ing] new Guards for their future security.*” While, in retrospect, this drastic step may have been short-sighted and, ultimately, a failure, it demonstrated one way in which political power may be resumed by the people. Are there others? Most assuredly.

One method is through the election of “more faithful” representatives, men and women who will pledge to legislate within the original confines of what we affectionately call the Founders Constitution. Madison said it this way:

"What is to be the consequence, in case the Congress shall misconstrue [the necessary and proper clause] of the Constitution and exercise powers not warranted by its true meaning, I answer the same as if they should misconstrue or enlarge any other power vested in them ... the success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts; and in a last resort a remedy must be obtained

from the people, who can by the elections of more faithful representatives, annul the acts of the usurpers."²⁰

George Washington said it slightly differently:

"The power under the constitution will always be in the people. It is intrusted (sic) for certain defined purposes, and for a certain limited period, to representatives of their own choosing; and, whenever it is executed contrary to their interest, or not agreeable to their wishes, their servants can and undoubtedly will be recalled."²¹

Another method for resuming delegated power was articulated by Washington in his 1796 Farewell Address:

"If in the opinion of the people the distribution or modification of the constitutional powers [as articulated by the Court] be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates (i.e. Article V). But let there be no change by usurpation; for though this in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed."

If the Supreme Court, through various interpretations, but particularly [Helvering v. Davis](#), has turned the General Welfare Clause into a plenary grant of spending power, amending the wording of the clause to unequivocally remove the ambiguity the court relied upon will cause those powers (arguably unconstitutional in the first place) to no longer be available to the Congress or other branches of the government. As I've stated previously, it is unlikely the Congress will ever take the unprecedented step of passing a proposed amendment that serves to restrict their power; so if an amendment is to ever happen, the people will have to initiate action to bring the amendment to pass using an Article V Convention.

It is too late to invoke John Adams' advice now. But it bears repeating:

"Nip the shoots of arbitrary power in the bud, is the only maxim which can ever preserve the liberties of any people. When the people give way, their deceivers, betrayers, and destroyers press upon them so fast, that there is no resisting afterwards. The nature of the encroachment upon the American constitution is such, as to grow every day more and more encroaching. Like a cancer, it eats faster and faster every hour. The revenue creates pensioners, and the

20 Federalist, No. 44, 25 Jan. 1788

21 Letter to Bushrod Washington, November 10, 1787.

pensioners urge for more revenue. The people grow less steady, spirited, and virtuous, the seekers more numerous and more corrupt, and every day increases the circles of their dependents and expectants, until virtue, integrity, public spirit, simplicity, and frugality, become the objects of ridicule and scorn, and vanity, luxury, foppery, selfishness, meanness, and downright venality swallow up the whole society."²²

Americans have forgotten much, certainly when compared with the Americans Alexis De Tocqueville encountered in 1830.²³ We don't understand we are the source of our government's power nor do most of us seem to care (or recognize) when it is being abused. Until Americans are somehow "shocked" into recognizing and correcting this deficiency, I see nothing standing in the way of a continued loss of our freedoms.

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²² John Adams, Novanglus Letters, 1774.

²³ "In New England every citizen ... is taught...the doctrines and the evidences of his religion, the history of his country, and the leading features of its Constitution. In the states of Connecticut and Massachusetts, it is extremely rare to find a man imperfectly acquainted with all these things, and a person wholly ignorant of them is a sort of phenomenon." Democracy in America, Volume 1.