The Supreme Court Has Destroyed the Principle of the "Consent of the Governed"

As Americans celebrated the 242nd anniversary of their secession from Great Britain, references to the Declaration of Independence ratified on July 4, 1776 were many. But while the left reminded us "all men are created equal" and the right reminded us that all inalienable rights come from our Creator, far too little attention was paid to another phrase in Jefferson's famous preamble: "deriving their just powers from the consent of the governed." Judging from the way most Americans talk, almost no one remembers how that consent is supposedly obtained.

Hint: It isn't from voting, but that's what most Americans seem to believe. According to this narrative, representatives are elected democratically, and by casting one's vote, one consents to whatever legislation the representatives who win the election choose to pass, or whatever executive actions the elected president chooses to take. In the aftermath of Obamacare's passage, surrogates for President Obama often justified that new federal endeavor with the quip, "That's why we have elections." Conservatives employ the same reasoning when their candidates win.

That raises the question: Why did the framers bother with Sections 8, 9 and 10 in Article I, Sections 2, 3 and 4 in Article II, or Sections 2 and 3 of Article III? Why did they include Article V at all?

The answer is that the aforementioned sections define the list

of powers the people were consenting to, all others being reserved to the states or the people, while Article V was provided as the one and only means for the people to consent to any new powers. Put another way, any power exercised by the federal government that is not among those delegated in the Constitution is power exercised without the consent of the governed.

So, determining what the federal government should do is not "why we have elections." Elections merely decide who will exercise powers already granted.

Even this standard for establishing consent of the governed requires an extremely elastic interpretation of the word "consent." In the end, ratification of the Constitution itself and subsequent amendments were just another series of majority votes, each posing all the dangers to individual rights that any democratic process poses. That makes legislating without meeting even this low standard for consent even more egregious.

The word "unconstitutional" tends to obscure what's really going on when the black robed high priests in Washington retire to deliberate on some new constitutional challenge. It's such a stuffy, academic-sounding word that well-meaning people probably honestly believe it's better left to the finest legal minds to determine. But what judicial review really purports to do is determine if anyone ever consented to the power being exercised by the law or executive action in question. And if the power is not listed in the original Constitution or a subsequent amendment, the answer is "no."

That means that when the Supreme Court ruled as "constitutional" Social Security, Medicare, federal drug laws and myriad other federal legislation, it was ruling that the ratifying conventions of 1787-90 consented to the federal government having those powers right from the beginning.

That seems ludicrous, doesn't it?

The Constitution is not written in a dead foreign language or legalese. It's written in plain English, in a manner "We the People" can understand. It doesn't take the finest legal minds in the country to determine which powers are granted and which are not. It's all there in black and white. In fact, because it's so unambiguously written, the court has had to rule constitutional most of what the federal government does outside of the military under the power granted in the Commerce Clause, which was originally proposed and ratified mainly in reaction to states erecting their own tariffs.

The assertion that by granting the federal government the power to regulate interstate commerce, 18th-century Americans were consenting to allow the federal government to force them to participate in a federal pension program, monopolize all health insurance for people over 65 years of age, prohibit possession or ingestion of certain plants, and even to mandate how much water Americans could have in their toilet bowls, is absurd. With few exceptions, the history of judicial review is the history of an unelected group of judges lending legitimacy and legal sanction to the federal government seizing vast new powers without the consent of the governed.

Prior to Donald Trump's election, this writer heard from many conservatives and libertarians that they would vote for Trump solely based on their fear that Hillary Clinton could appoint replacements for several aging SCOTUS judges. Many believed the ancient right to bear arms could be lost based solely on this. Two years into Trump's term, with one appointment confirmed and Anthony Kennedy retiring from the Court, liberals now decry the imminent threat to "reproductive rights," gay marriage and other progressive pillars. Their rhetoric and actions are becoming increasingly violent.

Surely, the founders never intended for the election of one man or woman to so profoundly change the legal framework of

the entire nation, one way or another. This is the fruit of violating not only a set of rules spelled out in the Constitution, but for violating the fundamental principle that underpins the entire document: that the federal government will exercise no power not delegated to it, i.e., without the consent of the governed.

Strict constructionists since Jefferson have argued even judicial review itself is a power nowhere delegated to the federal government. That's one of the very few powers upon which there is room for argument on both sides. But whether the power was granted or not, history clearly shows it has been used to undermine one of the most important principles of the American republic.

Here's a useful rule of thumb. If it takes nine judges dozens of pages of legalese to explain how the Constitution grants a power in question to the federal government, then we should assume the power isn't there. If there is any question at all, an amendment to the Constitution should be offered to determine if the people really do consent. That goes for all previous rulings by SCOTUS on constitutionality. If we really believe in consent of the governed, why not be sure?

Most of what the federal government currently does wouldn't pass the test. That probably scares the heck out of a lot of people, but it really shouldn't. It would simply allow blue states to govern themselves in much bluer fashion and red states to do so in much redder fashion. That's by no means a perfect solution, but it would be highly preferable to the imminent civil unrest—or worse—Americans currently face as a result of letting the federal government do whatever it wants.

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[Image Credit: Collection of the Supreme Court of the United States]